CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION

This is a book about the ever more complex legal networks of transnational economic governance structures and their legitimacy problems. It takes up the challenge of the editors' earlier pioneering works which have called for more cross-sectoral and interdisciplinary analyses by scholars of international law, European and international economic law, private international law, international relations theory and social philosophy to examine the interdependences of multilevel governance in transnational economic, social, environmental and legal relations. Two complementary strands of theorising are expounded: one argues that globalisation and the universal recognition of human rights are transforming the intergovernmental 'society of states' into a cosmopolitan community of citizens which requires more effective constitutional safeguards for protecting human rights and consumer welfare in the national and international governance and legal regulation of international trade. The second emphasises the dependence of the functioning of international markets and liberal trade on governance, arrangements which respond credibly to safety and environmental concerns of consumers, traders, political and non-governmental actors. Enquiries into the generation of international standards and empirical analyses of legalisation and judicialisation practices form part of this agenda.

The perspectives and conclusions of the more than 20 contributors from Europe and North-America cannot be uniform. But they converge in their search for a constitutional architecture which limits, empowers and legitimises multilevel trade governance, as well as in their common premise that respect for human rights, private and democratic self-government and social justice require more transparent, participatory and deliberative forms of transnational 'cosmopolitan democracy'.

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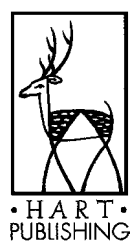
Constitutionalism, Multilevel Trade Governance and Social Regulation

Edited by

CHRISTIAN JOERGES

and

ERNST-ULRICH PETERSMANN



OXFORD AND PORTLAND, OREGON
2006

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA
Tel: +1-503-287-3093 or toll-free: (1)-800-944-6190
Fax: +1 503 280 8832
E-mail: orders@isbs.com
Website: www.isbs.com

Hart Publishing, 16C Worcester Place, Oxford, OX1 2JW
Telephone: +44 (0)1865 517530 Fax: +44 (0)1865 510710
E-mail: mail@hartpub.co.uk
Website: http://www.hartpub.co.uk

British Library Cataloguing in Publication Data
Data Available

ISBN-13: 978-1- 84113-665-3 (hardback)
ISBN-10: 1- 84113- 665- 4 (hardback)

Typeset by Compuscript, Shannon
Printed and bound in Great Britain by
TJ International Ltd, Padstow, Cornwall

Preface and Acknowledegments

This book is a product of two long-term research agendas—and of their co-ordination. One of the editors—Ernst-Ulrich Petersmann—has published extensively on the 'constitutional functions' of international trade law, and of their inter-relationships with domestic constitutional laws in Europe and the United States, for the promotion of individual freedom, non-discrimination, rule of law and human rights across national frontiers. The co-editor—Christian Joerges—has, for a long period, undertaken studies on the law's potential to ensure the social responsibility of the economy, focusing first on issues of social regulation and the safety of products within the EU, and gradually extending the European focus of his research by studies on transnational governance and WTO law. The co-editors joined forces in their common seminar on *Constitutionalising Economic Market Integration and Multilevel Governance in Europe and Worldwide* in 2003/2004 at the European University Institute in Florence, Italy, and received funding from the EUI Research Council for a conference on *Legal Patterns of Transnational Social Regulation and International Trade*. Since January 2003, Christian Joerges and Josef Falke have also been directing a closely related project on *Social Regulation and World Trade* at the University of Bremen, which is part of a broader research project on *Transformations of the State*, financed by the German Science Foundation.[1] The conference on *Legal Patterns of Transnational Social Regulation and International Trade*, organised on 24-25 September 2004 at the EUI, and this conference book resulted from these co-ordinated activities. We benefited substantially from this collaboration with the Research Centre at the University of Bremen and from the interdisciplinary studies undertaken by their political scientists.

The contributions to this book have been revised several times since they were first presented at the interdisciplinary conference in Florence. This book is thus a product of a long-term and ongoing co-operation, rather than a mere collection of conference papers.

We wish to express our gratitude for the financial support we have received from the EUI and, more indirectly, from the German Science

[1] Details at: http://www.staatlichkeit.uni-bremen.de

Foundation. We also wish to thank Laura Burgassi for her administrative assistance, as well as Chris Engert for his patient and sensitive language editing.

Christian Joerges and Ernst-Ulrich Petersmann

Florence, January 2006

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Abbreviations

AASB.....Australian Accounting Standards Board
AB .....Appellate Body
ABS.....Access and Benefit Sharing
ASTM.....American Society for Testing and Materials International
CAC.....Codex Alimentarius Commission
CBD.....Convention on Biological Diversity
CCEXEC.....Codex (Alimentarius) Commission Executive Committee
CCGP .....Codex Committee on General Principles
CCNFSDU.....Codex Committee on Nutrition and Food for Special Dietary Purposes
CCPR.....Codex Committee on Pesticide Residues
CFI .....Count of First Instance of the EC
CI.....Consumers International
CITES.....Convention on International Trade in Endangered Species of Wild Fauna and Flora
Codex.....Codex Alimentarius Commission of the FAO/WHO
CSR.....Corporate Social Responsibility
CTE .....Committee on Trade and Environment
CTESS.....Committee on Trade and Environment Special Session
DC.....Deliberative-Constitutive
DCIS.....Democratic Constitutional Interventionist State
DD .....Doha Ministerial Declaration
DPG.....Domestically Prohibited Goods
DSB .....Dispute Settlement Body (WTO)
DSU.....Dispute Settlement Understanding
EC.....European Community
ECHR .....European Court of Human Rights
ECJ .....European Court of Justice
ECOSOC.....Economic and Social Council of the United Nations
EEA .....European Environment Agency
EFTA .....European Free Trade Association
EMIT.....Environmental Measures and International Trade
EMS .....Environmental Management System
EPA .....Environmental Protection Agency
EPER.....European Pollution Emissions Register
EU.....The European Union
EUI .....The European University Institute
FAO.....Food and Agriculture Organisation

FASB.....Financial Accounting Standards Board
FTA.....Free Trade Agreement
GA .....General Assembly of the United Nations
GAAP.....Generally Accepted Accounting Principles
GATS .....General Agreement on Trade and Services
GATT.....General Agreement on Tariffs and Trade
GMO .....Genetically Modified Organism
GRI .....Global Reporting Initiative
GSP.....Generalised System of Preferences
IAS.....International Accounting Standards
IASB .....International Accounting Standards Board
IASC.....International Accounting Standards Committee
ICANN .....Internet Corporation for Assigned Names and Numbers
ICJ.....International Court of Justice
ICSID .....International Centre for the Settlement of Investment Disputes
IDF .....International Dairy Federation
IGC .....Intergovernmental Conference
IGO .....International Governmental Organisation
ILO.....International Labour Organisation
IMF.....International Monetary Fund
IO .....International Organisation
IPPC.....International Plant Protection Convention
IPU .....Inter-Parliamentary Union
ISO .....International Standardisation Organisation
ITO.....International Trade Organisation
JECFA.....Joint (FAO/WHO) Expert Committee on Food Additives
JEMRA.....Joint (FAO/WHO) Expert Meetings on Microbiological Risk Assessment
JMPR.....Joint (FAO/WHO) Meetings on Pesticide Residues
MEA .....Multilateral Environmental Agreement
MFN.....Most Favoured Nation
MNC.....Multi-national Corporation
MRL.....Maximum Residue Level
NAFTA .....North American Free Trade Agreement
NGO .....Non-Governmental Organisation
NPRI.....The Canadian National Pollutant Release Inventory Scheme
OECA .....Office of Enforcement and Compliance Assurance
OECD .....Organisation for Economic Co-operation and Development
OIE.....Office International des Epizooties (World Organisation for Animal Health)
OSPAR .....Convention for the Protection of the Marine Environment of the North-East Atlantic
PrepCom.....Preparatory Committee
RA .....Risk Assessment

RM .....Risk Management
RI .....Rational Instrumental
SAI .....Social Accountability International
SEC .....Securities and Exchange Commission
SPS.....Sanitary and Phytosanitary (relating to food safety or animal/plant health)
SPS Agreement .....Agreement on the Application of Sanitary and Phytosanitary Measures
STDF.....Standards and Trade Development Facility
TBT.....Technical Barriers to Trade
TCE .....Treaty establishing a Constitution for Europe
TRI.....Toxic Release Inventory
TRIPS .....Trade-Related Aspects of Intellectual Property Rights
UDHR .....Universal Declaration of Human Rights
UK .....The United Kingdom
UN.....The United Nations
UNAIDS .....Joint United Nations Programme on HIV/AIDS
UNCED .....United Nations Conference on Environment and Development
UNCITRAL .....United Nations Commission on International Trade Law
UNCTAD .....United Nations Conference on Trade and Development
UNDP .....United Nations Development Programme
UNEP .....United Nations Environment Programme
UNESCO .....United Nations Educational, Scientific and Cultural Organisation
UP.....University Press
US .....The United States
WHO.....World Health Organisation
WIPO .....World Intellectual Property Organisation
WTO.....World Trade Organisation

Introduction and Overview

ERNST-ULRICH PETERSMANN

THIS BOOK SUPPLEMENTS the editors' previous publications on *Transnational Governance and Constitutionalism*[1] and *Legitimacy, Efficiency and Democratic Governance* in the World Trade Organization (WTO)[2] in order to promote cross-sectoral studies inducing private law, European law and international law experts and political scientists to analyse jointly the ever more complex reality of multilevel governance in transnational economic, social, environmental and legal relations. This Introduction summarises Chapters 1 to 8 in Section I on *International Trade Law: Constitutionalisation and Judicialisation in the WTO and Beyond*, Chapters 9 to 14 in Section II on *Transnational Governance Arrangements for Product Safety*, and Chapters 15 to 17 in Section III on *The WTO and Transnational Environmental Governance*. While this Introduction is written from the perspective of public constitutional and international law, Section IV, by the co-editor Christian Joerges, offers an account of *Constitutionalism in Postnational Constellations* with conclusions from the perspectives of international private and European law. The perspectives and conclusions of the private and public, American, European and international lawyers and political scientists, the authors of the 18 chapters of this book, are inevitably diverse and often focus on particular regulatory problems. This Introduction and the concluding Epilogue draw conclusions concerning the constitutional structures limiting, empowering and legitimising multilevel trade governance. They share the constitutional value premise that respect for human rights, private and democratic self-government and social justice requires more transparent, participatory and deliberative forms of transnational 'cosmopolitan democracy', as well as more legal coherence in multilevel trade governance, so that citizens can

[1] See C Joerges, I.-J. Sand and G. Teubner (eds), *Transnational Governance and Constitutionalism* (Oxford: Hart, 2004); C. Joerges and C. Godt, 'Free Trade: The Erosion of National and the Birth of Transnational Governance in S. Leibfried and M. Zürn (eds), *Transformation of the State* (Cambridge: CUP; 2005), at 93–117.

[2] See E.-U. Petersmann (ed), *Reforming the World Trading System. Legitimacy, Efficiency and Democratic Governance* (Oxford: OUP, 2005). For comparative constitutional, economic and political analyses of trade laws and policies in constitutional democracies in Europe and North America, see M. Hilf and E.-U. Petersmann (eds), *National Constitutions and International Economic Law* (Amsterdam: Kluwer, 1993).

better comprehend, influence and scrutinise international trade regulation for their mutual benefit.[3]

I. MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION

Modern globalisation and the universal recognition of human rights are transforming the intergovernmental 'society of states' into a cosmopolitan community of citizens with complex layers of national and international governance and legal regulation. The newly emerging global society is increasingly influenced not only by state regulation, but also by intergovernmental as well as non-governmental networks searching for joint responses to common concerns and global risks. The private and public regulation of investments, production, trade, competition, consumption, goods, services, social and environmental standards, transnational movements of capital, persons and communications takes place at private, (sub)national, transnational and intergovernmental levels and interacts in manifold ways that often lack transparency. The worldwide administration of website addresses by the private organisation ICANN, the international harmonisation of standards by the private International Standardisation Organisation (ISO), the legal references in the WTO Agreement on Technical Barriers to Trade (TBT) to relevant ISO standards, the arbitration procedures administered by the World Intellectual Property Organisation (WIPO) concerning private Internet domain name disputes and their enforcement by ICANN, the private 'Independent Review Procedures' administered by the WTO in order to determine compliance by public and private parties with the WTO Agreement on Preshipment Inspection, or the interrelationships between investor–state arbitration under trade and investment agreements illustrate these ever increasing linkages between private and public, national and international governance structures.

Multilevel trade governance can no longer be understood only from an economic, political or legal perspective, let alone from a single private law, state law, European or public international law perspective. For instance, negotiations, rule-making and disputes in the WTO are often influenced by private interests and non-governmental organisations (NGOs). In the increasing number of WTO dispute settlement proceedings over (phyto) sanitary standards and public or private technical regulations, hearings of

[3] See J. Habermas, *Between Facts and Norms—Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass: MIT Press, 1996), at 315–28, arguing that democratic self-government requires that only those rules may claim democratic legitimacy that can meet with the assent of all rational citizens in a discursive process equally open to all possibly affected persons. Public discourse and collaborative reasoning will enhance problem-solving and mutual learning. On the relationships between democracy and rule of law, see also E.-U. Petersmann, 'European and International Constitutional Law: Time for Promoting Cosmopolitan Democracy in the WTO' in G. de Búrca and J. Scott (eds), *The EU and the WTO* (Oxford: Hart Publishers, 2001), at 81–110.

scientific experts and *amicus curiae* submissions by NGOs have become frequent. The regular meetings by members of parliaments and NGOs during WTO Ministerial Conferences reflect the recognition of the need for more transparent problem-solving and 'deliberative structures' in multilevel trade governance. According to some observers, it may be only a matter of time before the political WTO bodies have to emulate the more developed forms of participatory democracy in national and regional trade governance, and the WTO dispute settlement bodies may have to respond to claims that trade restrictions are necessary for the protection of human rights.

The interrelationships between multilevel trade governance and social regulation are obvious not only from the economic perspective focusing on consumer welfare, producer interests and 'sustainable development' reconciling short-term and longer-term, private and public interests. They are likewise illustrated by the increasing impact of human rights and non-economic concerns on trade regulation, for instance when trade in biomedical products (for example, human stem cells, other isolated body parts), services (for example, gene therapies), trade-related intellectual property rights (for example, regarding essential medicines), food aid (for example, genetically modified food and crops) or 'blood diamonds' are restricted on grounds of human rights protection.[4] The classical 'international law of states' did not subject state sovereignty to international obligations of distributive justice and perceived justice as a virtue *within* national polities rather than *between* states. The emergence of a global community of citizens with cosmopolitan human rights and common threats entails human rights obligations also *across* national boundaries *vis-à-vis* foreign citizens and non-state actors, notably in favour of the about 1 billion people living below the poverty line of 1 dollar per day.[5]

The explicit commitment of all 149 WTO Members, in their Hong Kong Ministerial Declaration of 18 December 2005, to conclude their Doha Round negotiations as a 'Development Round' with clear benefits for the more than 100 less-developed WTO countries confirms this increasingly social re-orientation of the world trading system.[6] Just as liberalisation of national market access barriers inside the European Community (EC) during the 1960s was followed by social re-regulation at the EC level, so do the WTO Agreement and the Doha Round negotiations reflect a move

[4] See T. Cottier, J. Pauwelyn and E. Bürgi (eds), *Human Rights and International Trade*, (Oxford: OUP, 2005); E.-U. Petersmann, '*Biotechnology, Human Rights and International Economic Law*' in F. Francioni and R. Pavoni (eds), *The Impact of Biotechnology on Human Rights* (Oxford: Hart, 2006).

[5] See E.-U. Petersmann, 'Theories of Justice, Human Rights and the Constitution of International Markets', in Symposium: The Emerging Transnational Constitution' (2003) 37 *Loyola Law Review* 407–460.

[6] See WTO Ministerial Declaration adopted on 18 Dec. 2005, WT/MIN(05)/DEC of 22 Dec. 2005.

from 'negative integration' under the General Agreement on Tariffs and Trade (GATT 1947) to 'positive integration' measures in the context of the WTO (for example, harmonisation of intellectual property rights, technical regulations, (phyto)sanitary standards, preshipment inspection standards, professional accounting standards, telecommunications standards and related competition rules). Yet, the 2001 Doha Round Declaration does not envisage changes of the basic legal and institutional framework of the WTO. Do the existing WTO rules and institutions leave enough 'policy space' to ensure that trade policies contribute to the fulfilment of human rights and the basic social needs of all people? As the traditional, national forms of deliberative community and of parliamentary democracy cannot be replicated at the level of worldwide organisations like the WTO, should national parliaments and democracies, as is often claimed in the United States and in other countries with 'dualist' legal systems, oppose the idea that intergovernmental rule-making could be a means of changing national democratic legislation? Or does the experience with European integration confirm that multilevel constitutionalism is necessary not only for *limiting abuses* of multilevel governance, but also for further *protecting individual freedom and democratic self-government* across national frontiers? To what extent do fundamental economic and social rights entail constitutional duties to protect private rights-holders not only against governmental, but also against non-governmental abuses of economic power? Do the legal obligations in the TBT Agreement to use 'relevant international standards' (Article 2.4) and to ensure compliance by non-governmental standard-setting bodies (like ISO) with the TBT Agreement reflect such government obligations to protect citizens against threats caused by private activities? What are the relationships between human rights, constitutional law, private and public international trade law and social law? For example, what are the respective (dis)advantages of the European approach of defining the legal and social obligations of transnational corporations on the basis of a comprehensive 'economic constitution', compared with proposals for extending UN human rights obligations to international corporate governance?

II. CONSTITUTIONALISATION OF INTERNATIONAL TRADE LAW

Section I of this book includes eight chapters on the increasing 'judicialisation' and 'constitutionalisation' of international trade law, including normative as well as empirical studies of how the legitimacy and effectiveness of private and public, multilevel trade governance can be promoted through multilevel democratic and judicial procedures and other constitutional safeguards.

In *Chapter 1*, E-U Petersmann argues that multilevel trade governance requires multilevel constitutionalism in order to *constitute governance*

powers for the collective supply of 'international public goods', *limit abuses of foreign policy powers* more generally, and *protect individual constitutional rights* and democratic self-government also at transnational and intergovernmental levels of rule-making, administration and adjudication. National constitutions turn out to be 'partial constitutions' which cannot realise many constitutional objectives across national frontiers without complementary, transnational constitutionalism. 'Constitutional methods' and 'constitutional principles' have enabled regional trade law and WTO law to transform power politics into rule of law and peaceful settlement of disputes by compulsory international adjudication. Multilevel trade governance needs to be further 'democratised' and 'constitutionalised' so as to protect mutually beneficial co-operation among free citizens across frontiers more effectively and more legitimately.

Chapter 2 offers a political science analysis by P Nanz of the legitimacy of transnational trade governance from the perspective of its problem-solving capacity (efficiency), the rule of law, democracy and the interrelationships between them. Nanz proposes 'deliberative democratic constitutionalism' as a way of overcoming the false alternatives of national democracy or global markets. Stronger involvement of private actors in the 'transnational public sphere' is necessary for a better balancing of economic freedoms and social policies; 'principle-guided deliberative problem-solving in transnational arenas puts "justificatory burdens" on private actors'. The democratic legitimacy of transnational governance arrangements 'is to be assessed in terms of transparency, access to deliberation, responsiveness and inclusion'. The international public sphere must offer 'a political arena with actors and deliberative processes that can further democratise global governance practice'.

In *Chapter 3* on 'Dispute Settlement under GATT and WTO: An Empirical Enquiry into a Regime Change', the political scientists A Helmedach and B Zangl offer empirical evidence that the formal judicialisation of WTO dispute settlement *procedures* has led to a corresponding dispute settlement *practice*; this changing state practice has strengthened international rule of law and has enabled a regime change in international trade among WTO members compared with the previously weak GATT 1947 legal and dispute settlement system.

Chapter 4 by C Gerstetter examines 'The Appellate Body's Response to the Tensions and Interdependencies between Transnational Trade Governance and Social Regulation'. She analyses the textual and normative, interpretative arguments and 'balancing methods' developed by the WTO Appellate Body in order to respond to non-economic interests at stake. The 'judicial style' of the Appellate Body—such as its exhaustive reasoning based on strong commitment to textual interpretation, balanced with normative and interest arguments—bears more resemblance to that of the US Supreme Court than to the often teleological arguments and more

far-reaching balancing methods of the European Court of Justice, or the deductionist style of the French *Cour de Cassation*, notwithstanding important differences (for example, between the consensus-minded reasoning of the Appellate Body and the frequent dissenting opinions in Supreme Court judgments). The different judicial styles reflect the different legal status and functions of the courts and different modes of promoting legitimacy through judicial checks and balances.

Chapter 5 by J Steffek and C Kissling explains why civil society participation in the WTO remains institutionally underdeveloped. They find little incentive for the WTO 'to pull in NGOs' (for example, in order to help identify new issues, promote research, fact-finding, stakeholder participation, social acceptance and implementation of WTO rules, monitoring of compliance). Certain improvements—for instance, in WTO Secretariat co-operation with NGOs, transparency and access to documents, NGO participation in WTO ministerial conferences, filing of private *amicus curiae* briefs in WTO dispute settlement proceedings—seem to respond rather to pressures from NGOs 'pushing into the organisation'. As in other intergovernmental organisations, such pressures meet resistance by member states and bureaucracies seeking to protect the intergovernmental core of the organisation.

Chapter 6 by R Nickel states that there is an ongoing *materialisation* of transnational law at work and emphasises the need for 'participatory arrangements ensuring the involvement of civil society actors, stakeholders, and the general public in the arguing, bargaining and reasoning processes of transnational regulation, procedural rights safeguarding these procedural positions, and courts or court-like institutions that flank these arrangements'. Such a wider inclusion of civil society actors in transnational regulation should operate as an antidote to existing 'corporatist' influences on regulatory processes. Only a law-making process where those subjugated to the law can view themselves also as law-makers can provide the needed legitimacy. Drawing on Habermasian thinking, Nickel suggests that the opening of transnational governance structures to non-represented interests and groups, and promotion of 'societal constitutionalism from below' (for example, on the model of the ISO) should help to broaden the regulatory agenda and enhance more inclusive representation of societal interests through 'participative transnational governance'. Nickel proposes to 'constitutionalise' the existing transnational administrative governance structures further.

Chapter 7 by J Pauwelyn examines 'Non-traditional Patterns of Global Regulation' and concludes that 'the risk that the WTO "misses the boat" of non-traditional patterns of global regulation is real'. Apart from references to relevant international standards in WTO agreements and the interpretation of softer forms of regulation (for example, UN resolutions) as factual evidence, the limitation of the WTO to intergovernmental

agreements entails the risk of 'over-inclusion' in the intergovernmental regulation of the conduct of non-state actors, whose private rules and governance may distort trade as much as government conduct. The possibilities of intergovernmental treaties directly disciplining such trade-distorting conduct of non-state actors are, however, limited. The fallback on control by domestic law may likewise prove inadequate, for instance, if domestic law does not incorporate international trade obligations.

Chapter 8 by R Wai analyses 'Conflicts and Comity in Transnational Governance: Private International Law as Mechanism and Metaphor for Transnational Social Regulation through Plural Legal Regimes'. Private international law plays a decisive role in transnational social regulation and co-ordination of the effects of domestic private law and private self-regulation across borders. Its governance functions (for example, of civil procedures, private ordering, distribution of resources among individuals, compensation for torts) and its contribution to conflict avoidance, comity and dispute settlement in international relations make it an important part of transnational governance regimes and a model for decentralised co-ordination of the interrelationships among the plural regimes of transnational governance. Conflicts and contestation are important components of transnational society and, as illustrated by Wai's case-studies of private cross-border litigation and of investor–state disputes under Chapter 11 of the North American Free Trade Agreement (NAFTA), may be prevented or resolved most effectively through transnational arrangements that broadly pursue the goals of conflict and comity recognised in private international law.

III. TRANSNATIONAL GOVERNANCE ARRANGEMENTS FOR PRODUCT SAFETY

Section II of the book includes six case-studies on transnational governance arrangements for product safety in order to protect the health and safety of consumers without unduly reducing their economic consumer welfare by unnecessary barriers to trade and increased prices.

Chapter 9 by T Hüller and ML Maier reviews the 'Global Food Safety Governance' by the Codex Alimentarius Commission ('Codex'), jointly established by the UN Food and Agricultural Organisation (FAO) and the World Health Organisation. The hundreds of standards and food-safety guidelines elaborated by the Codex since the early 1960s, usually without much public notice outside the scientific and bureaucratic networks directly involved, are being referenced in the WTO Agreement on Sanitary and Phytosanitary Standards (SPS) and have thereby received additional legal importance for the world trading system. However, the pessimistic expectation that higher stakes in Codex decisions would necessarily impair the decision-making process is not confirmed in this chapter. The authors

focus on efforts that have recently been made by Codex members themselves to review and remedy existing lacunae in the Codex process, especially with regard to the participation of different types of actors, the reconciliation of potentially competing sources of knowledge and the decision rules applied in standard-setting. Improvements can be noted in at least some of these respects, but further procedural and institutional reforms would be necessary to reduce the domination of Codex decision-making by the interests of a few powerful actors.

In *Chapter 10*, A Herwig argues that the precautionary principle, combined with an accountable and responsive assessment of normative and ethical dimensions of hazards, promotes better public reasoning and more legitimate solutions to problems of uncertainty. She views the indeterminacy of the precautionary principle as an advantage, because it does not prescribe specific outcomes to different legal cultures. Herwig complains that the SPS Agreement's focus on consistency in levels of protection, and the absence of methods for risk assessment as the key justification for precautionary measures, fall short of promoting fully accountable and legitimate risk regulation. In Herwig's view, a better approach to reviewing the justification of precautionary measures would evaluate the reasonableness of proffered scientific evidence and establish procedures that require regulators to give better reasons for regulating. According to Herwig, herein also lie the apparent *lacunae* of the precautionary principle as currently set out in international agreements and in the SPS Agreement.

According to *Chapter 11* by E Fisher, the SPS Agreement regulates administrative action and rests on 'assumptions about how legitimate public administration is constituted, limited and held to account, or, in other words, theories of administrative constitutionalism'. The debates and disputes over risk regulation in the SPS Agreement should be viewed as an extension of national debates over 'rational-instrumental' and 'deliberative-constitutive paradigms' of risk regulation, and of the need for integrating science into democratic decision-making, rather than as a clash between national democracy and science-based WTO rules. Fisher argues for re-orienting SPS scholarship and interpretations of the SPS Agreement away from the flawed democracy/science dichotomy towards administrative constitutionalism in order to address the interface between transnational trade governance and national social regulation in more appropriate ways.

Chapter 12 by D Chalmers analyses the potential of globalisation for enhancing self-government (for example, collective problem-solving) and for curbing regulatory excesses of national governments; Chalmers also examines the risks of undue intrusion by intergovernmental organisations, by 'administrative globalisation' and multinational corporations, for example, due to asymmetries of power in multilevel trade governance. His thesis is that the legitimacy of multilevel economic governance requires a better understanding of its administrative functions, rules and procedures.

Chapters 13 by R Howse and *14* by H Schepel examine the requirement of the TBT Agreement to use 'international standards' as a 'basis' for technical regulations, unless the international standards are ineffective or inappropriate (Article 2.4), as well as the impact of the TBT Agreement on the creation of new international standards, including privately generated norms. Even though the TBT and SPS Agreements pursue both the harmonisation of domestic regulations on the basis of 'international standards', important differences result from the fact that SPS standardisation is largely a matter for public organisations, whereas product safety standards are overwhelmingly private. In contrast to the WTO Agreement on Trade-related Intellectual Property Rights (TRIPS) which incorporates *existing* international treaty rules and regulatory standards into WTO law, the TBT Agreement—according to Howse—'turns a mass of normative material that never before had the status of international law into international legal obligation'. Howse criticises the interpretation of Article 2.4 TBT by the Appellate Body and discusses the implications of this 'broad automatic law-making mechanism the Appellate Body may have created by its interpretation' on what Howse calls 'progressive regulatory democracy'.

Schepel explains the lesser legal force of international standards under the TBT Agreement by the fact that WTO Members have far less control of international standards bodies under the TBT Agreement than they have under the SPS Agreement. Schepel compares the 'public and private intergovernmentalism' in the TBT Agreemment, including the Code of Good Practices for the Preparation, Adoption and Application of Standards annexed to the TBT Agreement, which extends the intergovernmental TBT rules to private standards bodies. National private standards bodies are thereby brought within the ambit of the TBT Agreement. Even though the TBT Agreement does not formally recognise ISO, most 'international standards' are ISO standards. Yet, as the TBT Agreement also covers standards that are not based on international consensus, Schepel complains that 'we are now left with a Trade Agreement obliging members to "use as a basis" normative material upon which the Agreement sets no institutional, representational or procedural requirements whatsoever … this, surely, cannot be right'. Schepel's conclusion illustrates the advantages of a constitutional approach that perceives international trade law, national administrative law and private self-regulation as being all subject to constitutional restraints.

IV. THE WTO AND TRANSNATIONAL ENVIRONMENTAL GOVERNANCE

Section III includes three case-studies on the WTO and transnational environmental governance.

In *Chapter 15*, C Godt uses the example of the UN Convention on Biodiversity, its 'Bonn Guidelines' and their impact on trade rules and policies for examining the interrelationships between global environmental and

trade governance and the 'constitutional task' of policy co-ordination. Godt concludes that global environmental governance enriches the current debate on constitutionalism. She proffers the example as a problem-solving, multilevel governance structure which includes private and public actors, and which overcomes specific shortcomings of classical national and international solutions. In her view, global environmental problems have to be tackled as international economic problems, and effective regimes depend on the inclusion of private actors.

Chapter 16 by U Ehling discusses the past work of the WTO Committee on Trade and Environment and interprets the Committee's establishment, institutional limits and meagre accomplishments as 'symbolic politics', notwithstanding its contribution to more transparent discussion, better understanding and problem-solving of environmental concerns in the WTO, as illustrated by the repeated statements of WTO Members that trade and environmental problems can and should be mutually supportive. Are the very same governments pursuing mutually conflicting trade and environmental policies in separate international institutions, just as their trade and environmental policies at domestic levels are not always coherent?

Chapter 17 by O Perez on 'Facing the Global Hydra: Ecological Transformation at the Global Financial Frontier' emphasises the fragmented nature of global society, of global economic governance and international law. His contribution focuses on international financial law and its close link with the global economy and protection of the environment, as illustrated by the 2002 'Global Reporting Initiative' requiring corporations to provide a more comprehensive picture of the social and ecological dimensions of their actions and contribution to 'sustainable development'.

V. PROMOTING LEGITIMACY AND COHERENCE OF MULTILEVEL GOVERNANCE BY CONSTITUTIONAL PRINCIPLES

In *Section IV*, the co-editor C Joerges winds up this book with observations and conclusions building upon his conflict of laws approach to transnational governance and international adjudication. He emphasises (like R Wai and other contributors) that private international law provides useful principles that may be of broader interest to all regimes of transnational governance (such as the WTO and NAFTA dispute settlement bodies) in attempting to co-ordinate the plural regimes of multilevel transnational governance. His private law, comparative law and European law approaches differ from my constitutional law perspectives. But we share the view that private and public, national and international law and governance require constitutional restraints in order to prevent and limit abuses of power and promote individual freedom, democratic self-government and social justice more effectively. Just as the regional de-regulation of discriminatory market access barriers in the EC and NAFTA was accompanied by

new forms of transnational governance and social re-regulation, so can the move from 'negative' to 'positive integration' among WTO Members remain socially and politically acceptable only in the framework of new governance arrangements promoting input legitimacy (such as respect for human rights, participatory and deliberative democracy) and output legitimacy (for example, in terms of consumer welfare, protection of the environment, fulfilment of human rights) more effectively.[7]

The case-studies in this book illustrate that political and legal problems of multilevel trade regulation, risk regulation, social regulation and international adjudication in the WTO may be resolved more effectively by examining them also from the perspective of 'deliberative democratic constitutionalism' (P Nanz, R Nickel), 'administrative constitutionalism' (E Fisher), 'rights-based cosmopolitan constitutionalism' (E-U Petersmann), 'constitutionalisation of transnational administrative governance' (R Nickel) and 'principle-oriented interpretation and balancing of WTO rights and obligations' (C Joerges, E-U Petersmann) rather than only in terms of intergovernmental rights and obligations, or of conflicts between national democracy and international trade law. National and international constitutional principles may offer a more appropriate normative framework and 'balancing principles' than a one-sided focus on particular trade rules (for example, in the TBT and SPS Agreements) and particular national regulatory concepts (for example, parliamentary sovereignty to define 'national interests', the 'equivalence principle' justifying the equal treatment of natural and genetically-modified organisms in food products, diverse definitions of 'anti-competitive practices' in national competition laws). The explicit recognition—in the Preamble to as well as in numerous provisions of the WTO Agreement—of 'basic principles underlying this multilateral trading system' offers a legal basis for such 'principle-oriented' interpretation and progressive development of WTO rules with due regard to general legal principles recognised by WTO members.[8]

Mutually beneficial private and public trade law belongs to the oldest fields of international law. As all international legal relations raise economic questions, it is not surprising that international trade rules have often influenced other areas of international law (such as the treatment of foreigners) and continue to be among the most developed areas of today's international legal system. Just as private international law is founded on private autonomy and responsibility, and public international law rests on 'public autonomy' (state sovereignty) and state responsibility, so does the coherence of transnational economic law and of multilevel trade governance depend

[7] For analyses of the WTO and its Doha Round negotiations from these perspectives, see Petersmann, n 2 above.

[8] See E-U Petersmann, 'Ten Years WTO Dispute Settlement System: Past, Present and Future' in (2006) IV *Pennsylvania Journal of International Law and Policy* (forthcoming 2006).

on reconciling state sovereignty, popular sovereignty and individual rights through equal freedoms and rule of law.[9] My constitutional approach to international law (as explained in *Chapter 1*) has prompted me to support the 'human rights approach to international trade' advocated by the UN High Commissioner for Human Rights. Yet, the legally and institutionally fragmented UN human rights conventions neglect the 'indivisibility' of human rights, as well as the constitutional task of welfare-creation (for example, by failing to protect freedom of profession, property rights and open markets), and do not effectively empower citizens to invoke and enforce UN human rights in multilevel trade governance and in their daily life and personal self-development.[10] For instance, the human rights and fundamental freedoms of EU citizens are protected more comprehensively in their national constitutions and in European constitutional law (including the European Convention on Human Rights) than in UN human rights law. Bottom-up struggles for stronger participation rights in multilevel governance, and for judicial protection of the rule of international law (including compliance with WTO law), may be more important for the individual and social self-development of European citizens than their rare invocation of UN human rights law *inside* the EC.[11] The less effective *procedural* democratic rights are in distant worldwide organisations (such as the UN and the WTO), the more important it may be to limit the foreign policy discretion of governments by *substantive* fundamental rights.[12] Without such stronger individual rights, UN law and WTO law risk remaining ineffective in the numerous countries where citizens are prevented by governments from directly invoking WTO rules and UN human rights in domestic courts.

Rules that are not perceived as just are unlikely to remain effective over time. The universal recognition—not only in the Preambles of UN human rights conventions but also in regional and national human rights instruments—of 'the inherent dignity and of the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world' has induced me to argue in favour of maximum

[9] See E-U Petersmann, 'From State Sovereignty to the "Sovereignty of Citizens" in the International Relations Law of the EU?' in N Walker, *Sovereignty in Transition* (Oxford: Hart Publishers, 2003), at 145–165.

[10] See E-U Petersmann, Human Rights and International Trade Law: Defining and Connecting the two Fields in Cottier, Pauwelyn and Bürgi, 4 above, at 29.

[11] The EU's external relations law is explicitly committed to 'conformity with the principles of the United Nations Charter' and 'respect for human rights and fundamental freedoms' (Art 11 EU Treaty). Yet, it appears unwarranted to ridicule the fact that the human rights clauses in the EC's international agreements with about 150 countries rely more on the universal UN human rights instruments than on the common human rights law inside the EU, as an 'ironic bifurcation': A Williams, *EU Human Rights Policies. A Study in Irony* (Oxford: OUP, 2004), Ch 8, or as a 'fundamental discrimination at the heart of the EU's narrative of identity' (as claimed by P Craig and G de Búrca in their Preface to the book by Williams, at p. vi).

[12] This argument is elaborated by Petersmann, n 9 above.

equal freedom as a moral 'categorical imperative' (I Kant) and 'first principle of justice'—not only *inside* constitutional democracies (as argued by J Rawls) but also in European and international law.[13] The emphasis on respect for human dignity in German and European constitutional law responds not only to the historical experience of unique 'constitutional failures' in Europe (like colonialism, dictatorships, world wars and genocide); it also reflects the need for the dynamic development of constitutional rights beyond the claims to 'life, liberty and property' in Anglo-Saxon and French constitutional documents of the eighteenth century, and for basing such 'new constitutional rights' (as codified in the EU Charter of Fundamental Rights) on respect for human dignity as the most basic 'human right to have rights'.[14] Multilevel trade governance could gain in democratic legitimacy, and could empower individuals more effectively in their struggle against unnecessary poverty and welfare-reducing protectionism if WTO rules were construed not only as intergovernmental agreements among sovereign states aimed at 'international order', but also as cosmopolitan commitments to promote individual freedom, 'sustainable development' and social justice for the benefit of citizens and their social welfare.[15]

VI. FOR MULTILEVEL CONSTITUTIONAL PLURALISM, AGAINST CONSTITUTIONAL NATIONALISM

The abovementioned moral and human rights foundations of my constitutional approach have led me, for more than 30 years, to support the practice in German and European constitutional law and jurisprudence of interpreting the broad constitutional guarantees of individual freedom as also protecting 'market freedoms' and rule of international law—in the economy no less effectively than inside the European polity, subject to

[13] See Petersmann, nn 4 and 5 above.

[14] On this constitutional recognition of a right to respect for human dignity in Art 1 of the German Basic Law and Art 1 of the EU Charter of Fundamental Rights, see Petersmann, n 5 above.

[15] On the pursuit of 'order' rather than 'justice' in international relations see: R Foot, JL Gaddis and A Hurrel (eds), *Order and Justice in International Relations* (Oxford: OUP, 2003); J Thomson, *Justice and World Order* (Tokyo: United Nations Press, 1992). On 'development as freedom', see E-U Petersmann (ed), *Developing Countries in the Doha Round* (Florence: EUI, 2005) at 3–18. The proposed interpretation (*de lege ferenda*) of the WTO guarantees of freedom as *erga omnes* obligations in favour of their citizens to protect private 'rights to trade' has so far been recognised (*de lege lata*) only in the 2001 WTO Protocol on the accession of China. Contrary to the polemic claims by my Australian critics, such an interpretation has nothing to do with their proposition of a 'human right to freedom of trade': see DZ Cass, *The Constitutionalization of the WTO* (Oxford: OUP, 2005) at 146, which is inconsistent with my arguments for broad constitutional rights to general freedom of action subject to democratic legislation. For my criticism of the narrow Anglo-Saxon and UN conception of human liberty rights on the ground that broader constitutional guarantees of equal freedoms (as in Art 2 of the German Basic Law and in EC law) tend to protect individual liberty and a 'social market economy' more effectively: see Petersmann, n 5 above.

democratic legislation protecting, promoting and balancing all other human rights. Inside the EC, international trade law and multilevel trade governance derive their democratic legitimacy from protecting the constitutional rights of citizens and from 'participatory democracy'.[16] I have therefore argued that the incorporation of WTO law as an 'integral part of the Community legal system' (pursuant to Article 300(7) EC Treaty) should prompt the EC governments to recognise EC citizens as being entitled to rely on 'the strict observance of international law' by EC institutions and EC Member States, as explicitly prescribed in Article I–3 of the 2004 Treaty Establishing a Constitution for Europe (TCE) in conformity with the jurisprudence of the European Court of Justice (ECJ). Respect for the fundamental rights of EU citizens requires the interpretation of German, EC and WTO guarantees of freedom, non-discrimination and rule of law in a mutually consistent manner.[17]

Clearly, such constitutional claims—based on functional interrelationships between national, European and WTO guarantees of freedom, non-discrimination and rule of law inside particular constitutional orders with 'monist' legal systems—may not be justifiable in intergovernmental jurisdictions (like the UN and WTO) and national constitutional systems without equivalent constitutional guarantees. For example, the legal and judicial respect—in the recent *Yusuf* and *Kadi* judgments of the ECJ—for UN Security Council resolutions branding individuals and groups as terrorists and seizing their private property has been dangerously deferential in view of the risks of such political UN resolutions for the protection of fundamental rights and due process of law.[18] Whereas the WTO guarantees of freedom, non-discrimination and rule of law extend, and exceed, the corresponding

[16] The 'principle of participatory democracy' is explicitly recognised and protected in Art I–47 of the 2004 Treaty Establishing a Constitution for Europe (= TCE [2004] OJ c/310/1) which, due to its signing by all 25 EC Member States and ratification so far by 13 Member States, already entails legal obligations not to defeat the purpose of this Treaty (see Art 18 of the Vienna Convention on the Law of Treaties). The TCE makes clear that 'participatory democracy' complements the 'principle of representative democracy' (Art I–46) and 'the principle of democratic equality' (Art I–45 TCE), all of which are rooted also in national constitutional guarantees and are closely related to 'deliberative democracy': see J Habermas, 'Three Normative Models of Democracy' in Habermas, *The Inclusion of the Other. Studies in Political Theory* (Cambridge, Mass: MIT Press, 1998) at 239–252; HH Koh and RC Slye (eds), *Deliberative Democracy and Human Rights* (New Haven, conn: Yale UP, 1999).

[17] On the persistent denial of 'direct effect' of GATT and WTO rules by the ECJ, and its rare application of the principle of 'WTO-consistent interpretation of EC law', see E-U Petersmann, 'On Reinforcing WTO Rules in Domestic Laws' in JJ Barcelo and H Corbett (eds), *Rethinking the World Trading System* (forthcoming 2006).

[18] See P Eeckhout, 'Does Europe's Constitution Stop at the Water's Edge? Law and Policy in the EU's External Relations' in *Walter van Gerven Lectures*, (Leuven: Europa Law Publishing, 2005), who rightly criticises the CFI judgments of 21 Sept 2005 in *Yusuf* v. *Council and Commission* (Case T–306/2001 (2005) 49T) and *Kadi* v. *Council and Commission* (T-315/2001, CMLR 2005, 1334) as 'judicial abdication cloaked in respect for international law'.

guarantees in national and regional trade law and are subject to judicial review at intergovernmental and national levels, the lack of corresponding guarantees in intergovernmental decision-making processes in the UN necessitates stronger judicial safeguards at domestic levels. Citizen-oriented constitutional approaches may not be warranted in intergovernmental institutions like the WTO dispute settlement bodies, which rightly interpret the intergovernmental WTO rules as rights and obligations of WTO Members that do not require governments—subject to rare exceptions (for example, in Article XX of the WTO Agreement on Government Procurement)—to give 'direct effect' to WTO rules inside their domestic legal systems. Interestingly, the UN High Commissioner for Human Rights no longer suggests inserting human rights provisions into WTO law. Unlike the 'economic constitution' of the EC, the national constitutions in Australia, Canada, the United States (US) and other countries with 'dualist' legal systems do not protect economic 'market freedoms' and 'strict observance of international law' as constitutional rights.[19] From the national perspective of 'parliamentary sovereignty' and democratic self-determination of a national *demos*, international influences on national democratic legislation may even appear democratically undesirable, as emphasised by 'realist' and 'neo-conservative' defenders of unilateralism and 'exceptionalism' in US foreign policies.[20] Yet, my critics, who reject *multilevel* constitutionalism by using Australian and American constitutional nationalism as their ideal, admit that:

— 'none of the writers who claim the WTO is constitutionalising also claim that the WTO legal system is a constitution, in the same sense as a national constitution';[21]
— and 'thinking about WTO constitutionalisation' is normatively necessary in view of the inadequacies of the 'received account' of national constitutionalism in a globally interdependent world.[22]

[19] See the comparative constitutional studies in M Hilf and E-U Petersmann (eds), *National Constitutions and International Economic Law* (The Hague: Kluwer, 1993). According to Cass n 15 above, neither individual economic freedom nor other individual rights are 'a matter considered essential to constitutionalisation in the received tradition' of Anglo-Saxon constitutionalism (at 168 and 176).

[20] See M Ignatieff, *American Exceptionalism and Human Rights* (Cambridge, Mass: Harvard UP, 2005); J Rubenfeld, 'The Two World Orders' in G Nolte (ed), *European and US Constitutionalism* (Cambridge: CUP, 2005) at 280–296. Cass n 15 above bases herself on 'mature constitutional systems, for example in the United States, Canada and Australia' (at 191), without taking into account the different constitutional traditions in continental European countries and in EC law, and claims that 'the WTO is not constitutionalised, and nor, according to any current meanings of the term, should it be' (at x). Cass' recommendation for 'trading democracy' (Chapter 8 of her book) is a recipe for power politics; for democratic decision-making has never been effective outside 'constitutional democracy'.

[21] Cass, n 15 above, at 49.

[22] Ibid, at 240–245, who admits—after 7 chapters rejecting the need for 'constitutionalising' international law and international organisations—that her 'received account' of constitutionalism has 'been revealed as neither descriptively adequate nor normatively appealing' (at 240).

Respect for human rights requires respect for the diversity of democratic constitutions and of multilevel governance. In process-based democracies, governments and courts often disregard the 'constitutional functions' of international guarantees of freedom of trade in favour of 'parliamentary sovereignty' and 'dualist scepticism' *vis-à-vis* international law.[23] Rights-based multilevel constitutionalism is supported by all 25 EU Member States, as well as by all 44 member states of the Council of Europe, on the basis of the European Convention on Human Rights, their common constitutional traditions, EU law and the EU's association agreements with other European countries. In regional trade agreements outside Europe (for example, in NAFTA) recourse to 'constitutional methods' remains contested. Most international lawyers and political scientists, even if they support reforms of UN law and WTO law, avoid my cosmopolitan focus on human rights and on empowering citizens to become legal subjects of UN and WTO law.[24] The state-centred, 'realist' foreign policies of most governments outside Europe make it unlikely that European rights-based, multilevel constitutionalism will become a model for *worldwide* trade governance. Even though the WTO guarantees of freedom go far beyond the guarantees of freedom in national and regional trade laws, and the compulsory WTO dispute settlement system promotes a more effective rule of law than in other areas of international relations, respect for national sovereignty remains the prevailing 'constitutional principle' of the intergovernmental WTO legal system.[25]

An increasing number of international lawyers, in Europe and in the United States, have begun analysing WTO law from constitutional perspectives. They all identify 'constitutional deficits' of the WTO that call for constitutional reforms, with due respect for the diversity of national constitutions and for more effective forms of democratic participation in multilevel trade governance. The 'de-nationalisation' resulting from the increasing international interdependence and the universal recognition of human rights entail that national constitutions—and even hegemonic powers like the US—cannot effectively protect human rights and 'public

[23] See E-U Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law. International and Domestic Foreign Trade Law in the United States, the EC and Switzerland* (Fribourg: Fribourg UP, 1991), Ch IX.

[24] See B Fassbender, 'The Meaning of International Constitutional Law' in MSJ Macdonald and DM Johnston (eds), *Towards World Constitutionalism. Issues in the Legal Ordering of the World Community* (Amsterdam: Nijhoff, 2005), at 837–851.

[25] This GATT principle of national economic sovereignty, and the moral and constitutional need for using this 'policy space' for promoting a 'social market economy', social rights and social justice at national, EC, GATT and UN levels, have been emphasised in my publications for more than 30 years: see Petersmann, n 18 above, at 236 ff. On the legal limitations of these sovereignty and national treatment principles by WTO obligations (e.g., to avoid 'unnecessary' restrictions even in non-discriminatory, domestic regulations), see E-U Petersmann, 'From "Negative" to "Positive Integration" in the WTO: Time for Mainstreaming Human Rights into WTO Law?' in (2000) 37 *Common Market Law Review* 1363.

goods' across frontiers without complementary, multilevel constitutionalism. As the national forms of process-based democracy and of parliamentary control cannot be replicated at the level of worldwide organisations, we have to learn through international trial and error and regulatory competition how multilevel trade governance can be rendered more consistent with respect for human rights and democratic self-government. This book hopes to contribute to the needed 'conjectures and refutations' (K Popper) and democratic learning processes, without which the consensus-based WTO decision-making procedures will fail to reach agreement on the needed reforms.

The multilevel, liberty-based constitutional principles advocated by most contributors to this book differ from the power-oriented 'realist paradigm' of bargaining among governments by their 'universalisability' (I Kant), which promotes peaceful co-operation among free citizens and people even if they pursue antagonistic self-interests and diverse value preferences. European integration law, as well as WTO law, refutes the 'realist claim' that constitutionalisation of power is possible only inside nation states. EU and WTO law suggest that Immanuel Kant's moral claim—that an effective legal protection of equal freedoms across frontiers requires constitutional safeguards on all three levels of human interactions: national, international and transnational (for example, in relations between citizens and foreign governments)[26]—is politically and legally practicable. The private law and constitutional law approaches of the contributors to this book find their common legal roots in the protection of individual autonomy, which is also the basic value underlying respect for human dignity and human rights. The diversity of individual preferences and interests and the scarcity of resources inevitably entail conflicts of interests and conflicting legal claims that can be resolved peacefully only by recognition of general constitutional rules of a higher legal rank. Hence, prevention and settlement of conflicts of interests and of 'conflicts of laws' in the antagonistic reality of power-oriented international relations are the central challenge of multilevel constitutionalism.[27] It is hoped that the interdisciplinary and empirical studies in this book will contribute to a broader public discourse on the normative premises and political practicality of 'constitutionalising' multilevel trade governance.

Inevitably, the constitutional approaches of the various contributors to this book differ among each other, just as national democratic constitutions legitimately differ between each other. Notwithstanding the variety of legal

[26] On Kant's theory on the need for national, international and transnational constitutional rules promoting a complete legalisation and constitutionalisation of social relations, see E-U Petersmann, 'How to Constitutionalise International Law and Foreign Policy for the Benefit of Civil Society?' in (1999) 20 *Michigan Journal of International Law* 1.

[27] See E-U Petersmann, 'Justice as Conflict Resolution: Proliferation, Fragmentation and Decentralization of Dispute Settlement in International Trade' in (2006)27 *University of Pennsylvania Journal of International Economic Law* 273.

and political science approaches used in the individual contributions—such as private law, administrative law, constitutional law, conflict of laws, European law, international law, public choice and international relations approaches, most contributors refrain—in view of other recent publications—from analysing the human rights dimensions of multilevel trade governance as well as the regulation—outside the WTO—of labour standards.[28] Yet, it should not be overlooked that the proposed multilevel constitutionalism aims at remedying certain deficits of intergovernmental UN human rights approaches which fail effectively to protect citizens' rights and democratic self-government at intergovernmental levels (for example, in UN and WTO law), including remedies against non-governmental abuses of power. What unites most contributors to this book is their belief that the state-centred international trade order requires democratic reforms for the benefit of general citizens' interests—not only 'top-down reforms' through intergovernmental bargains, but also 'bottom-up reforms' through democratic struggles by citizens for more effective participation rights in transnational governance and more comprehensive constitutional protection of their individual and democratic rights at national, transnational and intergovernmental levels. This struggle resembles the task of Sisyphus, but remains a moral imperative that may be easier to realise in the field of mutually beneficial trade than in most other areas of antagonistic international relations.

[28] See nn 4, 5 and 9 above as well as FM Abbott, C Breining-Kaufmann and T Cottier (eds), *International Trade and Human Rights. Foundations and Conceptual Issues* (Ann Arbor Mich: Michigan UP, 2006); A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: OUP, 2006).

Section I

International Trade Law: Constitutionalisation and Judicialisation in the WTO and Beyond

Section I.1

Constitutionalisation and the WTO: Two Competing Visions from Two Different Disciplines

1

Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism

ERNST-ULRICH PETERSMANN

INTRODUCTION

PART II OF this contribution discusses the reality of multilevel governance, the defining elements of 'constitutionalism' and the diverse foreign policy conceptions of rights-based *v.* process-based constitutionalism, as well as of national *v.* international constitutionalism. Part III, explains why states and intergovernmental organisations must be evaluated in terms of their contribution to the realisation of human rights, fundamental freedoms, democratic procedures and the satisfaction of basic human needs; the inevitable 'democratic deficit' of worldwide organisations for the collective supply of 'global public goods' must be compensated for by subjecting their multilevel governance to multilevel constitutional restraints at both international and domestic levels. Part IV analyses the problems of further 'constitutionalising' multilevel trade governance in the World Trade Organisation (WTO) with due regard for the 'sovereignty' of WTO members and the human rights of their citizens. Part V summarises the conclusions. As the GATT 1947 paradigm of 'embedded liberalism' has entailed far-reaching policy failures, this contribution rejects the nationalist plea to 'return to non-constitutional approaches to reviving the multilateral trading system as an interstate bargain'.[1] The needed 'multilevel constitutionalism' views domestic and international constitutional restraints on

[1] See R Howse and K Nicolaidis, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step too Far' in RB Porter *et al.* (eds), *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millenium* (Washington, DC: Brookings Institution Press, 2001), 227, at 230. For a similar 'anti-constitutionalization critique'—from the perspective of process-based, national Anglo-Saxon constitutionalism rather than rights-based, multilevel European constitutionalism—of constitutional approaches to the WTO see DZ Cass, *The Constitutionalization of the WTO* (Oxford: OUP, 2005), who claims 'that the WTO is not constitutionalized, and nor, according to any current meanings of the term, should it be' (p. x).

multilevel governance as a functional unity and attempts to strengthen the synergies between international and domestic guarantees of freedom, non-discrimination, rule of law and social safeguard measures. Constitutional discourse helps to explain the 'constitutional problems' and functional interrelationships among the different levels of constitutional rules. For instance, the WTO rights of WTO members may become obligations under human rights law (for example, to promote access to essential medicines); the WTO obligations of WTO members may justify individual rights under domestic constitutional rules (such as the private 'rights to import and export' as guaranteed in EC law and in the 2001 WTO Agreement on the accession of China); and the WTO guarantees of property rights and of non-discrimination may become a relevant context for interpreting domestic constitutional guarantees of property and non-discrimination in conformity with the international legal obligations of the country concerned.

II. MULTILEVEL GOVERNANCE AND MULTILEVEL CONSTITUTIONALISM: INTRODUCTION AND CONCEPTUAL CLARIFICATIONS

Constitutionalism and its basic objective of constituting and limiting government powers for the protection of equal rights of citizens by means of constitutional rules of a higher legal rank go back to the comparative study of more than 100 city constitutions in Aristotle's '*Politeia*'. *Republican constitutionalism*, from the Greek city republics up to the Renaissance republics in Italy, gave priority to the public autonomy of citizens over their private liberties, and excluded large numbers of people from the franchise.[2] *Democratic constitutionalism*, since the revolutionary French and US constitutions of the late eighteenth century, has postulated inalienable human rights as the birth rights of every individual, which constitutionally limit government powers as well as the sovereign will of the people. Decolonisation and the fall of most communist governments during the twentieth century contributed to the fact that, today, almost all states have committed themselves to respect for both human rights and popular sovereignty as the two main sources of political 'input legitimacy', and have adopted national constitutions using two basic 'constitutional methods' for the constitution and limitation of governance powers:

— distinction between long-term 'constitutional rules' of a higher legal rank and 'post-constitutional rules', such as (sub-)national legislative and administrative rules and intergovernmental agreements; and
— the general and abstract nature of constitutional rules which should bind all without discrimination.

[2] On republican freedom, see P Pettit, *Republicanism. A Theory of Freedom and Government* (Oxford: OUP, 1997), Pt I.

The universal trend towards *national constitutionalism* has revealed diverse constitutional approaches and common problems.[3] For instance,

— *democratic constitutionalism* committed to the normative ideal of self-determination of the people must be distinguished from *non-democratic constitutionalism* protecting the power structures of the ruling classes (for example, in communist countries, Islamic republics);
— *rights-based constitutions* establishing new, democratic governance powers circumscribed by comprehensive guarantees of fundamental rights (for example, in Germany, India, South Africa) provide for more precise and more comprehensive substantive limits on democratic decision-making procedures than *process-based democracies* limiting existing governance powers (for example, of the monarchy in the United Kingdom) and 'popular democracy' (for example, in the United States—hereinafter the US) by more limited 'Bills of Rights' that often tolerated 'monarchical privileges' and other discriminatory practices (for example, slavery, racial discrimination);
— national constitutionalism must be distinguished from *international constitutionalism*, which provides for multilevel constitutional restraints aimed at limiting 'constitutional failures' at national as well as intergovernmental levels without pursuing state-like forms of constitutional governance at the international level; intergovernmental rule-making remains subject to criticism, notably from the perspective of human rights and constitutional democracies with 'dualist' legal systems and 'realist' foreign policies (like the hegemonic US foreign policies) which contest whether international rules should shape domestic legislation and policies;[4]
— the European Union (EU) remains so far the only *international constitutional democracy* aimed at protecting the rights of EU citizens and democratic self-determination of the peoples in EU Member States across national frontiers, thus illustrating another extension of democratic self-government from the democratic city-state (in classical Greece) and national democracy to transnational forms of democratic self-determination reducing border discrimination against foreign

[3] See B Ackerman, 'The Rise of World Constitutionalism' (1997) 83 *Virginia Law Review* 771. The book by RSJ MacDonald and DM Johnston (eds), *Towards World Constitutionalism* (The Hague: Nijhoff, 2005) was published only after this manuscript was finalised.

[4] Just as most constitutions prior to the revolutionary French and US Constitutions of the 18th Century reflected the actual power of the privileged classes, so are the 'treaty constitutions' of worldwide organisations based on the 'realist' international law principles of 'state sovereignty' and 'effectiveness' of government powers, regardless of whether the member states and the ruling governments respect human rights and democratic self-determination. On US distrust *vis-à-vis* international constitutionalism, see E.A. Young, 'The Trouble with Global Constitutionalism' (2003) 38, *Texas International Law Journal* 527. On the Australian and Canadian 'anti-constitutionalisation critique', see Cass n 1, at 7.

goods, services and foreigners and promoting mutually beneficial co-operation among citizens across national borders;
— *federal* and *con-federal constitutions* (including the EU Treaty Constitution) often interact in dynamic processes 'from treaty to constitution (and *vice versa*)'.[5]

All national constitutions remain confronted with the *Lockean dilemma* that, in an interdependent world with some 200 sovereign states, most constitutions provide for only few procedural constraints on discretionary foreign policy powers to tax, restrict and regulate the transnational relations of citizens across frontiers.[6] Thus, national constitutions turn out to be incomplete *partial constitutions*:

— neither do they effectively constrain discretionary foreign policy powers (such as trade-policy powers to tax domestic citizens by means of intergovernmental regulation of customs tariffs and subsidies on thousands of product categories);
— nor can they ensure the collective supply of 'global public goods', like collective security, international rule of law, a welfare-increasing global division of labour, protection of the environment and of human rights across frontiers.

The reality of ever more extensive multilevel governance (for example, of international competition, trade, finance, product and production standards, risk regulation, telecommunications, the protection of the environment, the protection of human rights and collective security) through networks of national and international authorities, regulatory bodies, courts and other law enforcement agencies has given rise to new forms of *multilevel constitutionalism* at worldwide, regional and national levels.

II.1. Worldwide Treaty Constitutions

Following the 'Constitution' (*sic*) of the International Labour Organisation (ILO, 1919), the constitutive agreements of several other UN Specialised Agencies (for example, the FAO, WHO and UNESCO) were officially designated as 'constitutions' in view of the fact that the law of these international organisations both constitutes and limits international institutions with rule-making, administrative and dispute settlement powers, often with far-reaching limitations on the powers of member states (for example, regarding treaty amendments and withdrawal) and explicit commitments to respect for human rights (for example, the human right to health as an

[5] See Ackerman, n 3 above, at 776.
[6] On the Lockean concept of rights-based domestic policies and the 'primacy of foreign policy', see, e.g. E-U Petersmann, 'Constitutionalism and International Organisations' (1996) 17 *Northwestern Journal of International Law & Business*, 398, 415 *et seq*.

explicit objective of the WHO, the labour rights recognised in the ILO, the human right to food recognised in FAO law, and the human right to education recognised in UNESCO law).[7] All these agreements make use of the two formal techniques of constitutionalism, i.e., they provide for general long-term rules of conduct which are binding on all member states and assert legal primacy over conflicting rules of domestic laws. The treaty provisions for intergovernmental majority decisions, international supervisory powers, international adjudication, the possibility of international sanctions and other limitations of the rights of member states (for example, to enter treaty reservations, to withdraw unilaterally from the treaty, etc.) entail far-reaching legal limitations on national sovereignty. For example, the UN Charter is sometimes perceived as an international 'treaty constitution' in view of:

— its general rules of conduct without limitation in time;
— its universal acceptance by 191 member states;
— the far-reaching powers of, and mutual 'checks and balances' among, UN bodies, such as the UN Security Council and the International Court of Justice;
— the dynamically evolving UN human rights obligations, and their surveillance by a network of UN human rights bodies; and
— the legal primacy of UN Charter obligations which, 'in the event of a conflict between the obligations of the Members under the present Charter and their obligations under any other international agreement shall prevail' (Article 103 of the UN Charter).

UN law and regional integration law have strongly promoted the modern universal recognition of individuals as subjects of international law with inalienable and 'indivisible' human rights, including rights to participate in the democratic election of governments and in the exercise of government powers.[8] It is not only regional organisations (such as the EC), but also worldwide organisations (such as the ILO) that have construed their respective treaty law as imposing human rights obligations on their member states even if the treaty did not explicitly provide for such obligations. The 1998 ILO Declaration on Fundamental Principles and Rights at Work, for instance, recognises that:

> all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organisation, to

[7] As the limited functions and principles of this 'international constitutional law' are very different from those of national constitutional law, most lawyers prefer to speak of international institutional law: see, e.g. HG Schermers and NM Blokker, *International Institutional Law* (4th edn, The Hague: Kluwer, 2004). On the 'UN Constitution' see B Fassbender, 'The Meaning of International Constitutional Law' in Macdonald and Johnston, n 3 above, 837.

[8] On 'first', 'second' and 'third generation' human rights, including the still contested right to democratic governance see, e.g. C Tomuschat, *Human Rights. Between Idealism and Realism* (Oxford: OUP, 2003), Chap 3.

> respect, to promote and to realise, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.[9]

The ILO Declaration and other modern human rights instruments[10] illustrate that—in addition to the longstanding prohibitions of, for example, genocide, slavery and apartheid—there is an increasing core of additional human rights which must be respected even 'in time of public emergency';[11] since the end of the Cold War, these intergovernmental and national 'core guarantees' of human rights have been evolving into an international *ius cogens*,[12] notwithstanding the divergent views on the precise scope and definition of such 'inalienable human rights'. As every WTO member has ratified one or more human rights convention(s) and has human rights obligations also under the UN Charter and ILO Constitution, WTO rules have to be construed with due regard to the human rights obligations of WTO members.[13]

II.2. Regional Treaty Constitutions

Regional integration law in Europe has led to the constitution of international parliamentary assemblies, international courts, and to ever more intensive intergovernmental regulation and multilevel governance by intergovernmental bodies and independent competition authorities, telecom regulators, food, health and environmental agencies, private and public standardisation authorities, and law enforcement agencies (such as

[9] ILO Declaration on Fundamental Principles and Rights at Work (Geneva, ILO 1998), at 7.

[10] E.g. the 1989 UN Convention on the Rights of the Child (ratified by more than 190 states) and the 1993 Vienna Declaration by the UN World Conference on Human Rights, which recognises, in para 1, that 'the universal nature of [human] rights and freedoms is beyond question'.

[11] See, e.g. Art 4 of the UN Covenant on Civil and Political Rights, 999 UNTS 171, and Art 15 of the European Convention on Human Rights, 312 UNTS 221.

[12] See I Seiderman, *Hierarchy in International Law* (Oxford: OUP, 2001). The European Court of First Instance, for instance, in its recent judgment of 21 Sep 2005 in Case T–306/01, *Yusuf v Council and Commission,* (2005) 49 CMLR 1334, examined 'whether the superior rules of international law falling within the ambit of jus cogens have been observed, in particular, the mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United Nations may derogate because they constitute intransgressible principles of international customary law' (para 282); the Court examined in this context the alleged breaches of private property rights, of the right to a fair hearing, and of the right to an effective judicial remedy (paras 284–346).

[13] See E-U Petersmann, 'Human Rights and International Trade Law—Defining and Connecting the Two Fields' in T Cottier, J Pauwelyn and E Bürgi (eds), *Human Rights and International Trade* (Oxford: OUP, 2005), at 29.

Interpol). Membership of the EU, the Council of Europe, NATO, NAFTA, as well as other regional organisations, is made conditional on respect for human rights and democratic procedures. The elaboration of the EU Charter of Fundamental Rights[14] and of the 2004 Treaty Establishing a Constitution for Europe (TCE)[15] by two 'European conventions', and their constitutional safeguards for 'democratic equality' (Article I–45 TCE), 'representative democracy' (Article I–46), 'participatory democracy' in the EU (Article I–47) and guarantees of fundamental rights that go beyond those in national constitutions and UN law illustrate the many innovative features of *international constitutionalism*. Even prior to the signing of the 2004 Treaty Constitution in October 2004, EC law had been described and interpreted by the European Court of Justice as a 'constitutional charter'.[16] The compulsory jurisdiction of the European Court of Human Rights (ECtHR) and the collective enforcement of the European Convention on Human Rights (ECHR) have likewise prompted the ECtHR to interpret the ECHR as a constitutional charter of Europe[17] and to protect human rights in all member states of the ECHR as an objective 'constitutional order'.[18]

II.3. Diverse Adjustments of National Constitutionalism to International Integration

The ever increasing legal limitation of state sovereignty by international law and the ever more comprehensive delegation of government powers to international organisations have prompted many states to adapt their often introverted, national constitutions to the requirements of collective international governance, international rule-making and international adjudication. Most of the 25 Member States of the EU have inserted explicit provisions into their national constitutions on their participation in EU institutions and on the domestic implementation of EU law.[19] The German Basic Law of 1949, for example, now states in Article 23(1):

> With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the

[14] The text of this Charter, proclaimed by the European Parliament, the EU Commission and the EU Council in Dec 2000, is published [2000] OJ C/364/1.

[15] [2004] OJ C/310/1. Even though ratification of the TCE remains uncertain following the negative referenda in France and the Netherlands, the main constitutional rules codified in the TCE are likely to continue to form part of EU constitutional law.

[16] See A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Oxford: Hart Publishing, 2006).

[17] See, 2 EHRR, *Ireland v United Kingdom* (1979)25.

[18] See the judgment of the ECtHR in *Loizidou* v *Turkey* (preliminary objections) of 23 March 1995, Series A No. 310, para 75, referring to the status of human rights in Europe.

[19] See, e.g. J Schwarze (ed), *The Birth of a European Constitutional Order: The Interaction of National and European Constitutional Law* (London: Sweet & Maxwell, 2001); A Jyränki (ed), *National Constitutions in the Era of Integration* (The Hague: Kluwer, 1999).

> principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end, the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.[20]

In accordance with the *so lange*(as long as)case law of the German Constitutional Court,[21] German membership of the EU remains constitutionally constrained by German and EU constitutional law. Paragraphs (2) to (7) of Article 23 regulate, in great detail, the rights, obligations and procedures for the participation of the *Bundestag*, the German *Länder* and the Federal Government in matters and decision-making processes concerning the EU. Article 24 on 'International organisations' provides:

> (1) The Federation may by law transfer sovereign powers to international organisations.
> (1a) In so far as the *Länder* are competent to exercise state powers and to perform state functions, they may, with the consent of the Federal Government, transfer sovereign powers to transfrontier institutions in neighbouring regions.
> (2) With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so, it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world.
> (3) For the settlement of disputes between states, the Federation shall accede to agreements providing for general, comprehensive, and compulsory international arbitration.

According to Article 25 of the Basic Law, the 'general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory'. These provisions of the German Basic law, like similar provisions in the national constitutions of other EU Member States, reflect the constitutional recognition that many goals of national constitutions can no longer be achieved without participation in international organisations and respect for international law. Foreign policy is no longer a monopoly of Foreign Offices; the Basic Law recognises and protects the participation of citizens, parliaments, the *Länder* and other governmental and non-governmental institutions in the transnational integration processes. The worldwide state practice of negotiating and ratifying

[20] Art 79 of the Basic Law requires approval 'by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat' (para 2) and renders inadmissible 'amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20' (para 3), notably the constitutional protection of human dignity and of inalienable human rights (Art 1).

[21] 89 BVerfGE 155.

international legal and institutional restraints on discretionary foreign policy powers confirms the constitutional insight by Immanuel Kant, in his essay on 'Perpetual Peace' (1795), that effective protection of equal liberties and the international rule of law require national, international and cosmopolitan constitutional restraints in all national, international and transnational human relations.[22]

Rights-based constitutional democracies, such as the 25 EU Member States and the 44 members of the ECHR, recognise international constitutionalism and international courts as the necessary complements of national constitutionalism so as to protect human rights, democratic accountability and rule of law across frontiers. Constitutional democracies (like the US) that rely more on democratic processes than on substantive fundamental rights (notably in the economic area) sometimes perceive international law and intergovernmental organisations as a potential threat to 'national sovereignty'.[23] Yet, in response to the protectionist abuses of US trade policy powers by the US Congress, the US has also provided for new law-making procedures in order to more effectively promote, control and implement intergovernmental rule-making (for example, through 'fast-track legislation').[24] However, even though the US was the driving force for multilateralism after World Wars I and II, it has often insisted on privileged rights (for example, in the UN Security Council, the Bretton Woods institutions, NATO) and has refused to ratify numerous UN conventions (for example, on human rights, labour rights and the International Criminal Court).[25] The WTO legal and dispute settlement system is the only worldwide treaty system with comprehensive rules of conduct and compulsory jurisdiction accepted by the US without reservations. As the US Constitution (for example, its 'commerce clause') protects freedom of trade inside the US through procedural, rather than substantive, guarantees, US lawyers have welcomed the WTO guarantees of freedom, non-discriminatory competition and rule of law as a 'world trade constitution' that can complement

[22] On Kantian constitutional theory, and my criticism of the lack of constitutional theory in state-centred international law doctrine, see EU Petersmann, 'How to Constitutionalise International Law and Foreign Policy for the Benefit of Civil Society?' (1999) 20 *Michigan Journal of International Law* 1.

[23] See Young, n 4 above, at 529: 'My basic argument is that, because supranational law-making operates outside (the US's) system of checks and balances and accountability, it risks undermining our Constitution's institutional strategy. Global law-making may circumvent the constitutional law-making structure entirely.'

[24] See K Dam, 'Cordell Hull, the Reciprocal Trade Agreements Act and the WTO' in E-U Petersmann (ed), *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance* (Oxford: OUP, 2005), at 83; S Charnovitz, 'Using Framework Statutes to Facilitate U.S. Treaty-Making' (2004) 98 *American Journal of International Law* 696.

[25] On the often sceptical US attitude *vis-à-vis* international law, see JF Murphy, *The United States and the Rule of Law in International Affairs* (Cambridge: CUP, 2004). On 'exceptionalism' and double standards in US human rights policies and foreign policies see M Ignatieff (ed), *American Exceptionalism and Human Rights* (Cambridge, Mass. Harvard UP, 2005).

the US constitutional safeguards for freedom of trade and democratic trade policy-making.[26]

International constitutionalism remains contested not only by many governments, but also by civil society, private lawyers and economic operators benefiting from discretionary foreign policy powers distributing subsidies and other 'protection rents' to rent-seeking interest groups. For centuries, private contract law, tort law, property rights and commercial law (*lex mercatoria*) have enabled a transnational 'private law society' to rely on self-regulation and decentralised co-ordination and ordering of the international division of labour. The new private transnational governance regimes sometimes challenge traditional national private law concepts and provide for new forms of transnational collaboration among public and private actors, as is illustrated by the WTO Agreement on Pre-Shipment Inspection and its provisions (Article 4) on private access of pre-shipment inspection companies to international commercial arbitration in the WTO.[27] In discussions of the needed reforms of international corporate governance (for example, of the Internet, private co-determination in corporations), some private lawyers refer to 'constitutionalisation without the state' and to private forms of 'constitutionalisation of a multiplicity of autonomous sub-systems of world society'.[28] Modern *constitutional economics* emphasises that constitutional rights and an 'economic constitution' are the preconditions for a proper functioning of markets; economic development should be defined not only in utilitarian quantitative terms, but also in terms of 'positive freedom' of market participants and their individual capacity to personal self-development.[29] Private self-regulation requires constitutional guarantees and restraints that may be autonomously agreed or imposed not only by national constitutions, governments or intergovernmental organisations, but also by private law regimes that can be legally enforced by private or public, national or international courts. The 'dual constitution of organised and spontaneous sectors' promotes mutual control that can be seen as an important part of the constitutional 'checks and balances' in modern, open societies.[30]

[26] See JO McGinnis and ML Movsesian, 'The World Trade Constitution' (2000) 114 *Harvard Law Review* 511.

[27] See WTO, *The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations*, (Geneva: WTO, 1994), at 230 and 237. The first private arbitration under this WTO dispute settlement procedure was initiated in Dec 2005.

[28] See G Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?' in C Joerges, I-J Sand and G Teubner (eds), *Transnational Governance and Constitutionalism* (Oxford and Portland: Hart Publishing, 2004), Chap 1, at 7–8.

[29] See E-U Petersmann, 'Constitutional Economics, Human Rights and the Future of the WTO' (2003) 58 *Aussenwirtschaft* (*Swiss Review of International Economic Relations*) 49; W Sauter, 'The Economic Constitution of the European Union', (1998) 4 *Columbia Journal of European Law* 27.

[30] See G Teubner, n 28 above, at 27. On the regulatory functions of private law and its constitutional significance for transnational economic governance see, also, Chap 8 by R Wai below.

II.4. Commonalities and Divergences of National and International Constitutionalism

The term 'constitution' usually refers to the basic long-term rules on which a community is based and by which it is legally bound. These basic rules may be codified in a 'formal constitution', or they may be applied without such a codification ('material constitution'). The two basic, formal techniques of constitutionalism have already been mentioned: (1) the distinction between the long-term constitutional rules of a higher legal rank and the short-term 'post-constitutional rules'; and (2) the general and abstract nature of constitutional rules which should be binding on all without discrimination. These formal 'constitutional principles' may be used not only in national and international constitutions for a political community (such as the EU Treaty Constitution), but also in functionally limited, intergovernmental treaty constitutions (such as the WTO's 'world trade constitution') as well as in privately adopted legal instruments constituting and limiting private governance systems.[31]

The abovementioned defining elements of constitutionalism remain formal: they leave open the substance of the relevant constitutional rules and may also be applicable to non-democratic constitutions (such as the ancient Greek and medieval Italian city constitutions). The longstanding historical processes of trial and error in designing, applying and improving constitutional rules have led to additional 'political inventions' of constitutionalism, such as (3) the rule of law requirement, (4) respect for human dignity and human rights, (5) democratic self-government, (6) separation of powers and other horizontal and vertical 'checks and balances' (such as the subsidiarity requirement), (7) 'social justice' as a precondition for maintaining the needed social consensus over time, and (8) international law as a precondition for the collective supply of international public goods.[32] The diversity of national constitutions illustrates the numerous possibilities of combining these basic constitutional principles. The lack of a European *demos*, of a 'European public' and of effective parliamentary control of the EU's foreign policies, even after more than 50 years of European integration, lends empirical support to my normative premise that the less democratic *procedures* can effectively control and guide multilevel governance in worldwide institutions the more important are multilevel constitutional safeguards of *substantive rights of citizens* and of their judicial protection.[33]

[31] On the notion, functions and principles of 'constitutional rules' see E-U Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (Fribourg: Fribourg UP, 1991), Chap VII. Privately agreed governance and constitutional arrangements derive their democratic legitimacy from public constitutional law.

[32] For an explanation of these various 'constitutional principles' see E-U Petersmann, 'Human Rights and International Economic Law in the 21st Century' (2001) 3 *Journal of International Economic Law* (*JIEL*), at 11 ff.

[33] The Anglo-Saxon focus on process-based, communitarian *national* constitutionalism (as postulated, e.g. by Cass, n above 1, Chap 2) is one of the reasons for the frequent rejection

The 'foreign policy constitution' of rights-based constitutional democracies (such as Germany) and of functionally limited 'international constitutional democracies' (such as the EC) differs from that in process-based constitutional democracies (for example, in Australia, Canada and the US, which are the 'mature constitutional systems' idealised by DZ Cass) with regard to their substantive 'constitutional restraints' on foreign policy powers: European countries accept national and international constitutional restraints 'founded on the indivisible, universal values of human dignity, freedom, equality and solidarity' (EU Charter of Fundamental Rights) and committed to 'strict observance of international law' (Article I–3 TCE), which process-based national democracies (such as the US) often reject as undemocratic limitations on national 'popular sovereignty'.[34] While universal law and institutions are accepted by Europeans as constitutionally necessary for the protection of human rights and 'democratic peace' across frontiers, they are often viewed suspiciously by the US as a potential threat to the democratic sovereignty of the American people and to the hegemonic power of the US to promote 'American interests' and 'American values' abroad.[35] The different conceptions of constitutionalism entail different 'world views': rights-based constitutionalism and international constitutionalism are based on 'universalisable' rules (such as human rights, liberal trade rules) and on multilateralism. Process-based national constitutionalism protects the majoritarian, national democratic process and international 'unilateralism', and seeks to limit the influence of unelected, international institutions and of 'anti-democratic world constitutionalism' on democratic self-government by the American people.[36]

by Anglo-Saxon lawyers of the very idea of international constitutionalism, or of their proposals for a 'trade community' legitimising a 'WTO constitution' (Cass, at 202). Cass' misrepresentation of my 'rights-based constitutionalism' (Chap 5 of her book) illustrates her misunderstanding of the multilevel interrelationships of my constitutional arguments (i.e., their foundation in German and EU constitutional law rather than in WTO law) and her disregard for comparative constitutional studies (e.g., M Hilf and E-U Petersmann (eds), *National Constitutions and International Economic Law* (The Hague: Kluwer, 1993).

[34] See, on the one hand, nn 23 and 25 above, and on the other, E-U Petersmann, 'The 2004 Treaty Establishing a Constitution for Europe and Foreign Policies: A New Foreign Policy Paradigm?' in R Iglesias *et al*. (eds), *Festschrift für Manfred Zuleeg* (Baden-Baden: Nomos, 2005), at 165–183.

[35] See J Rubenfeld, 'The Two World Orders', and the comment by A von Bogdandy in G Nolte (ed), *European and US Constitutionalism*, (Cambridge: CUP, 2005), 280.

[36] See J Rubenfeld, 'Unilateralism and Constitutionalism' (2004) 79 *New York University Law Review* 1971. J Habermas, 'The Kantian Project of the Constitutionalization of International Law. Does it still have a Chance?' in J Habermas, *Der Gespaltene Westen* (Frankfurt aM: Suhrkamp, 2004), at 183, has rightly emphasised that 'realist', hegemonic foreign policies cannot secure a peaceful international order: '[e]ven if we … ascribe the purest motives and most intelligent policies to the hegemonic power, the 'well-intentioned hegemony' will encounter insuperable cognitive obstacles. A government that must by its own decide on issues of self-defence, humanitarian interventions or international tribunals can operate as thoughtfully as it may; in the unavoidable weighing of goods it can never be sure whether it actually separates its own national interests from the universalisable interests that could be shared by

American 'unilateralism' has not prevented the US from promoting the universal recognition of 'inalienable', civil and political human rights and of 'economic multilateralism' as serving US interests. In addition, the human right to democratic governance at national and intergovernmental levels has become recognised in numerous UN human rights instruments and regional agreements (including the 'Inter-American Democratic Charter' adopted in September 2001 by the Organisation of American States), notwithstanding the diversity of views on how democratic constitutionalism should be realised in national and international governance systems and how it should guide the needed reforms of the international legal system.[37] There is also increasing recognition in national as well as international case law (for example, of the European Court of Justice, the European and Inter-American Courts of Human Rights) that human rights conventions apply not only among governments and *erga omnes vis-à-vis* their citizens, but also *vis-à-vis* abuses of powers by non-governmental as well as intergovernmental organisations.[38] Indeed, Immanuel Kant was the first legal philosopher who, in his essay on 'Perpetual Peace' (1795), explained why—in order to protect equal freedoms and limit abuses of power not only inside nation states, but also in international and transnational relations—three different, yet inter-related, systems of national, international and transnational constitutionalism were necessary:

> (1) a constitution based on the *civil right* of individuals within a nation (*ius civitatis*);
> (2) a constitution based on the *international right* of states in their relationships with one another (*ius gentium*); and:
> (3) a constitution based on *cosmopolitan right*, in so far as individuals and states, co-existing in an external relationship of mutual influences, may be regarded as citizens of a universal state of mankind (*ius cosmopoliticum*). This classification, with respect to the idea of a perpetual peace, is not arbitrary, but necessary. For if even one of the parties were able to influence the others physically and yet itself remained in a state of nature, there would be a risk of war…[39]

Human rights law and international trade law evolved as separate legal regimes. Whereas UN human rights law sets out minimum standards that are often less extensive than the national guarantees in constitutional democracies, the WTO guarantees of freedom, non-discrimination and rule of law go far beyond the autonomous guarantees in national constitutional

all the other nations. This inability is a matter of the logic of practical discourse, not of good or bad will'.

[37] On the human right to democratic governance, and the diversity of views on the institutional arrangements needed for realising human rights, see Section III.2 below.

[38] See, e.g., J Paust, 'Human Rights Responsibilities of Private Corporations' (2002) 35 *Vanderbilt Journal of Transnational Law* 801.

[39] See n 22 above, and I Kant, *Werkausgabe* (ed W Weischedel, Frankfurt aM: Suhrkamp, 1968), xi, at 203.

systems. From a constitutional perspective, the human rights and trade rules for the protection of peaceful co-operation and competition among citizens on the basis of equal legal freedoms, non-discrimination, rule of law and social safeguards remain incomplete in many ways unless they are complemented by multilevel constitutionalism. Part III briefly describes basic elements of democratic constitutionalism that have been recognised in domestic and international law and increasingly influence the dynamic transformation and 'constitutionalisation' of the European, North-American and worldwide trading systems.

III. DEMOCRATIC CONSTITUTIONALISM AND HUMAN RIGHTS AS CONSTITUTIONAL RESTRAINTS ON MULTILEVEL TRADE GOVERNANCE

Just as John Locke argued against Thomas Hobbes that domestic legal systems require governments to protect basic individual citizens' rights (for example, to life, liberty and property) rather than merely to keep peace within states, so has the modern universal recognition of human rights led to increasing claims that the modern international legal system requires all states and intergovernmental organisations to protect human rights, rather than merely 'national interests' and 'peace among states'. The modern 'paradigm shift' in the historically state-centred, power-oriented Westphalian system of international law inevitably challenges traditional interpretations of international treaties which, like the UN Charter, endeavour to combine respect for 'the principle of the sovereign equality of all its Members' (Article 2(1)) and for power realities (like the differentiation between permanent and non-permanent Security Council members, or between states and non-self-governing territories) with commitments to 'the principle of equal rights and self-determination of peoples' and 'respect for human rights' (Articles 1, 55, 56).

For instance, human rights defenders argue that international law rules (for example, on aggression, secession, etc.), international institutions (for example, the WTO), international security and 'sustainable development' need to be evaluated from the standpoint of universal human rights even if the relevant international legal instruments (such as the WTO Agreement) do not refer to human rights. Hobbesian 'realists' counter that international anarchy forces states to focus on their national security interests and to rely on democratically legitimate national institutions (for example, the US Congress), or international 'coalitions of the willing', rather than on international institutions with non-democratic member states. Human rights supporters reply that the legitimacy of 'national interest' and the peaceful resolution of international conflicts (such as secession crises, ethnic conflicts, failed states, global terrorism, poverty reduction, etc.), often depend more on their consistency with universal human rights than on military

power and unilateral interventions.[40] Realists respond that legitimate consent by non-democratic states, or popular sovereignty and self-determination in 'failed states', remain illusionary in the absence of prior changes of non-democratic power-structures ('regime-change').

These examples illustrate that international law arguments increasingly depend on how state sovereignty, the self-determination of peoples, human rights and 'national interests' are being defined and related to each other. Human rights may be compatible with a variety of institutional arrangements and do not specify how international organisations need to be reformed. Especially with regard to worldwide organisations such as the WTO, whose rule-making and adjudication directly impact on individual freedom and human welfare in more than 150 countries, there is need to clarify to what extent human rights and democracy may be the relevant legal context for interpreting and evaluating the WTO rules and institutions. For instance, do WTO rules or trade policies inflict unjustifiable harm on persons in violation of their human rights?

III.1. Human Rights as Constitutional Restraints on Trade Governance in the WTO?

The Universal Declaration of Human Rights (UDHR), the UN human rights conventions and numerous other UN human rights instruments proceed from the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world' (Preamble). If 'freedom, justice and peace' depend on respect for human rights, then the 'realist' Hobbesian view of international relations as an anarchic billiard-ball system is hardly consistent with the universal recognition of 'equal and inalienable rights of all members of the human family', who are 'entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised' (Article 28 of the UDHR), and who have 'duties to the community in which alone the free and full development of his personality is possible' (Article 29 of the UDHR). The universal human rights obligations of today entail that:

— 'state interests', 'state consent' and state-centred international law rules can no longer be properly evaluated and interpreted without regard to human rights;
— human rights limit not only domestic government powers, but also foreign policy powers and intergovernmental rule-making; and

[40] On the importance of 'soft power' and 'civil power' (like democratic governance and law), see JS Nye, *Soft Power: The Means to Success in World Politics* (Cambridge, Mass.; Harvard UP, 2003).

— intergovernmental treaties (such as the WTO Agreement) may constitute not only rights and obligations among states, but also governmental obligations to protect private rights, such as the 'rights to trade' and private rights to 'judicial remedies' explicitly protected in the 2001 WTO Agreement on the accession of China, including the 'rights to import and export goods',[41] or the private intellectual property rights protected in the WTO Agreement on Trade-related Intellectual Property Rights (TRIPS).

(a) Respect for Human Rights as Constitutional Restraint

According to Article 1 of the UDHR, '[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'. All UN human rights conventions recognise in their Preambles 'that these rights derive from the inherent dignity of the human person'. These universally agreed rules suggest that respect for human dignity and human rights, i.e., *normative individualism*—and not just state sovereignty, 'the will of the people' (Article 21 of the UDHR) and their 'right of self-determination' (Article 1 of the 1966 UN human rights covenants)—constitute the founding principles of modern international law. The references, in Article 1 UDHR, to 'reason and conscience' lend support to the view that the protection of human dignity as the basic objective of all human rights requires respect for 'individual sovereignty' (for example, in the sense of moral, rational, personal and legal autonomy), responsibility and a real capacity for personal self-development.[42] Human dignity as a moral 'right to have rights' requires individuals to be treated as legal subjects rather than as the mere objects of authoritarian government policies. The authoritarian state-centred practices of treating citizens as mere objects even in those fields of international law which regulate mutually beneficial private co-operation across frontiers (such as WTO law) need to be challenged in the light of the human rights objective of empowering citizens and protecting human rights across national borders. From a human rights perspective, the legitimacy of intergovernmental organisations (such as the WTO) depends less on 'output legitimacy' (for example, in terms of the promotion of economic

[41] See WT/L/432 of 23 November 2001, Pt I, Sect 2 (D).

[42] See the contributions by K Dicke, 'The Founding Function of Human Dignity in the Universal Declaration of Human Rights', and J Frowein, 'Human Dignity in International Law' in D Kretzmer and E Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer, 2002), at 111 and 121.; E-U Petersmann, 'Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution' in F Abbott, C Breining and T Cottier (eds), *International Trade and Human Rights* (Ann Arbor, Mich: Michigan UP, 2005), at 29. On 'individual sovereignty' see UN Secretary-General Kofi Annan, 'Two Concepts of Sovereignty', *The Economist*, 18 Sept 1999, and E–U Petersmann, 'From State Sovereignty to the Sovereignty of Citizens in the International Relations Law of the EU?' in N Walker (ed), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003), at 145–166.

growth) than on 'input legitimacy' in terms of respect for human rights, fundamental freedoms, democratic procedures and rule of law for the benefit of citizens, even if the statutory law of the organisation does not explicitly refer to the universal human rights obligations of all states today.

The UN Covenant on Economic, Social and Cultural Human Rights emphasises 'the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms' (Preamble); it recognises that, 'in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society' (Article 4). Both states and 'peoples' (Article 1) are legally constituted and limited by human rights (for example, to adopt a constitution that constitutes a 'people' and a state), just as 'freedom, justice and peace' must be legally constituted and limited by respect for human rights, as explained in Kantian legal philosophy and universally recognised in the human rights instruments of the UN.

The abovementioned legal relationships between human dignity, human rights, popular sovereignty and state sovereignty in UN human rights law concord with those in European human rights law and constitutional law, as reflected in the Treaty Establishing a Constitution for Europe. The 1957 EC Treaty was negotiated and concluded as an agreement among states without any references to human rights and, for decades, was justified mainly *ex post* by the EC Treaty's contribution to economic welfare, rule of law and peace in Europe. The jurisprudence of the European Court of Justice progressively transformed the state-centred EC Treaty, and its utilitarian common market project, into a citizen-centred 'economic constitution' with guarantees of fundamental economic freedoms, human rights, democratic governance and non-discriminatory competition (i.e., input legitimacy). Today, according to Article I–2 of the 2004 EU Constitution, the Union is explicitly 'founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights', without reference to state sovereignty. Even though many EU provisions continue to be drafted in terms of the rights and obligations of the Member States, the treaty objectives are citizen-oriented:

> The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted. [Article I–3(2) TCE].

(b) Human Rights Dimensions of WTO Law

The legal relevance of national and international human rights guarantees for interpreting international economic agreements has been emphasised in a number of recent reports by the UN High Commissioner for Human

Rights on the human rights dimensions of the WTO Agreements on Trade-related Intellectual Property Rights,[43] the Agreement on Agriculture,[44] the General Agreement on Trade in Services,[45] international investment agreements,[46] non-discrimination in the context of globalisation[47] and on the impact of trade rules on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[48] The reports call for a 'human rights approach to trade', and underline that what are referred to—in numerous WTO provisions—as the *rights* of WTO members to regulate may be *duties* to regulate under human rights law (for example, so as to respect, protect and fulfil human rights of access to water, food, essential medicines, basic health care and education services at affordable prices).[49]

Due to their limited trade policy mandate, WTO bodies have, hitherto, not responded to the UN proposals for a 'human rights approach to trade'. As national human rights, democratic and constitutional traditions differ legitimately among states, and as long as UN human rights conventions refrain from protecting welfare-creation through freedom of profession and trade, it appears unrealistic to expect WTO members to reach agreement on the complex inter-relationships between human rights and WTO rules. Neither the UN reports nor past GATT and WTO dispute settlement jurisprudence have identified concrete conflicts between GATT/WTO rules and human rights. The particular focus of UN human rights law and of European constitutional law on human dignity, human rights and their protection 'by the rule of law' (Preamble, UDHR) as foundational principles appears justified by the fact that international law and intergovernmental organisations serve only very limited functions, compared with the much broader jurisdiction of national polities. The legal and institutional design and distributional policies of intergovernmental organisations may differ from organisation to organisation[50] and do not affect the sovereign freedom

[43] The Impact of the Agreement on Trade-Related Aspects of Intellectual Property rights on Human Rights, E/CN.4/Sub.2/2001/13 (27 June 2001).

[44] Globalisation and its Impact on the Full Enjoyment of Human Rights, E/CN.4/2002/54 (15 Jan 2002).

[45] Liberalisation of Trade in Services and Human Rights, E/CN.4/Sub.2/2002/9 (18 June 2002).

[46] Human Rights, Trade and Investment, E/CN.4/Sub.2/2003/9 (2 July 2003).

[47] Analytical Study of the High Commissioner for Human Rights on the fundamental principle of non-discrimination in the context of globalisation, E/CN.4/2004/40 (15 Jan 2004).

[48] The right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Report by the Special Rapporteur Paul Hunt on his Mission to the WTO, E/CN.4/2004/49/Add.1 (1 Mar 2004).

[49] See E-U Petersmann, 'The Human Rights Approach to International Trade Advocated by the UN High Commissioner for Human Rights: Is it Relevant for WTO Law and Policy?' in Petersmann, n 24 above 357.

[50] See E-U Petersmann, 'Theories of Justice, Human Rights and the Constitution of International Markets' (2003) 37 *Loyola of Los Angeles Law Review* 407; A Buchanan, *Justice, Legitimacy and Self-Determination. Moral Foundations for International Law* (Oxford: OUP,

of each member state to decide on its respective national, constitutional system.

III.2. The Human Right to Democratic Governance and the WTO

The cosmopolitan conception of citizens in UN human rights law and in European law differs fundamentally from the conception of state sovereignty in the Westphalian international law tradition, which perceived foreign policy, state consent and the internal organisation of states as a discretionary matter for the rulers. From a human rights perspective, individuals and their chosen representatives constitute not only 'peoples' and states, but also—through the intermediary of their elected state agents—intergovernmental organisations as a necessary 'fourth branch of governance'.[51] None of these various forms of collective governance institutions has a constitutional mandate to disregard or violate human rights. The legitimacy of international organisations (such as the UN, the WTO and the EU) depends on their respect for, and their promotion of, human rights, even if—at international level, i.e., far away from the local communities in which citizens live, co-operate and form their public opinions, and also far away from national parliaments and other directly elected representatives of citizens—intergovernmental rules and procedures inevitably suffer from 'democratic deficits' compared to local and national democratic processes and parliamentary decision-making.

The recognition of human rights to democratic governance[52] and 'to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised' (Article 28 UDHR) confirms that participatory, representative and deliberative democracy are important benchmarks for the input legitimacy of international organisations. Yet, democratic control by citizens and by the national parliaments of international bureaucratic bargaining in distant, intergovernmental organisations is—for numerous reasons—far more difficult than in domestic political processes. Human rights instruments recognise that human rights need to be protected and mutually balanced through democratic legislation, and that 'everyone has the right to take part in the government of his country,

2004), e.g., at 125–127 (many different institutional arrangements may be capable of upholding human rights, and their choice will also depend on the available resources and the defects of existing institutions).

[51] See Petersmann, n 6 above.

[52] On the emerging 'human right to democratic governance', see, e.g., TM Franck, 'The Emerging Right to Democratic Governance', (1992) 86 *American Journal of International Law* (*AJIL*) 46; GH Fox and BR Roth (eds), *Democratic Governance and International Law* (Oxford: OUP, 2000); E Stein, 'International Integration and Democracy: No Love at First Sight' (2001) 95 *AJIL* 489. On the recognition and promotion of human rights by international organisations see 'Interdependence between democracy and human rights', Report of the Office of the High Commissioner for Human Rights, E/CN.4/2004/54 (17 Feb 2004).

directly or through freely chosen representatives' (Article 21(1) UDHR); '[t]he will of the people shall be the basis of the authority of governments; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures' (Article 21(3) UDHR). Most governments today claim to respect the human right to democratic governance. Yet, national parliaments and civil society groups often complain of the 'democratic deficits' and 'information asymmetries' which result from intergovernmental rule-making by bureaucratic networks in non-transparent, intergovernmental organisations without effective parliamentary participation and effective democratic control by public opinion and civil society (for example, insufficiently 'inclusive' decision-making without participatory and/or consultative rights of non-governmental groups that may be affected by intergovernmental decisions). Such democratic concerns increase if intergovernmental negotiations (for example, in the WTO) are strongly influenced by powerful interest groups (for example, agricultural, textile and steel lobbies), take place behind closed doors without adequate 'deliberative democracy', do not refer to human rights in the international negotiations and balancing processes and may lead to comprehensive 'package deals' (like the 1994 WTO Agreement) which can hardly be re-opened at the request of a single national parliament or at the request of a few WTO members in the consensus-based WTO decision-making processes, once the international negotiations have been closed.

European integration illustrates that international law and international organisations for the collective supply of international public goods can also *enlarge* citizens' rights, *enhance* the legitimacy of multilevel governance, *limit* abuses of multilevel governance and *facilitate* parliamentary accountability of foreign policies beyond what is possible through merely national rules and institutions. In international relations no less than in domestic policies, democratic governance can hardly be effective without rule of law and respect for citizens' rights. There are an increasing number of multilateral treaties (for example, on the prohibition of land mines, the protection of biological diversity, the establishment of an International Criminal Court, etc.) in which non-governmental organisations and participatory forms of consensus-building (for example, in the 'European Conventions' that elaborated the EU Charter of Fundamental Rights and the TCE) have complemented intergovernmental politics and parliamentary ratification. Such citizen participation in international policy-making reflects the recognition in numerous UN resolutions that

— 'everyone is entitled to a democratic and equitable international order';[53]

[53] Promotion of a democratic and equitable international order, Resolution 2003/63 of the UN Commission on Human Rights, adopted on 24 Apr 2003 (E/CN.4/2003/L.11/Add.6).

— 'democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing', and 'a democratic and equitable international order requires, *inter alia* … the promotion and consolidation of transparent, democratic, just and accountable international institutions in all areas of cooperation'.[54]

If democracy is defined as the self-government of the people, by the people and for the people, then the diverse forms of local, national and transnational democracy have, at least, three complementary elements in common:

(a) A *liberal element* based on the instrumental function of democracy to promote the freedom, equal rights and basic needs of citizens.[55] This democratic function tends to be enlarged by the WTO guarantees of freedom across frontiers and by non-discriminatory access to foreign markets which enables mutually beneficial trade exchanges, especially if international trade liberalisation takes place in the context of 'constitutionally embedded liberalism' promoting 'social justice' through national institutions.

(b) A *majoritarian, representative element* based on the need for majority decisions by local, national or transnational communities and their representative institutions for the collective supply of public goods that cannot be supplied through private markets (for example, democratic legislation, accountability of the rulers, etc). In contrast to the effective parliamentary control by the US Congress of trade policy-making, the parliaments of many WTO Members (including the European Parliament) often fail effectively to supervise and influence the trade policies of their governments. This 'parliamentary deficit' in intergovernmental negotiations and rule-making could be reduced by more precisely defined mandates of trade negotiators, more parliamentary involvement in and surveillance of intergovernmental negotiations, and parliamentary scrutiny of international rules prior to the ratification of international agreements. There are also various means of promoting democracy inside intergovernmental organisations, for example, through consultative parliamentary bodies and the participation or consultation of representative non-governmental organisations (as in the ILO and in the International Federation of Red Cross Societies). Yet, whereas representative, parliamentary rule-making is based on the assumption of a

[54] Promotion of a democratic and equitable international order, Resolution 2004/64 of the UN Commission on Human Rights, adopted on 21 Apr 2004 (E/CN4/2004/127).

[55] On the important distinction between liberal and 'illiberal' democracy and on the need for restraining popular majority politics by equal basic rights and by other general constitutional constraints, see F. Zakaria, *The Future of Freedom. Illiberal Democracy at Home and Abroad* (New York and London: WW Norton, 2003).

constitutionally-defined 'community interest', the common membership interests in state-centred, worldwide organisations often remain fragmented and contested.

(c) The horizontal and vertical constitutional constraints on abuses of public and private power constitute a third *constitutional element* of the diverse forms of local, national and international democratic governance in order to promote rule of law and hold the rulers accountable to the citizens, the parliaments and the courts. WTO rules reinforce such constitutional restraints on discretionary trade-policy powers and strengthen rule-oriented (rather than 'power-oriented') and transparent policies both at home and abroad. There are various ways (discussed below) to constitutionalise WTO law further, for instance, by empowering citizens to invoke democratically ratified WTO guarantees of freedom and non-discrimination in domestic courts in order to promote their decentralised enforcement by self-interested citizens as the guardians of rule of law.

These and other 'democratic functions' of the GATT/WTO rules—for example, to promote private freedom, non-discriminatory treatment and the economic welfare of citizens, transparency of trade policy-making, accountability of governments for adverse 'external effects' of national trade policies, and an international forum which enables participation in the trade policy-making of other countries—are increasingly recognised.[56] None of these 'democratic functions' of the WTO rules limits the sovereign freedom of each WTO member state to decide on its own national system of democratic governance.

III.3. Sustainable Development as a WTO Objective and the Right to Development

The concept of 'sustainable development' has become recognised in an increasing number of regional treaties (including the EC Treaty and the TCE) and worldwide environmental, fisheries and trade agreements. The commitment, in the Preamble to the WTO Agreement, to 'sustainable development' as an objective of the WTO could enhance the input legitimacy of WTO law if it were construed in conformity with the UN resolutions on the 'right to development', in which all WTO member states have recognised that 'development' must be understood as referring not only to macro-economic data (such as increase in GDP) but also to the promotion and realisation of human rights and the individual human

[56] See, e.g., PM Gerhart, 'The WTO and Participatory Democracy: The Historical Evidence' (2004) 37 *Vanderbilt Journal of Transnational Law* 897.

capacity for personal self-development.[57] A number of international judicial decisions during the 1990s, for instance, by the International Court of Justice, the WTO Appellate Body and the European Court of Justice, have explicitly referred to 'sustainable development' as a legal concept. The resolutions and reports by the UN Human Rights Committee and the UN High Commissioner for Human Rights have likewise pointed to links between 'sustainable development' and the 'right to development'.[58] Even though the precise legal and human rights dimensions of 'sustainable development' remain contested, its explicit recognition as a WTO objective offers a relevant legal context for interpreting and further developing WTO rules with due regard to environmental law and the human rights obligations of the WTO member states, especially in the continuing 'Doha Development Round' of the WTO.

A recent study by R Howse on 'Mainstreaming the Right to Development into international Trade Law and Policy at the WTO', commissioned by the Office of the High Commissioner for Human Rights, suggests various legal and institutional WTO reforms in order to mainstream the right to development—notably its 'uncontested, procedural participation dimension' and its 'linking development to the entire human rights framework'—into WTO practices in order to enhance the contribution of the WTO to 'human opportunities for self-realisation'.[59] According to Howse, trade policies should be designed and evaluated by the WTO Trade Policy Review Mechanism not only in terms of aggregate increases in national wealth or income, but also 'in terms of the enhancement of human capacities and the meeting of human needs as reflected in the range of civil and political, and economic, social and cultural rights'.[60] Moreover, the right to development calls for 'much more open consultation and deliberation processes with civil society, parliamentarians, and other actors' because the 'WTO (along with other intergovernmental organisations) must take into account the rights and the views of citizens, not just governments, in the formulation of proposed rules and policies'.[61] The participatory dimension of the right to

[57] See, e.g., UN General Assembly Declaration 41/128 of 4 Dec 1986 on the 'Right to Development'. The 1993 Vienna Declaration and Action Programme of the UN World Conference on Human Rights recognised the right to development as 'a universal and inalienable right and integral part of fundamental human rights': see Council of Europe, *Human Rights in International Law* (Strasbourg, Council of Europe, 2000), at 202. On 'sustainable development' as an objective of the WTO, see E-U Petersmann (ed), *Developing Countries in the Doha Round* (Florence: European University Institute, 2005), at 4 ff.

[58] See, e.g., A. Sengupta, 'Implementing the Right to Development' in N Schrijver and F Weiss (eds), *International Law and Sustainable Development* (The Hague: Nijhoff, 2004), at 341.

[59] E/CN.4/Sub.2/2004/17 of 9 June 2004, at 2. On the search for a more coherent system of global governance of trade, environmental and development policies see, also, G Sampson, *The WTO and Sustainable Development* (Tokyo: United Nations UP, 2005), who does not refer to human rights.

[60] Howse, n 59 above, at 7.

[61] Ibid.

development calls for 'direct citizen access to the process of international policy-making, and also a process of domestic policy-making that is open to all groups, including disadvantaged groups and minorities'.[62] Howse proposes taking into account the right to development in the interpretation of WTO law by the WTO dispute settlement bodies, and calls on the UN High Commissioner for Human Rights to submit *amicus curiae* briefs to the WTO dispute settlement bodies on the human rights dimensions of WTO disputes.[63]

IV. CONSTITUTIONALISING THE WTO? PROBLEMS AND PROSPECTS

Part II of this contribution began by defining national and international constitutionalism by two common formal techniques (i.e., the distinction between long-term 'constitutional rules' of a higher legal rank and 'post-constitutional rules'; the general and abstract nature of constitutional rules). 'Democratic constitutionalism' was then characterised by additional principles (rule of law, human rights, democracy, the separation of powers, social justice, etc). The legitimate diversity of national democratic traditions was emphasised, such as 'limiting constitutions' focusing on the limitation of existing governance powers (for example, in England) and 'enabling constitutions' establishing new democratic forms of governance (for example, in France and the US in the eighteenth century). Rights-based constitutions protecting individual self-government through comprehensive guarantees of civil, political, economic and social rights were distinguished from process-based constitutions focusing more on the communitarian dimensions of democratic governance. The emerging 'international constitutionalism' was described as a functionally limited response to the increasing 'constitutional failures' of national constitutions to protect human rights and other public interests across frontiers (for example, international 'public goods' such as 'democratic peace', protection of the environment and social justice); international constitutionalism does *not* seek to establish state-like forms of international governance and, due to its limited 'compensatory functions', is less endowed with 'historically singular constitutional moments' and 'constitutional pathos', compared with the making of state constitutions and regional treaty constitutions for political communities (such as the EU). In Europe, national constitutions are increasingly recognised as 'partial constitutions' which, in order to protect citizens rights and democratic peace across frontiers, require complementary international and cosmopolitan constitutional rules. Outside Europe, most governments continue to insist on state sovereignty *vis-à-vis* international rule-making and remain reluctant to submit to compulsory international adjudication.

[62] Ibid, at 8.
[63] Ibid, at 17 (para 49).

Part III discussed the universal human rights obligations of every WTO Member and the democracy-enhancing functions of WTO rules. As each WTO member state has legally accepted one or more international human rights treaties, and the scope of general human rights obligations has continued to expand since the fall of the Berlin wall (1989), it has been argued that human rights are becoming 'constitutional restraints' not only for trade policies and trade laws *inside* constitutional democracies and in EU law, but also in international law and in the trade governance in the WTO. The universal recognition of human rights constitutionally *limits* the powers of states and intergovernmental organisations. Respect for human rights can also *enhance* their 'power of legitimacy', their political ethos and their real ability to transform the state-centred structures of the power-oriented Westphalian international law system into more citizen-oriented structures for worldwide poverty reduction, the protection of human rights and the environment, and the enhancement of individual and social welfare through trade. This is particularly true for the WTO and its 'Doha Development Round', the central 'development' objective of which has so far been designed without regard to human rights, and whose neo-liberal value premises are increasingly challenged by civil society.

Part III also drew attention to the innovative forms of 'participatory democracy' and 'representative democracy' in European constitutional law. The sources of democratic legitimacy in the EU go far beyond those in worldwide organisations, as is illustrated, for example, by:

— democratic governance inside all EU Member States (for example, elected member state representatives in EU bodies, ratification of EU treaties by national parliaments);
— comprehensive human rights guarantees at national as well as at European levels;
— direct democratic representation of EU citizens in EU bodies (for example, in the European Parliament, the Economic and Social Committee); and:
— the explicit EU commitments to the promotion of consumer welfare and human rights.

Notwithstanding the emerging international human right to democratic governance, there is no international consensus on how democratic states should respond to the 'globalisation' of international relations, and how they can collectively supply global public goods with due regard to the requirements of democratic governance.[64] In view of the inevitable

[64] For an overview of the diverse views, e.g., of 'globalization as a threat to national self-determination' or of 'globalization as an instrument of democratization', see A von Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization and International Law' (2004) 15 *European Journal of International Law* 885. See, also, Habermas, n 36 above, at 113.

'democratic deficit' of intergovernmental rule-making with non-democratic member states in distant worldwide organisations (for example, due to information asymmetries, distant principal–agent relationships), Part III argued in favour of compensatory, national and international constitutional restraints on international governance by human rights, parliamentary control, judicial review and 'democratic scrutiny' by civil society.

IV.1. Constitutional Structures and Diversity of Constitutional Conceptions of the WTO

Almost all 149 (2006) WTO Members have adopted national constitutions—or, as in the case of the EU, a European treaty constitution—that constitute and limit government powers, subject governments to constitutional restraints and commit government policies to respect for human rights. Yet, the constitutional traditions of the WTO members differ so widely that WTO diplomats, WTO officials and most WTO experts avoid constitutional discourse regarding WTO law and policies. Nowhere does the WTO Agreement refer to the word 'constitution'. Yet, following the reform proposals in the 'Sutherland Report' on 'The Future of the WTO',[65] there is increasing agreement on the need for far-reaching legal, institutional and political reforms of rule-making and decision-making in the WTO. The Director-General of the WTO, Pascal Lamy, has famously criticised the decision-making processes of the WTO as 'medieval' and has called for new forms of 'cosmopolitics' and 'cosmopolitan constituencies' in support of global public goods (such as a rule-based world trading system); Lamy has rightly emphasised the need to learn from the EU's governance experiences with international economic integration without a common state.[66]

(a) Intergovernmental Structures and 'Constitutional Functions' of the WTO Agreement

The WTO Agreement provides a legal and institutional framework for regular negotiations among all WTO members on additional rules and liberalisation commitments in the WTO. WTO negotiators wisely refrained from enumerating all 'the basic principles and … objectives underlying th[e] multilateral trading system', to which the Preamble to the WTO Agreement refers. They primarily constituted only rights and obligations among WTO members; yet, since trade takes place between private producers, traders and consumers, numerous WTO provisions and WTO dispute settlement reports acknowledge the need for 'security and predictability' in the

[65] 'The Future of the WTO. Addressing Institutional Challenges in the New Millenium'; Report by the Consultative Board of the Director-General (Geneva: WTO, 2004).

[66] See, e.g., P Lamy, *La démocratie-monde. Pour une autre gouvernance globale* (Paris: Editions du Seuil, 2004).

multilateral trading system (see Article 3 of the WTO Dispute Settlement Understanding (DSU), including legal and judicial protection of private 'rights to import and export goods', intellectual property rights and other private rights.[67] WTO law expresses these 'constitutional functions' of certain WTO guarantees of freedom, non-discrimination, rule-of-law and safeguard measures—not only in *intergovernmental* relations, but also inside countries for the protection of private rights against protectionist abuses of government powers—only in very imperfect ways, for instance, in the WTO Agreement on Trade-related Intellectual Property Rights (TRIPS) which requires member states to 'accord the treatment provided for in this Agreement to the nationals of other member states' (Article 1), notwithstanding the fact that WTO member states appear to protect the property rights of their citizens without 'negative discrimination'.

(b) Judicial Clarification of WTO Rules: Cui Bono?

All international agreements are incomplete and need to be progressively clarified by agreed interpretations (see Article IX of the WTO Agreement) or case law 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' (see Articles 3 DSU and 31 Vienna Convention on the Law of Treaties). Whereas WTO members tend to perceive the WTO as a 'member-driven' trade regime aimed at promoting national interests (for example, as defined in the national 'schedules of concessions' of WTO members), WTO dispute settlement bodies increasingly interpret WTO rules as part of the international legal system and emphasise the need to interpret WTO commitments in the light of the *common intentions* of WTO members. The 'human rights approach to international trade' suggested by the UN High Commissioner for Human Rights and the frequent focus by non-governmental organisations (for example, in their *amicus curiae* submissions to WTO dispute settlement bodies) on WTO provisions protecting non-economic public interests confirm the diversity of interpretative approaches to WTO rules. Should WTO rules be construed in favour of protecting national trade policy discretion or producers, traders and consumers against protectionist abuses of trade policy powers? Are WTO dispute settlement bodies autonomous and legitimate enough to clarify the disputed meaning of WTO rights and obligations by taking into account the human rights obligations of the WTO member states concerned? Do the WTO's reciprocity principles imply that all WTO member states are legally required to protect private 'rights to import and export' in the manner in which they are explicitly guaranteed in the WTO Protocol on the accession of China?[68] Was it legally

[67] See the explicit guarantees of private 'rights to trade' and private judicial remedies in the 2001 WTO Agreement on the accession of China, WT/L/432 of 23 Nov 2001, Pt I, Sect 2 (D).

[68] See n 67 above.

justifiable that some GATT dispute settlement panels found that GATT obligations to withdraw illegal anti-dumping duties and countervailing duties also entailed legal obligations to reimburse the illegal duties to the private parties concerned?[69]

Arguably, the answers to such questions may differ, depending on whether one construes the WTO rules with a view to maximising national 'sovereignty' and policy discretion or with a view to 'providing security and predictability to the multilateral trading system' (Article 3 DSU) for the benefit of citizens and market participants. Whereas WTO dispute settlement bodies are legally bound to apply the customary methods of international treaty interpretation, the political WTO bodies and non-governmental organisations may construe WTO rules from different policy perspectives.

(c) Constitutional Principles Underlying WTO Law

WTO law uses each of the formal techniques that are characteristic of 'constitutionalism'. For example:

(1) The distinction between long-term 'constitutional rules' and 'post-constitutional' decision-making is reflected in the more stringent WTO requirements for the entry into force and amendment of the WTO Agreement (Articles X, XIV) than for normal decision-making by consensus or majority voting (Article IX of the WTO Agreement).
(2) The WTO Agreement asserts legal primacy over conflicting provisions in the Multilateral Trade Agreements annexed to the WTO Agreement (see Article XVI(3)), as well as over conflicting implementing 'laws, regulations and administrative procedures' within WTO member states (Article XVI(4)), and legally limits the scope for decision-making by WTO bodies (Articles IX and X).
(3) WTO rules are of a general nature protecting freedom of trade (for example, Articles II, XI GATT, XVI GATS), most-favoured-nation treatment (for example, Articles I GATT, II GATS, 4 of the TRIPS Agreement), national treatment (for example, Article III GATT, XVII GATS), private property rights (see the TRIPS Agreement) and rule of law for the benefit of private traders, investors, producers and consumers, subject to broad 'exceptions' and public interest provisions protecting the sovereign rights of WTO members to pursue non-economic policies and protect public interests other than liberal trade.

[69] See E-U Petersmann, *The GATT/WTO Dispute Settlement System. International Law, International Organisations and Dispute Settlement*, (The Hague: Kluwer, 1997), at 139–140. On the methods of treaty interpretation developed in WTO jurisprudence see E-U Petersmann, 'Ten Years WTO Dispute Settlement System: Past, Present and Future' (2006) IV *Pennsylvania Journal of International Law and Policy* (forthcoming 2006).

Moreover, WTO law also uses the various *substantive* principles that were characteristic of the historical evolution of constitutionalism. Although only a functionally limited 'world trade constitution' covering more than 90 per cent of world trade, and albeit only in an imperfect manner, the WTO Agreement imposes far-reaching *substantive limits* on trade-policy powers to tax and restrict citizens in welfare-reducing ways:

(4) The WTO Agreement (for example, Article XVI) and its DSU aim at rule of international law by protecting 'the rights and obligations of member states under the covered agreements' and 'providing security and predictability to the multilateral trading system' (Article 3 DSU).
(5) The WTO protects freedom and non-discrimination in international trade and is committed to 'sustainable development' (Preamble to the WTO Agreement) and to (quasi-) judicial interpretation of WTO law 'in accordance with customary rules of interpretation of public international law' (Article 3 DSU); these customary rules of treaty interpretation (as codified in Article 31 of the Vienna Convention on the Law of Treaties) require respect for the universal human rights obligations of WTO members.
(6) Horizontal and vertical separation of powers are protected by the compulsory WTO dispute settlement system (for example, the WTO jurisprudence on the limited jurisdiction of dispute settlement panels) and by the power of WTO members to reject dispute settlement rulings or adopt authoritative interpretations (Article IX of the WTO Agreement).
(7) The WTO objectives of 'raising standards of living, ensuring full employment', promoting 'sustainable development' and 'positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development' (Preamble) reflect a concern for 'social justice', albeit inadequately defined.

(d) Diversity of 'Constitutional Approaches'

This use of 'constitutional methods' (principles 1–3 above) and 'constitutional principles' (principles 4–7 above), and the longstanding state practice of 'international treaty constitutions' for the protection of individual freedom and other human rights (for example, labour rights protected by the ILO, the human right to health promoted by the WHO, the right to education protected by UNESCO) have prompted me to argue that WTO law can usefully be conceived as part of a multilevel 'constitutional framework' for limiting multilevel trade governance for the benefit of producers, trad-

ers, consumers and other citizens.[70] Other academics justify recourse to the notion of a 'WTO constitution' in view of:

(1) the comprehensive rule-making, executive and (quasi-)judicial powers of WTO institutions;[71]
(2) the 'constitutionalisation' of WTO law resulting from the jurisprudence of the WTO dispute settlement bodies;[72]
(3) the domestic 'constitutional functions' of GATT/WTO rules, for example, for promoting domestic democracy (for example, by limiting the power of protectionist interest groups):[73]
(4) the international 'constitutional functions' of WTO rules, for example, for the promotion of 'international participatory democracy' (for example, by holding governments internationally accountable for the 'external effects' of their national trade policies, by enabling countries to participate in the policy-making of other countries)[74], 'jurisdictional competition among nation states'[75] and 'the allocation of authority between constitutions';[76]
(5) in view of the necessity of 'constitutional approaches' for a proper understanding of the law of international organisations.[77]

These and other constitutional conceptions of WTO law focus on diverse constitutional dimensions of trade policy-making and complement each other. All these constitutional approaches agree that the WTO should not be viewed simply in narrow *economic* terms (for example, as an institution

[70] See E-U Petersmann, 'Constitutionalism and WTO Law—From a State-Centred Approach towards a Human Rights Approach in International Economic Law' in DLM Kennedy and JD Southwick (eds), *The Political Economy of International Trade Law*, (Cambridge: CUP, 2002), at 32.

[71] See JH Jackson, *The World Trade Organisation: Constitution and Jurisprudence* (London: Royal Institute of International Affairs, 1998).

[72] See DZ Cass, 'The Constitutionalization of International Trade Law: Judicial Norm-Generation as the Engine of Constitutionalization' (2001) 12 at 39.

[73] See McGinnis and Movsesian, n 26 above; Petersmann n 31 above. PM Gerhart, 'The Two Constitutional Visions of the World Trade Organisation' (2003) 24 *University of Pennsylvania Journal of International Economic Law* 1, contrasts the 'inward-looking, economic vision of the WTO' in helping member countries addressing internal political failures with the 'external, participatory vision of the WTO' helping WTO members to address concerns raised by policy decisions in other countries.

[74] See, e.g., Gerhart, n 56 above.

[75] See JO McGinnis, 'The WTO as a Structure of Liberty' (2004) 28 *Harvard Journal of Law and Public Policy* 81.

[76] J Trachtman, 'The WTO Constitution: Toward Tertiary Rules' (to be published in (2006) 17 *European Journal of International Law*).

[77] See, e.g., N Walker, 'The EU and the WTO: Constitutionalism in a New Key' in G de Búrca and J Scott (eds), *The EU and the WTO: Legal and Constitutional Issues*, (Oxford: OUP, 2001), Chap 2, according to whom 'we must recognise constitutional law, or some functionally equivalent lable, as necessary to and constitutive of the legal normative order or contemporary non-state and post-state polities just as it is necessary to and constitutive of the legal normative order of state polities' (at 35).

promoting consumer welfare through trade liberalisation). WTO rules and policies also pursue *political* as well as *legal* objectives, and these are no less important than the economic benefits of liberal trade. The WTO's 'treaty constitution' complements national constitutions which—in a globally interdependent world—can protect neither a worldwide division of labour nor other basic needs and human rights of citizens without international co-operation in international organisations that must remain, like national organisations, subject to multilevel constitutional restraints limiting abuses of government powers. Notwithstanding the claim by some nationalist international lawyers that 'constitutional approaches' to multilevel trade governance in the WTO are 'idiotic'[78] in view of the absence of a constitutional *demos* for the WTO, there is increasing recognition also among US international lawyers that the collective action problems and constitutional problems of trade governance require avoiding 'the false limitation assumed by those who say the WTO can never be a constitution'.[79] However, constitutional approaches—notwithstanding their usefulness for a better constitution and limitation of multilevel trade governance—must not distract WTO judges from their obligation to 'clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law' (Article 3 DSU).

IV.2. Different Strategies of Constitutionalising the WTO

In view of the multilevel nature of trade governance and of the regulation of international trade, 'constitutionalising' WTO law may aim at reforming (a) international law or (b) domestic rules, and (c) processes, which may be brought about by rule-making, adjudication or policy-making processes. Just as many national federal constitutions (for example, in Germany, Switzerland) and the EC Treaty Constitution were preceded by con-federal free trade areas or customs unions, so are the economic and political dimensions of the rules-based WTO system closely intertwined.

[78] Statement by Robert Howse during an international WTO conference on 12 Mar 2005 at Stresa, Italy. The 'anti-constitutionalisation critique' (see Cass, n 1 above) acknowledges the numerous constitutional problems of international trade governance, but laments 'the manifest absence of a true world trade constitution': JL Dunoff, 'Constitutional Conceits: The WTO's "Constitution" and the Discipline of International Law' to be published in (2006) 17 *European Journal of International Law*. Cass' (n 1 above) conclusion that 'trading democracy, not merely trading constitutionalisation, should be the key to WTO constitutionalisation in this century' (at 242) seems to pursue similar objectives as the proponents of constitutionalisation of the WTO.

[79] JP Trachtman, 'Changing the Rules. Constitutional Moments of the WTO' (2004) 44 *Harvard International Review* at 48. Even US advocates of national 'sovereignty' (such as CE Barfield, *Free Trade, Sovereignty, Democracy. The Future of the WTO* (Washington, DC: American Enterprise Institute, 2001) use constitutional discourse in identifying the 'Emerging Constitutional Problems and Substantive Deficiencies' (Chap 4) of the WTO and make 'Proposals for Constitutional Reform' (Chap 7).

(a) Amendments of the WTO Agreement?

From the perspective of both rights-based and process-based democracies, the constitutionalisation of the law and institutions of intergovernmental organisations aims to bring an international treaty regime (such as WTO law) more into conformity with the basic constitutional principles of the WTO members concerned. Amendments to the WTO Agreement may require consensus among all WTO member states (see Article X) and may be politically feasible only as part of the periodic 'WTO Rounds' on the multilateral liberalisation and regulation of world trade. The replacement of the power-oriented GATT 1947 by the rules-based WTO Agreement entailed far-reaching 'constitutional changes' of the world trading system. However, there is, so far, no agreement in the current 'Doha Development Round' negotiations on comprehensive legal and institutional reforms of the WTO.

Rights-based constitutional democracies (such as the EU) have been more willing to support constitutional reforms at the *international* level (as illustrated by the EU proposals for a parliamentary WTO body and for a 'permanent WTO dispute settlement panel' that would be more independent of the WTO Secretariat and be composed of more professional WTO legal experts). This European support for multilevel trade constitutionalism is not surprising in view of the fact that the EC's 'fundamental freedoms' and EU constitutional law are based on 'universalisable principles' (in terms of Kantian legal theory) that may be strengthened by international rule of law (such as WTO law) and by international adjudication. Process-based democracies focusing on procedural rather than on substantive constitutional restraints (like some Anglo-Saxon democracies[80]) tend to be more reluctant to shift governance powers to international organisations. It is thus not surprising that most academic critics of multilevel constitutionalism (such as P Alston, DZ Cass, JL Dunoff, R Howse) rely on 'mature constitutional systems, for example in the United States, Canada and Australia',[81] and on the 'dualist' separation of national law from international law, without regard for the 'monist' European constitutional traditions. The US Congress tends to perceive international law as a potential threat to 'popular sovereignty' and insists on its constitutional powers to disregard international obligations and international adjudication. As 'constitutional politics' at national level has much more democratic legitimacy in the eyes of domestic citizens than intergovernmental 'constitutional reforms' can

[80] Young n 4 above, at 530, notes with regard to US constitutional law that 'the main restrictions on governmental power under the American Constitution are procedural rather than substantive in nature'; 'the fundamental limitation that the constitutional scheme imposes on the Commerce Clause—the most important federal power—is one of process rather than one of result'.

[81] Cass, n 1 above, at 191.

ever have, there are strong constitutional arguments in favour of keeping the jurisdiction of international organisations limited.[82]

(b) Constitutional Reforms of Multilevel Governance in Domestic Laws?

Constitutionalisation of multilevel trade governance may also be promoted by embedding the implementation of international trade rules into stronger domestic 'constitutional checks and balances' (such as stricter control by national parliaments and national courts). The international GATT/WTO guarantees of freedom, non-discrimination and rule of law can serve 'constitutional functions' for rendering corresponding *domestic* constitutional guarantees of economic liberties, non-discrimination, rule of law and human rights more effective in the trade policy area, for instance, if:

— GATT/WTO rules are incorporated into domestic law (see, e.g., the incorporation of GATT's customs union principle into Article III–36 of the Treaty Establishing a Constitution for Europe);[83]
— domestic governments and courts protect freedom, non-discrimination and rule of law in the market place in conformity with their WTO obligations; and
— adversely affected producers, investors, traders and consumers are empowered to invoke and enforce precise and unconditional WTO obligations through domestic courts.[84]

(c) Constitutional Reforms Through International and National Case Law?

Constitutionalisation of trade policy-making may also be brought about by international adjudication. WTO members tend to perceive the WTO as a member-driven trade regime and to construe the limitation of the jurisdiction of WTO dispute settlement bodies to 'the covered agreements' (Article 7 DSU) narrowly as permitting only legal claims and defences based on WTO rules. International lawyers and WTO dispute settlement bodies, however, emphasise that the customary methods of treaty interpretation require interpreting WTO rules as part of the international legal system in

[82] See the Ministerial Declaration on the Contribution of the WTO to Achieving Greater Coherence in Global Economic Policymaking of Dec 1993, in *WTO, Legal Texts* (Geneva: WTO 1995), at 442.

[83] The GATT obligations of all EC Member States strongly influenced the drafting of the EC Treaty (e.g., its customs union rules and provisions on a common commercial policy) and prompted the EC Treaty negotiators to include an explicit provision on EC co-operation with GATT into the EC Treaty Constitution (Art 229 EC Treaty, which was deleted by the Maastricht Treaty in 1992). *Vice versa*, the EC's exclusive competences for a common commercial policy required explicit recognition in the WTO Constitution by the admission of the WTO membership of the EC as an international organisation: see Art XIV WTO Agreement.

[84] Clearly, many international rules (e.g., on 'voluntary export restraints') do *not* serve 'constitutional functions' but are designed for the benefit of powerful interest groups, or reflect 'intergovernmental collusion' so as to circumvent domestic constitutional restraints. See Petersmann n 31 above, Chap VII.

conformity with general international law rules unless WTO law has excluded recourse to other rules of international law.[85] WTO jurisprudence continues to identify an increasing number of general principles of law (for example, on burden of proof, good faith, abuse of rights, due process of law, legal security) and more specific treaty principles for the mutual balancing of rights and obligations under WTO law (for example, principles of legal security, transparency, non-discrimination, necessity, and proportionality).[86] Some of these principles (for example, on burden of proof) are applied as general principles of law, whereas others appear to be construed as WTO-specific 'principles underlying this multilateral trading system' (as acknowledged in the Preamble to the WTO Agreement). The perspective of *international* judges (for example, focusing on the customary methods of international treaty interpretation and compliance with international law) may differ fundamentally from the perspective of domestic judges (focusing, for example, on national and EU constitutional law rather than on WTO obligations).

In the EC and in some other WTO members, the domestic constitutional perspective has occasionally prompted national and EC judges to interpret domestic trade rules (for example, the customs union rules in the EC Treaty) as protecting private rights even if the respective trade rules implemented intergovernmental GATT/WTO obligations (for example, the EC customs union rules implementing GATT Article XXIV). From the European perspective of a common market without a common state, such 'empowering functions' of liberal trade rules for the benefit of the private market participants and their incorporation as an 'integral part of the Community legal system' in order to limit governmental trade policy discretion have prompted me to support such 'constitutional interpretations' by EU judges of intergovernmental trade rules for the benefit of EU citizens, and to suggest that EU judges should interpret national and international trade rules as a functional unity for the benefit of citizens.[87]

[85] See J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: CUP, 2003), at 37–38. According to Pauwelyn, 'it is for the party claiming that a treaty has 'contracted out' of general international law to prove it' (at 213). Many WTO members and WTO lawyers proceed from the contrary presumption that the limitation of the jurisdiction of WTO dispute settlement bodies to 'the covered agreements' entail an agreed presumption in favour of exhaustive WTO regulation and confirms that '[I]n international law, every tribunal is a self-contained system (unless otherwise provided)', as stated by the International Criminal Tribunal for Yugoslavia in its *Tadic* judgment (1996) 35 ILM 32, at para 11. For an explanation of this narrow perception of the WTO as—in principle—a self-contained legal regime see, e.g., J Neumann, *Die Koordination des WTO-Rechts mit anderen völkerrechtichen Ordnungen: Konflikte des materiellen Rechts und Konkurrenzen der Streibeilegung*, (Berlin: Duncker & Humblot, 2002).

[86] See M Hilf and GJ Goettsche, 'The Relation of Economic and Non-Economic Principles in International Law' in S Griller (ed), Inter*national Economic Governance and Non-economic Concerns* (Vienna: Springer, 2003), at 5–46, as well as Petersmann, n 69 above.

[87] See E-U Petersmann, 'Application of GATT by the Court of Justice of the EC', (1983) 20 *Common Market Law Review* 409.

Yet, such 'constitutional interpretations' are not permissible for the international WTO judge who must interpret the intergovernmental WTO rules 'in accordance with customary rules of interpretation of public international law', as prescribed in Article 3.2 DSU.[88] The WTO panel report on *Sections 301–310 of the US Trade Act* emphasised, for example, that '[n]either the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect', i.e., creating not only rights and obligations for WTO member states but also direct individual rights for traders, producers and consumers.[89] In international law, however, WTO rules also limit the legislative discretion of national legislatures. The WTO panel report on Mexico's measures affecting telecommunications services, for instance, concluded that private price-fixing practices remained 'anti-competitive practices' prohibited under Mexico's obligations under the General Agreement on Trade in Services (GATS) even if Mexican legislation required such uniform pricing practices.[90] Due to the different jurisdiction, applicable laws and judicial competences of national and international courts, their 'constitutional interpretations' may differ at national and international levels. 'Constitutionalisation' by means of jurisprudence must respect constitutional limits which may not apply to 'constitutionalisation' by national and intergovernmental rule-making.

IV.3. 'Constitutionalising Trade Policies' May Politicise rather than Liberalise International Trade: The Example of the Human Rights Dimensions of WTO Rules

'Constitutionalising WTO law' may entail a 'politicisation' of trade policy-making in the WTO that may impede trade liberalisation. For example, the proposals by the UN High Commissioner of Human Rights for a 'human rights approach to trade' remain controversial among WTO Members and may not facilitate WTO negotiations on trade liberalisation.[91]

[88] On the 'constitutional limits' of WTO jurisprudence see the various contributions (e.g., by R Howse, W Davey and E-U Petersmann) in T Cottier and P Mavroidis (eds), *The Role of the Judge in International Trade Regulation. Experience and Lessons for the WTO* (Ann Arbor, Mich: Michigan UP, 2003), at 43–90.

[89] See *United States—Sections 301–310 of the Trade Act of 1974*, panel report adopted on 27 Jan 2000, WT/DS152/R, at para 7.72. The Panel makes the following important reservation: '[t]he fact that WTO institutions have not to date construed any obligations as producing direct effect does not necessarily preclude that, in the legal system of any given member state, following internal constitutional principles, some obligations will be found to give rights to individuals. Our statement of fact does not prejudge any decisions by national courts on this issue'.

[90] *Mexico—Measures Affecting Telecommunications Services*, Panel report (WT/DS204/R of 2 Apr 2004) adopted in June 2004, at paras 7.244–245.

[91] See nn 43–49 above.

(a) Do The Jurisdiction and Applicable Law in WTO Dispute Settlement Proceedings Comprise Human Rights?

Every WTO member state has ratified UN human rights conventions requiring respect for human rights. The limitation of the jurisdiction of WTO dispute settlement panels to 'the covered agreements' (see Article 7 DSU) entails that WTO panels may examine only legal claims based on WTO rules. In WTO dispute settlement practice, legal defences have so far always been based on the covered WTO agreements. Yet, the dispute settlement function of WTO dispute settlement bodies (for example, to examine alleged 'violations' of WTO rules, to secure the withdrawal of illegal measures, to promote the prompt settlement of WTO disputes) may require the interpretation of WTO rules in conformity with the human rights obligations of WTO members and also to respond to defences that departures from WTO obligations may be justifiable by other rules (for example, peremptory norms) of international law.

Many human rights arguments presented in trade disputes in the European Court of Justice (ECJ) and in the European Court of Human Rights (ECtHR) could likewise be raised in WTO dispute settlement proceedings. For example, the human rights justification in the ECJ's *Schmidberger* case that a restriction on the free movement of goods and freedom of transit caused by environmental demonstrators was justified by the freedom of expression and freedom of assembly of the demonstrators concerned (as guaranteed in Articles 10 and 11 of the ECHR)[92] could just as well have been presented under GATT Article XX in a WTO dispute settlement proceeding examining the same measures. Similarly, the human rights justification in the ECJ's *Omega* case that a national restriction on the importation of foreign services (laser games simulating acts of homicide) was legally necessary for protecting 'public order' by prohibiting a commercial activity affronting human dignity[93] could have been presented under Article XIV of the General Agreement on Trade in Services (GATS) in a WTO dispute settlement proceeding reviewing the WTO-consistency of the same measure. Yet, whether the jurisdiction and applicable law in WTO dispute settlement proceedings comprise human rights law remains controversial. And the legal methodologies and 'balancing principles' to be applied by WTO judges may differ from those applied by the ECJ and the ECtHR. Notably, trade sanctions and trade discrimination as instruments for the protection of human rights *abroad* (for example, the Burma sanctions applied by the US) may be more difficult to justify than trade restric-

[92] See Case C–112/00, *Schmidberger v Austria*, [2003] ECR I–5659.
[93] See Case C–36/2002, *Omega v City of Bonn* [2005] 1 CMLR 91.

tions designed to protect the human rights of domestic citizens *inside* the importing county claiming a 'margin of appreciation' for its domestic human rights legislation, especially if the protective measures are applied in a non-discriminatory manner regardless of the country of origin (as the prohibition of laser games simulating homicide in the abovementioned *Omega* case).

For instance, in a recent judgment on an application by the Netherlands for the annulment of EC Directive 98/44 on the legal protection of bio-technological inventions, the ECJ had to decide, *inter alia*, on the plea that the patentability of isolated parts of the human body provided for by Article 5(2) of the Directive reduced living human matter to a means to an end, thereby undermining human dignity. It was also claimed that the absence of a provision requiring verification of the consent of the donor or recipient of products obtained by bio-technological means undermined the right to self-determination. The Court affirmed, without further explanation, that 'it is for the Court of Justice, in its review of the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right to human dignity and integrity is observed'.[94] If the same patent rules had been challenged under the TRIPS Agreement in a WTO dispute settlement proceeding, the limited WTO jurisdiction of dispute settlement panels—and the more limited scope of the applicable law in WTO dispute settlement proceedings—would have made it impossible for a WTO dispute settlement body to arrive at a similar conclusion that the references to human dignity in UN human rights conventions entail a general obligation of WTO member states to respect human dignity as a human right in the interpretation and application of WTO rules.[95] Balancing human rights claims with WTO rules can raise fundamental questions of constitutional law which neither WTO members nor human rights experts wish to be prejudged by WTO bodies. Arguably, in all the examples mentioned above, the controversial issue of 'direct applicability' of human rights in WTO dispute settlement proceedings could, and should, be avoided by interpreting WTO rules consistently with the general international law obligations of WTO Members.

[94] Case C–377/98, *Netherlands v European Parliament and EU Council* [2001] ECR I–7079, para 70, regarding EC Dir 98/44 on legal protection of biotechnological inventions, [1998] OJ L213/1.

[95] On the different legal traditions concerning the concept of 'human dignity', see n 42 above. Many UN and WTO member states, like the USA, recognise respect for human dignity only as an objective government obligation without a corresponding human right: see EJ Eberle, *Dignity and Liberty. Constitutional Visions in Germany and the United States* (London: Praeger, 2001). On the 'federal rejection', but 'state protection' of economic and social rights in the US, see JM Woods and H Lewis, *Human Rights and the Global Marketplace. Economic, Social and Cultural Dimensions* (Ardsley, NY: Transnational Publishers, 2004) Chap 10.C.

(b) Need for 'Judicial Deference' in Interpreting WTO Rules in Conformity with Human Rights

WTO Members and WTO judges are likely to disagree even on the most basic human rights concepts, such as respect for human dignity and human liberty. According to a long tradition in economic thought—from Adam Smith via Friedrich Hayek up to the Nobel Prize winner Amartya Sen—market economies and economic welfare are only *instruments* for enabling and promoting individual freedom as the ultimate goal of economic life and the most efficient means of realising general welfare.[96] Yet, WTO members would certainly criticise WTO dispute settlement bodies for exceeding their limited jurisdiction if WTO judges were to follow the proposal by R Howse and interpret the WTO objective of 'sustainable development' in conformity with the human right to development. Views on interpreting WTO guarantees of freedom of trade in conformity with human rights are bound to differ as long as many UN human rights conventions are not ratified by all WTO members and, for instance, some WTO members perceive the free movement of goods and services as 'fundamental freedoms' (as protected in Article I–4 of the 2004 EU Constitution) and recognise private 'rights to import and export goods' (as explicitly prescribed in the 2001 WTO Agreement on the accession of China), while others claim that non-economic liberties have a superior moral value compared with economic liberties, as recognised in the constitutional traditions of some developed Anglo-Saxon countries.[97] There is also no agreement on whether the customary methods of international treaty interpretation authorise WTO dispute settlement bodies to construe WTO rules only in the context of the relevant *universal* human rights accepted by *all* WTO members, or also in the light of *national* or *regional* human rights invoked by the WTO members concerned (for example, by the parties to the dispute) even if such

[96] On defining economic development not only in terms of Pareto efficient satisfaction of utilitarian consumer preferences, but also in terms of individual decisional autonomy, individual 'immunity from encroachment', and substantive 'opportunity to achieve', see A Sen, *Rationality and Freedom* (Cambridge, Mass: Harvard UP, 2002), Chap 17 on 'markets and freedoms'. See, also, FA Hayek, *The Constitution of Liberty* (London: Routledge, 1960), at 35: '[e]conomic considerations are merely those by which we reconcile and adjust our different purposes, none of which, in the last resort, are economic (except those of the miser or the man for whom making money has become an end in itself)'.

[97] On this 'double standard' in the jurisprudence of the US Supreme Court, see, e.g., HJ Abraham, *Freedom and the Court* (7th edn, New York: Oxford University Press, 1998), at 11 ff. More generally, see J Raz, *The Morality of Freedom* (Oxford: OUP, 1986). According to Cass n 1 above, neither individual economic freedom nor other individual rights are 'a matter considered essential to constitutionalization in the received tradition of constitutionalization' (at 168 and 176); her focus on Anglo-Saxon national constitutionalism disregards the different constitutional traditions in continental Europe (e.g., the general right to liberty in Art 2 of the German Basic Law) and in EU constitutional law (such as the EC's 'fundamental market freedoms' and other economic liberties guaranteed in the EU Charter of Fundamental Rights).

rights go beyond the universal minimum standards in UN human rights instruments.

Trade rules adopted by WTO members to protect human rights *inside* their own country may require higher 'judicial deference' than unilateral trade sanctions adopted by WTO members to protect human rights abroad if the other WTO member state challenges such trade measures as a violation of its national sovereignty and WTO rights. As most WTO trade diplomats perceive freedom of trade only as a policy instrument rather than as an individual right, WTO dispute settlement findings on the human rights dimensions of WTO rules could easily spark conflicts—not only between the 'political branch' and the '(quasi-)judicial branch' in WTO governance, but also between the WTO and human rights bodies if the legal methodology used by WTO judges for interpreting human rights obligations in the WTO context should deviate from the methodologies favoured by human rights specialists. Hitherto WTO members have not been willing to clarify (for example, by means of a WTO Declaration similar to the 2001 Doha Declaration on the TRIPS Agreement and Public Health) the relevance of human rights for the application of WTO rules and the appropriate 'balancing principles' which WTO jurisprudence should apply. Also the UN High Commissioner for Human Rights no longer proposes to include explicit references to human rights in WTO law, possibly for fear that WTO bodies could adopt human rights interpretations different from those favoured by UN bodies (just as the protection of fundamental rights in the EC goes far beyond UN human rights law).

IV.4. The Cordell Hull Strategy of 'Embedded International Liberalism' and its Limits

A liberal (i.e., liberty-based) world trading system cannot properly function without an adequate framework of national and international rules that (1) protect individual liberty (for example, freedom of contract, freedom of profession, private property rights); (2) limit abuse of power (for example, by means of competition law, labour law, social law, monetary law); (3) promote open markets and non-discriminatory conditions of competition; and (4) are recognised and supported by national parliaments, domestic courts and citizens as being legitimate and in their long-term rational self-interest. Each of these four constitutive elements of a liberal trading system depends essentially on domestic law. The 1934 Reciprocal Trade Agreements Act of the United States, initiated by US Secretary of State Cordell Hull,[98] illustrated the crucial importance of domestic legislation for

[98] On the Cordell Hull strategy, which C Hull saw as the prerequisite for international peace (and for which he received the Nobel Peace Prize in 1945), see C Hull, *The Memoirs of Cordell Hull* (London: Hodder & Stoughton, 1948). The term 'embedded liberalism' was

changing the nature of trade policy-making and for creating the legal foundations of a liberal world trading system: it may often be politically feasible only by the parliamentary authorisation of reciprocal international trade liberalisation commitments based on unconditional most-favoured nation obligations, and by parliamentary 'hands-tying' with regard to the final (dis)approval of such agreements negotiated among the world trading countries, that the domestic political support (for example, from export industries) for overcoming the protectionist pressures from import-competing industries may be mustered, and 'protectionist log-rolling' (as in the case of the infamous 1930 Smoot–Hawley Tariff Act of the US Congress) can be prevented from unravelling the parliamentary ratification of international trade agreements. Without such domestic constitutional and legislative framework rules for trade policy-making, rent-seeking interest groups may pressure governments into granting trade protection in exchange for political support, which may trigger reciprocal trade restrictions on the part of foreign trading partners that, as in the wake of the Smoot–Hawley Tariff Act during the 1930s, might usher in the breakdown of the international trade and payments system and of international peace.

In line with this 'Cordell Hull strategy', GATT 1947 and the Bretton Woods institutions were based on the post-war paradigm of 'embedded international liberalism': at international level, the liberalisation of international trade and payments was negotiated in the context of GATT and the International Monetary Fund on the assumption that governments would retain broad discretionary powers with regard to the domestic implementation of their international liberalisation commitments according to their respective domestic laws and policies. This 'benevolent government assumption' worked reasonably well with regard to *administrative* trade policy measures in constitutional democracies where, as in the US, the delegation of limited trade negotiation authority to the Executive and the domestic implementation of international trade agreements are determined and closely supervised by the legislative branch so that the discretionary trade-policy powers of the Executive remain subject to constitutional 'checks and balances' and judicial review. Yet, with regard to *legislative* trade policy measures, the quasi-judicial WTO dispute settlement system has failed to induce the US Congress to implement all WTO dispute settlement findings of inconsistencies between US federal legislation and WTO law.[99] As the US Congress perceives international organisations as mere

coined by J Ruggie, 'International Regimes, Transactions and Change: Embedded Liberalism in the Post-war Economic Order' in S Krasner (ed), *International Regimes* (Ithaca, NY: Cornell UP, 1983), at 195–231.

[99] The 7 WTO dispute settlement rulings requiring action by the US Congress relate to the US legislation on Foreign Sales Corporations, the 1916 US Anti-dumping Act, the Byrd Amendment, S 211 of the US Appropriations Act (relating to the trade-mark 'Havana Club'), S 111 of the Copyright Act (relating to Irish music copyrights), amendments of the Anti-

frameworks for bureaucratic bargaining and rejects any 'direct effect' of WTO law on US law, Congress insists on its power to disregard international law and remains reluctant to respect the higher legal rank of WTO dispute settlement rulings.

Member-driven trade governance in GATT and the WTO has entailed that the agenda of rule-making was determined by the powerful producer interests from developed countries to the detriment of exports (for example, of cotton, clothing, agricultural products) from less-developed countries. From both human rights and political perspectives, the 'national interest approach' to foreign policies has four major shortcomings which impede the collective supply of global public goods, such as a rule-based world trading system[100]: (a) the 'jurisdictional gap'; (b) the 'democratic participation gap'; (c) the 'incentive gap'; and (d) the 'constitutional gap' with regard to multi-level governance for the supply of global public goods.[101] Viewed from this systemic perspective of the problems of collective action for the supply of global public goods, 'embedded liberalism' and the WTO governance system remain imperfect in many ways.

IV.5. Multilevel Trade Governance Requires Multilevel Constitutionalism

Multilevel constitutionalism and multilevel governance have become defining elements of the trade law of the EU and its 25 Member States. Inside the EU, international trade negotiations and trade conflicts among the 25 EU Member States have become 'depoliticised', decentralised and replaced by 'constitutional rules' of a higher legal rank, which protect mutually beneficial trade among EU citizens and can be directly applied and enforced in domestic courts. EU citizens enjoy 'freedom of trade' as an individual 'fundamental freedom' inside the EU, and have direct access to judicial review of national and EC trade restrictions. Since the entry into force of the EC Treaty in 1958, judicial disputes among EC Member States in the ECJ have been so rare that the ECJ has had to deliver only two judgments so far in infringement proceedings among EC Member States.[102]

dumping Act (relating to hot-rolled steel from Japan), and US agricultural legislation (e.g., authorising cotton subsidies). On the failures by the US Congress to comply with its WTO obligations in these disputes see WTO document WT/DS/OV/23 (2006).

[100] The two tests of a public good, i.e., non-rivalry and non-excludability, also apply to an open world trading system, e.g., in the sense that the needed multilateral trade liberalisation must be publicly and collectively produced and offers welfare gains (e.g., lower prices, new technology, etc.) that can be consumed without rivalry and without excluding consumers in closed economies.

[101] For an explanation of these shortcomings see E-U Petersmann, 'Addressing Institutional Challenges to the WTO in the New Millenium: A Longer-Term Perspective' (2005) 8 *JIEL* 647, at 652–656, and I Kaul, I Grunberg and MA Stern (eds), *Global Public Goods. International Co-operation in the 21st Century* (Oxford: OUP, 1999).

[102] Case 141/78, *France v United Kingdom* [1979 ECR 2923; Case C–388/95, *Belgium v Spain* [2000] ECR I–3123.

It has been shown above (Part III.1) that WTO law incorporates 'constitutional principles' and promotes freedom, non-discrimination, rule of law, transparent policy-making, accountability, sovereignty and economic welfare also *inside* states. Many of these 'constitutional safeguards' were deliberately introduced and designed so as to overcome the 'constitutional failures' of the 'embedded liberalism' model underlying GATT 1947, for example, so as to promote rule of law through compulsory WTO adjudication and appellate review, and enhance transparent, rule-based trade policy-making through the WTO Trade Policy Review Mechanism. Albeit 'democratic self-government' is not formally reflected in the intergovernmental WTO rules, ratification and control of WTO rules and policies (such as the WTO 'Trade Policy Review Mechanism') by national parliaments and the public are of crucial importance for the democratic legitimacy of WTO law. Apart from the tripartite structure of the ILO and of provisions promoting participation by non-governmental organisations (NGOs), participatory rights of citizens and of their elected representatives continue to be underdeveloped in most worldwide organisations.

The various democratic elements in European organisations (such as the EU and the Council of Europe) refute the view that 'international organisations cannot be democratic.'[103] Proposals for further 'constitutionalising the WTO'—for example, by promoting democratic citizen participation and parliamentary representation in the WTO, strengthening compliance with democratically agreed WTO obligations inside domestic legal systems and empowering domestic citizens and domestic courts directly to apply and enforce precise and unconditional WTO rules for the benefit of individual citizens—however, remain controversial.

(a) Is constitutionalising the WTO a 'step too far'?

R. Howse and K Nicolaidis claim that constitutionalism is a 'fallacy', and the 'constitutionalisation of the WTO will only exacerbate the legitimacy crisis or constrain appropriate responses to it'.[104] Even though they plead for 'non-constitutional approaches to reviving the multilateral trading system as an interstate bargain', Howse and Nicolaidis simultaneously argue that 'the guidelines that we have suggested … could ultimately result in creating some of the conditions for constitutionalism', including—*horribile dictu*—'for a legitimate global federal government'.[105]

The rejection of constitutionalism as a 'fallacy' is hardly consistent with the worldwide use of constitutional discourse not only for state constitutions, but also for the constitutive agreements of worldwide and regional

[103] R Dahl, 'Can International Organisations be Democratic? A Sceptic's View' in I Shapiro and C Hacker-Cordon, *Democracy's Edges* (New York: Cambridge University Press, 1999), at 32.

[104] See Howse and Nicolaidis, n 1 above, at 228–30.

[105] Ibid, at 248.

organisations, such as the 'constitutions' (in terms of their respective official designations) of the ILO, the FAO, UNESCO, the WHO and the EU. The reality of national, regional and worldwide constitutional restraints on trade governance (as illustrated in Parts II and III), and the recourse to constitutional principles in international trade governance (as illustrated in Part IV.1), confirm that multilevel trade governance requires multilevel constitutionalism in order to protect human rights and democratic governance not only at home, but also in intergovernmental and transnational relations.

Howse and Nicolaidis also argue for a global 'law of unfair competition', 'global democratic federalism', 'integration of human rights and environment into WTO law as higher norms', and 'a legitimate global federal government'[106]—a utopia which is rightly rejected by most constitutional and international lawyers since Immanuel Kant's essay on Perpetual Peace (1795). A world government is neither desirable (for example, because of its potential tyranny) nor practical (for example, in view of the unsolvable principal/agent problems in democratic control of a world government). Howse and Nicolaidis' rejection of constitutionalism as a 'fallacy', and their simultaneous calls for a 'global federal government' are as contradictory as Cass' rejection of 'constitutionalising' WTO governance and her simultaneous call for 'trading democracy' in WTO negotiations. Howse and Nicolaidis criticise 'the use of the European Union as a model for constitutionalising the WTO'.[107] Yet, I am not aware of any Don Quixote who has suggested such a utopian model (for example, a supra-national WTO Commission, WTO Parliament, WTO Charter of Fundamental Rights, or a global common market modelled on EC institutions). The universal recognition of human rights and the 'constitutional functions' of open markets and WTO rules for enabling mutually beneficial co-operation among individuals across discriminatory state barriers, render the 'decentralisation of trade governance' (for example, prevention of intergovernmental WTO disputes by enabling private actors to invoke WTO rules in domestic courts) and 'normative individualism' more convincing 'foundational principles' than the constructivist fallacy of a 'global federal government'.[108] The case-studies in this book illustrate not only that multilevel governance and multilevel constitutional restraints may take many possible forms. They also confirm that Australian and Canadian 'constitutional nationalism' offers no model for democratising and constitutionalising multilevel trade governance.

[106] Ibid, at 247–8.

[107] Ibid, at 248.

[108] See E-U Petersmann, 'Prevention and Settlement of Transatlantic Economic Disputes' in E-U Petersmann and M Pollack (eds), *Transatlantic Economic Disputes: The EU, the US and the WTO* (Oxford: OUP, 2003), at 3–64; ibid., 'Constitutional Approaches to International Law: Inter-relationships between National, International and Cosmopolitan Constitutional Rules' in J Bröhmer *et al.* (eds), *Festschrift für Georg Ress* (Berlin: Heymanns Verlag, 2004), at 207–22.

(b) How to Reduce the 'Democratic Deficit' in the WTO?

WTO decisions are adopted by consensus or by voting based on the principle of 'one member, one vote'. But state consent and the 'sovereign equality of states' are no guarantees of democratic self-government. In line with the prevailing post-war perception of intergovernmental organisations as 'bureaucratic bargaining systems', WTO law does not explicitly provide for democratic citizen participation, democratic decision-making or parliamentary approval of WTO decisions. The WTO's General Council 'may make appropriate arrangements for consultation and co-operation with non-governmental organisations concerned with matters related to those of the WTO' (Article V(2) of the WTO Agreement). The WTO's Trade Policy Review Mechanism is intended to achieve 'greater transparency in, and understanding of, the trade policies and practices of member states'; 'the inherent value of domestic transparency of government decision-making on trade policy matters for both member states' economies and the multilateral trading system' is recognised (see Annex 3 to the WTO Agreement). Yet, negotiations, rule-making and adjudication in the WTO take place 'among its Members' (Article III(2)) without any WTO guarantee that government representatives are democratically legitimated and democratically controlled, or that individuals adversely affected by WTO rules have not only access to domestic courts (as guaranteed by WTO law) but also democratic rights to participate in policy-making processes.

From the perspective of democratic constitutionalism, the WTO suffers from a lack of input legitimacy (in terms of explicit commitment to respect for human rights and constitutional democracy) as well as of output legitimacy (for example, in terms of maximising general consumer welfare rather than the 'protection rents' of special producer interests). WTO law does not provide for democratic decision-making, such as the principles of the 'democratic equality of citizens' (Article I–45), 'representative democracy' (Article I–46), 'participatory democracy' (Article I–47), the democracy-enhancing role of 'social partners and autonomous social dialogue' (Article I–48), 'transparency of proceedings' (Article I–50) and the 'protection of personal data' (Article I–51) provided for in the 2004 Treaty Establishing a Constitution for Europe. It is true that a living parliamentary democracy cannot be replicated in worldwide, specialised intergovernmental organisations. Yet, there are many ways of reducing the 'democratic deficit' in the intergovernmental supply of international public goods, for instance, by promoting 'participatory' and 'deliberative democracy' in multilevel governance. A large number of proposals for reducing the 'democratic deficit' of the WTO at intergovernmental level have been made over recent years, such as establishing a parliamentary WTO body,[109] an advisory

[109] See the discussion of the EU proposals for establishing a parliamentary WTO body, and of US concerns, in the contributions by G Shaffer, D Skaggs, M Hilf, E Mann and J Bacchus to Petersmann, n 24 above.

WTO Economic and Social Committee,[110] making WTO meetings public,[111] adopting a WTO Declaration pledging respect for the universal human rights obligations of all WTO member states,[112] and more systematic WTO consultations with NGOs whose expertise and monitoring can help to reduce the information asymmetries between citizens and parliaments on the one hand and WTO negotiators on the other.[113] Yet, due to the resistance by non-democratic governments and the WTO mantra of 'member-driven' WTO governance, none of these various proposals have become part of WTO law.

The US practice of defining the trade negotiating authority by Congressional legislation, insisting on close consultations with Congress throughout the conduct of negotiations, and deciding on the approval and domestic implementation of international trade agreements after they have been concluded at international level offers an effective democratic model of parliamentary oversight that is followed in only a few WTO member states. 'Recovering the spirit of embedded liberalism' can neither solve the constitutional problems of trade policy-making in the WTO (for example, the lack of transparency of WTO negotiations, non-transparent compulsory WTO adjudication) nor secure that WTO member state governments comply with their democratically approved WTO obligations and meet their human rights obligations of promoting individual rights, democratic self-government, consumer welfare and social justice in the trade policy area.

[110] See International Trade Law Resolution No.2/2000, Annex 3 ('Declaration on the Rule of Law in International Trade'), adopted by the International Law Association at its 69th Conference on 29 July 2000, which recommended, *inter alia,* 'WTO members should strengthen the rule of law in international trade by enhancing the legitimacy and acceptance of WTO rules by in particular: (a) Improving the transparency of the WTO rule making process *inter alia* by increasing the participation of national representatives of the economic and social activities in the work of the WTO, for instance, by the creation of an Advisory Economic and Social Committee or an advisory parliamentary body of the WTO to be consulted regularly by the WTO organs' in International Law Association, *Report of the 69th Conference* (London: International Law Association, 2000), at 24–5.

[111] See the ILA's International Trade Law Resolution No.2/2000, Annex 3, n 110 above: 'WTO members should strengthen the rule of law in international trade by enhancing the legitimacy and acceptance of WTO rules by in particular: … (b) Opening the WTO dispute settlement system for observers representing legitimate interests in the respective procedures, and promoting full transparency of WTO dispute settlement proceedings; (c) Allowing individual parties, both natural and corporate, an advisory *locus standi* in those dispute settlement procedures where their own rights and interests are affected', in International Law Association, n 110 above, at 24–5.

[112] See Petersmann, n 32 above, at 54–6.

[113] The so far pragmatic organisation by the WTO of an increasing number of annual 'WTO seminars' with NGOs (e.g., on trade-related environmental problems and development problems) should become a permanent and systematic undertaking. On information asymmetries and possibly conflicting self-interests in principal/agent relations, and on the contribution of NGOs to reducing such democratic control problems, see R Howse, 'How to Begin to Think About the 'Democratic Deficit' at the WTO' in S Griller (ed), *International Economic Governance and Non-Economic Concerns* (Vienna: Springer, 2003), 79, at 82.

(c) Strengthening Compliance with WTO Rules in Domestic Legal Systems?

Democratic self-government depends not only on parliamentary representation and the public deliberation of general citizens' interests, but also on compliance with democratically agreed law and the legal and judicial protection of individual citizens' rights to individual and democratic self-government. If democratically approved WTO prohibitions of market access restrictions and market distortions are not respected by trade bureaucracies, then the taxation of domestic citizens by illegal tariffs, subsidies and other restrictions on thousands of different goods, services, producers, importers and exporters from some 200 trading countries are likely to become so complex and opaque that they can no longer be effectively understood and controlled by any citizen and any parliament. Non-transparent 'taxation without representation' by self-interested trade bureaucracies and other 'political entrepreneurs' (for example, periodically elected congressmen depending on political and financial support from rent-seeking local constituencies) can be reduced only by general, legal requirements of transparent, non-discriminatory trade policy-making and by prohibitions of welfare-reducing, discriminatory tariffs and non-tariff trade barriers such as those in GATT/WTO law. Only a few countries have found it politically possible to accept such legal limitations on their respective trade policy discretion *unilaterally* without reciprocal commitments by other trading countries. Constitutional democracies and rational citizens have strong economic, democratic and legal self-interests in the WTO guarantees of reciprocal trade liberalisation and in ensuring compliance with democratically ratified WTO rules.

The DSU and other WTO provisions subject all trade restrictions to judicial review by WTO dispute settlement bodies and, in many cases, by national courts, too. In order to eliminate bilaterally-agreed departures from multilateral rules (such as 'voluntary export restraints'),

- '[a]ll solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any member state under those agreements, nor impede the attainment of any objective of those agreements' (Article 3(5) DSU);
- 'Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any member state may raise any point relating thereto' (Article 3(6) DSU).

Contrary to the 'grandfather clauses' in GATT 1947 which had exempted pre-existing domestic laws from GATT's liberalisation requirements, each

WTO member state 'shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements' (Article XVI.4). Yet, the lack of input legitimacy of WTO law (for example, in terms of WTO commitments for respect for human rights and democratic governance) and the—in many WTO member states—only cursory scrutiny of WTO agreements by national parliaments entail that domestic courts and citizens often distrust WTO rules and do little to ensure their effective implementation in domestic legal systems.

Moreover, the EC and US legislation on the domestic implementation of the WTO Agreement explicitly states that domestic citizens and domestic courts have no right to enforce WTO rules against WTO-inconsistent legislative or administrative restrictions.[114] Also in the few WTO member states with constitutional democracies in which trade policy-making tends to be effectively controlled by national parliaments (like the US Congress), trade policy-making is all too often 'captured' by powerful, nationalist interest groups (including US Congressmen) lobbying for 'protection rents' in exchange for political support, frequently at the expense of consumer welfare and rule of law (see, for example, the blatantly illegal US safeguard measures for steel in 2003). WTO rules tend to be disregarded by domestic courts in most WTO member states. In view of the often opaque, producer-driven rule-making processes in the WTO, the democratic legitimacy and social justice of rule-making and adjudication in the WTO are challenged by many citizens and their representative institutions.

(d) Empowering Individuals and Domestic Courts to Enforce Precise and Unconditional WTO Prohibitions in Domestic Constitutional Systems?

European and North American integration law and the constitutional law in federal states confirm the historical experience that the empowerment of citizens by the legal and judicial protection of individual rights and multi-level constitutionalism offer the most effective ways of protecting freedom, non-discrimination, consumer-driven *economic markets* as well as citizen-driven *political markets* across frontiers. Both the proponents and the critics of a constitutional approach to international trade emphasise the mediated 'bottom-up legitimacy' of international rules and organisations which, outside their limited functional mandate from their respective constituencies, must respect national policy autonomy and legitimate democratic diversity. The main difference of view relates to the question whether citizen welfare and citizens' rights require stronger constitutional 'checks and balances' of trade policy-making at domestic level. The multi-level constitutional perspective emphasises that constitutional reforms at domestic level may

[114] For comparative analyses of the domestic implementing laws in WTO member states see J Jackson and A Sykes (eds), *Implementing the Uruguay Round Agreements* (Oxford: OUP, 1997).

obviate legal and political problems at international level. For instance, many intergovernmental WTO disputes over private rights (for example, intellectual property rights), or over the taxation of individual private actors (for example, customs duties, antidumping or countervailing duties affecting individual exporters), could be 'depoliticised', 'decentralised' and resolved more efficiently by leaving the enforcement of WTO rules to domestic courts rather than transforming disputes among private economic actors (for example, holders of intellectual property rights), and their challenges of national administrative restrictions, into intergovernmental WTO disputes with the prospect of welfare-reducing, international sanctions.[115]

During the 1980s, economists (such as Jan Tumlir and Heinz Hauser) and international trade lawyers (such as Frieder Roessler, Robert Hudec and E-U Petersmann) argued that international legal guarantees of freedom, non-discrimination, rule of law and social safeguards—like the GATT rules for free trade areas and customs unions—could serve 'constitutional functions' for limiting welfare-reducing abuses of discretionary foreign policy powers and for extending the domestic legal protection of individual freedom, non-discrimination, rule of law and social welfare.[116] Far from circumventing national democracy, international agreements on the reciprocal liberalisation of welfare-reducing border discrimination and for the collective supply of international public goods (such as the international division of labour, rule of law, etc.) are necessary complements to constitutional democracy in order to realise policy goals that cannot be achieved unilaterally without multilateral, legal constraints on foreign policy discretion. Even though the intergovernmental GATT rules did not create private rights, the constitutional laws in many states required government institutions to interpret domestic laws in conformity with relevant international obligations, to resist protectionist pressures and to protect the confidence of citizens in the rule of international law. Moreover, where domestic legal systems provided for the 'monist' incorporation of international legal obligations into domestic law with a higher legal rank over domestic legislation (as, for example, in Article 300 EC) and construed the customs union rules (for example, in Article 28 EC) as creating private individual rights, such constitutional safeguards justified recognising individual freedoms to import and export also in the external customs union relations with third countries.[117] As many GATT rules include precise and unconditional

[115] See Petersmann, 'Prevention and Settlement', n 108 above, at 55 ff.

[116] See M Hilf and E-U Petersmann n 33 above; M Hilf, F Jacobs and E-U Petersmann (eds), *The EC and GATT* (The Hague: Kluwer, 1986).

[117] See, e.g., E-U Petersmann, 'The EEC as a GATT Member—Legal Conflicts Between GATT Law and European Community Law' in Hilf, Jacobs and Petersmann, n 116 above, 23–1, at 65 ('[t]he foreign trade regulations of the EEC explicitly recognise the freedom to import and export as a 'Community principle' subject to the exceptions provided for in Council Regulations EEC No. 288/82 on common rules for imports and No.2630/69 establishing common rules for exports. Since the various regulations of the EEC repeatedly state that any

prohibitions of discriminatory market access restrictions (for example, in GATT Articles II, III and XI(1)), this constitutional approach to trade policy focused on judicial protection of private market access rights for the benefit of EC citizens. It was also emphasised that the numerous 'exceptions' and safeguard clauses of GATT served essential 'constitutional functions' by subjecting liberal trade to non-economic national regulation that may be more important than liberal trade.[118]

In view of the inadequate constitutional 'checks and balances' at international level and the risk of intergovernmental collusion to the detriment of citizens, it was further emphasised that the 'constitutional functions' of international guarantees of freedom, non-discrimination, rule of law and social safeguards could become effective only if international rule-making and the domestic implementation of international rules were also more effectively controlled by national parliaments. Under international law (including GATT and WTO law) as well as under national constitutional laws, it was up to individual GATT member states to decide how they wanted to implement their GATT obligations in their respective domestic legal systems.[119] The incorporation of the GATT customs union rules into the EC Treaty, with a legal rank superior to the discretionary trade policy powers of the EC Council and the EC Member States (see Article 300 EC) and their judicial enforcement by national and European courts for the benefit of individual citizens were welcomed as a citizen-oriented form of 'multilevel constitutionalism'. With the transition from 'negative international integration' (for example, through GATT) to the elaboration of 'positive integration law' in worldwide institutions (for example, the WTO), the need for additional constitutional safeguards—also at intergovernmental level—was emphasised.[120] Following the example of the WTO Government Procurement Agreement, the international rules of which can be enforced through domestic courts (Article XX), WTO member states should negotiate additional reciprocal commitments to strengthening the domestic implementation of agreed WTO rules in their respective domestic legal systems by incorporating precise and unconditional WTO obligations into domestic legislation and enabling domestic courts and adversely affected

protective measures must be taken 'with due regard for existing international obligations' the GATT rules on non-discriminatory market access may serve as an additional international legal protection of the individual rights of the EEC citizens to engage freely in foreign commerce and to enjoy judicial review').

[118] See, e.g., Petersmann, n 31 above, at 236–7 (describing the 'GATT principle of national economic sovereignty' as one of the 'constitutional functions' of GATT).

[119] See Art XVI.4 WTO Agreement: '[e]ach member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements'.

[120] See E-U Petersmann, 'From "Negative" to "Positive Integration" in the WTO: Time for Mainstreaming Human Rights into WTO Law?' (2000) 37 *Common Market Law Review* 1363.

citizens to enforce certain WTO guarantees (for example, of freedom, non-discrimination, etc.) against their manifest violation by domestic governments.

Lawyers from Anglo-Saxon countries without constitutional protection of individual economic freedoms have criticised this constitutional approach to international trade on the ground that WTO guarantees of economic freedom, non-discrimination, rule of law and social safeguards do not deserve 'the legitimacy of higher law'—a political claim which is clearly inconsistent with European integration law and WTO law.[121] According to their communitarian and authoritarian value premises, individual economic freedoms are not part of 'the received account of constitutionalism', and respect for democratically approved WTO rules and economic freedom should not be placed 'above politics'.[122] Yet, neither the dualist legal system and inadequate constitutional guarantees of a truly internal common market inside Canada nor the hegemonic US distrust of international law offers models for the European 'common market without a common state', built upon fundamental citizens' rights and judicial protection of respect for international law. 'Constitutional interpretations' of intergovernmental guarantees of freedom and non-discrimination, as reflected in the *ex post* 'constitutionalisation' of the EC Treaty's common market rules as 'fundamental freedoms' of EC citizens, may be 'second-best approaches', similar to the constitutional jurisprudence in the transformation of US constitutional law from a 'flawed treaty-based system' into a federal Constitution.[123] Multilevel constitutionalism emphasises the close inter-relationships between international and domestic constitutionalism: just as rights of WTO member states under WTO law (for example, to protect domestic citizens against harmful imports) may be obligations under human rights law, so precise and unconditional WTO obligations may justify judicial protection of individual rights under domestic constitutional laws (for example, the fundamental rights of German, EU and Swiss citizens to freedom of trade as guaranteed in German, EC and Swiss constitutional law). Such synergies among domestic and international constitutionalism can be promoted more effectively by perceiving international and domestic constitutional rules as a functional unity for the protection and promotion of the rights of domestic citizens.

[121] GATT/WTO jurisprudence is based on the general international law requirement that 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty' (Art 27 of the Vienna Convention of the Law of Treaties), and each WTO member state 'shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements' (Art XVI.4 WTO Agreement).

[122] Howse and Nicolaidis, n 1 above, at 228–9; Cass, n 1 above, at 168, 176.

[123] See B Ackermann, n 3 above, and CM Vasquez, 'Judicial Review in the United States and in the WTO: Some Similarities and Differences' (2004) 36 *George Washington International Law Review* 587.

IV. SUMMARY AND CONCLUSIONS

Part II has shown that constitutional discourse is increasingly being used not only for state constitutions, but also for international treaty constitutions and general international *erga omnes* obligations and *ius cogens* (for example, in UN human rights law). The emerging international constitutional law was described as complementary to domestic constitutionalism and functionally limited, calling for a comprehensive conception of multilevel constitutionalism as a functional unity for the protection and promotion of freedom and human rights in multilevel governance at home and abroad. National constitutions were described as 'partial constitutions' which, in order to protect human rights and democratic peace effectively across frontiers, depend on complementary international and cosmopolitan constitutional rules for the collective supply of international public goods.

As each WTO member has legally accepted one or more international human rights treaties recognising 'inalienable' and 'indivisible' human rights, Part III argued that human rights have become 'constitutional restraints' for multilevel trade governance not only inside constitutional democracies and EU law, but also at the level of international governance in the WTO. Not only does the universal recognition of human rights *limit* the powers of states and intergovernmental organisations; respect for human rights also *enhances* their 'power of legitimacy', democratic ethos and political ability to transform state-centred structures into more citizen-oriented, democratic and cosmopolitan structures for enhancement of individual and social welfare through trade, poverty reduction and protection of individual rights and of the environment. As democratic processes in distant worldwide organisations cannot replicate the parliamentary forms of democratic self-government practised in national democracies, the legitimacy of international organisations requires stronger respect for, and the promotion of, participatory rights of citizens and national parliaments. The central 'development objective' of the WTO's 'Doha Development Round' should be conceptualised in terms of the promotion of individual and democratic self-development through trade, open markets, rule of law, social safeguard measures and individual rights.

Part IV showed that the WTO legal system uses 'constitutional methods' as well as 'constitutional principles'. It also identified numerous 'constitutional problems' of multilevel trade governance and their adverse repercussions on economic welfare, individual rights and democratic constitutionalism inside WTO member states. The Cordell Hull strategy of 'embedded international liberalism', as exemplified by GATT 1947, has failed to secure a liberal and democratic international trading system which protects consumer welfare and citizens' rights. The WTO Agreement responded to the constitutional failures of GATT 1947 by introducing 'embedded international trade constitutionalism', yet without linking WTO obligations to domestic constitutionalism in order to promote stronger

compliance with, and democratic control of, WTO obligations in domestic legal systems where the welfare and transaction costs of producers, investors, traders and consumers depend on rule of law. The various proposals for reducing the 'democratic deficit' of the WTO at intergovernmental level continue to be opposed in the member-driven and consensus-based, intergovernmental WTO bodies. In order to strengthen rule of law and depoliticise and decentralise intergovernmental dispute settlement in the WTO (for example, intergovernmental enforcement of WTO rules through trade sanctions), it was suggested that reciprocal WTO obligations be negotiated—following the model of Article XX of the WTO Agreement on Government Procurement—empowering both citizens and domestic courts to use domestic legal and judicial remedies to obtain compliance by governments with their self-imposed WTO obligations. More active parliamentary participation in the negotiation, adoption and implementation of WTO rules and the vigilance of citizens benefiting from open markets and rule of law offer democratic mechanisms for transforming the intergovernmental WTO system into a more decentralised and more self-enforcing trade constitution.

The WTO objectives of promoting mutually beneficial trade, 'sustainable development' and international rule of law are of constitutional significance far beyond international economic relations.[124] In contrast to power-oriented UN politics and 'idealist' top-down proposals for *World Peace through World Law*,[125] human rights—and proposals for 'constitutionalising WTO law'—proceed from 'normative individualism', i.e., that values derive from respect for individual self-development and from the constitutional protection of liberty and citizen-driven markets—in the economy no less than in the polity. The universal, 'indivisible' human rights obligations of all WTO member states call for transforming the intergovernmental WTO law into a cosmopolitan 'constitution of liberty' and rights-based 'social market economy'. Multilevel constitutionalism helps one better to understand, use and strengthen the functional inter-relationships between international and domestic constitutional rules. The 'constitutional functions' of WTO rules can complement the emerging 'UN human rights constitution' which, regrettably, continues to neglect the task of welfare-creation through protection of freedom of profession, trade, competition and private property rights. Rights of governments under WTO law may entail legal obligations *vis-à-vis* domestic citizens injured by harmful imports or dependent on access to imported medicines. WTO

[124] See RA Falk, RC Johansen and SS Kim (eds), *The Constitutional Foundations of World Peace* (Albany, NY: State University of New York Press, 1993).

[125] See G Clark and LB Sohn, *World Peace through World Law* (3rd edn, Cambridge, Mass: Harvard UP, 1966), whose project had been inspired by President Eisenhower's pronouncement that 'there can be no peace without law'. The Clark–Sohn project aimed at transforming the UN into a limited world government with a system of enforceable world law and general disarmament, but failed to receive political support from the US government or UN bodies.

obligations to promote freedom, non-discrimination and rule of law for the benefit of mutually beneficial trade may justify constitutional citizen rights to exercise personal freedom (for example, of profession) in conformity with the rule of law. Just as democracies are not sustainable over time without 'constitutional democracy', so market economies cannot maximise citizens' welfare without respect for human rights and 'economic constitutions' that protect non-discriminatory, consumer-driven competition and social justice. The legal ordering of the spontaneous co-operation among billions of producers, investors, traders and consumers cannot be secured effectively and legitimately through WTO law unless WTO rights and obligations are more strongly embedded in multilevel, democratic constitutionalism at home and abroad.

2

Democratic Legitimacy and Constitutionalisation of Transnational Trade Governance: A View from Political Theory

PATRIZIA NANZ*

IN POLITICAL SCIENCE terms, legitimacy is crucial for the functioning of democratic decision-making at nation-state level; however, what it may mean for decision-making at international level is far less clear. Studies in International Relations (IR) have been traditionally premised on a clear distinction between the legitimacy of a domestic political government and international legitimacy, the latter being dependent upon the legitimacy of the former. Structural changes of political authority have since affected this distinction and made obsolete the model of international politics as interstate diplomacy, based on functionally specific mandates to bureaucracies.[1] States, though still important actors in the international order, are 'disaggregated': they relate to each other through parts of states, such as regulatory agencies, ministries, legislature and courts.[2] Moreover, international institutions[3] increasingly make decisions in areas formerly reserved to sovereign states, for example, in environmental, economic and health and safety agreements. These regulations take effect behind national borders, within

* I would like to thank Robert Howse, Christian Joerges, Friedrich Kratochwil and Jens Steffek for their helpful comments. This chapter was completed during my Fellowship at the Wissenschaftskolleg zu Berlin.

[1] R Keohane and J Nye, 'The Club Model of Multilateral Co-operation and the World Trade Organisation: Problems of Democratic Legitimacy' in R Porter *et al*. (eds), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (Washington, DC: Brookings Institution Press, 2001).

[2] A-M Slaughter, *A New World Order* (Princeton, NJ: Princeton UP, 2004).

[3] In this chapter, I will make no distinction as to whether an institution is intergovernmental, supranational or transnational. This is a question of degree since—although controlled by national governments—international institutions may also have supranational or transnational components. See M Zürn, 'Global Governance and Legitimacy Problems' in D Held and M König-Archibugi (eds), *Global Governance and Public Accountability*, *Government and Opposition*, Special Issue 2 (2004), at 271.

democratic societies. State sovereignty is dispersed: vertically to supranational bodies such as the European Union (EU) institutions and the World Trade Organisation (WTO); and horizontally to private or mixed (private-governmental) authorities and networks at both national and transnational level. These simultaneous trends of globalisation and privatisation are challenging the fundamental idea of democratic legitimacy, namely, the idea that political authority must arise from the collective decisions of free and equal citizens governed by that authority.

In the 1990s, the 'democratic deficit' was put on the public and political agenda largely owing to the perceived legitimacy crises prompted by the popular dissent from European integration in the Maastricht Treaty ratification process[4] and by mass protests in Seattle, Prague and Genoa that targeted international economic organisations. Discontent with international institutions signalled that, for many people, the perceived shifts in political authority might not be desirable. At roughly the same time, both academic and practical efforts of 're-inventing government' beyond the nation-state gave birth to the term 'governance', a rather loose and benign concept of collective regulation (without the coercive power of states). Governance 'above the state' suggests that it is not about regulating states, but about addressing, and eventually resolving, transnationally salient issues.[5] Critics have claimed that the shift from government to governance blurs the distinction between public legitimacy and private power;[6] that it marks 'a significant erosion of the boundaries separating what lies inside government and its administration, and what lies outside them',[7] for example, scientific experts, international lawyers and non-governmental organisations (NGOs). How, then, should the problem of legitimacy of governance be characterised? What aspects of legitimacy should be considered for decision-making beyond the nation-state? What is the relationship between legitimacy, democracy and political community (*demos*)? In this chapter, I shall, first, try to clarify different strands of the debate about the *normative* legitimacy of international rule-making. I shall then focus on the three main sources of legitimacy: the problem-solving capacity or efficiency, the rule of law and democracy. Secondly, I shall briefly analyse the contemporary debate about international constitutionalism, which seems to be caught

[4] See the referenda on the Maastricht Treaty in Denmark, France and Ireland, as well as the difficulty of passing the treaty in the UK House of Commons.

[5] Much of the work of many global governance institutions depends on 'soft' power, i.e., the power of information, socialisation, reason-giving and learning. Governance also signals a move away from formal, command-style regulation to 'soft law' regulation without coercion. See J Scott and D Trubek, 'Mind the Gap: Law and New Approaches to Governance in Europe' (2002) 8 *European Law Journal* 1 at 1.

[6] Christian Joerges points to the fact that governance was successfully in place in a variety of administrative contexts at national and European levels before the concept became popular (see his contribution to this book).

[7] M Shapiro, 'Administrative Law unbounded: Reflections on Government and Governance' (2001) 8 *Indiana Journal of Global Legal Studies* 369.

between the 'libertarian' and the '*demos*' viewpoints. I shall then go on to show how constitutionalism based on deliberative theories of democracy can overcome the resulting false alternatives between global markets and national democracy. Thirdly, I shall outline some elements of deliberative democratic constitutionalism as a way of rephrasing the legitimacy *problématique* of transnational governance. I shall thereby point to open questions for further exploration concerning the involvement of private actors, the problem of heterogeneity and the links between jurisdiction and political decision-making processes and, ultimately, the broader transnational public sphere.

I. THE LEGITIMACY OF TRANSNATIONAL GOVERNANCE: WHAT ARE THE QUESTIONS?

Generally speaking, legitimacy designates the relationship between a people governed and a political order or parts of it (law, decision, policy, etc). Legitimacy authorises particular governors or institutions to make and interpret rules; it gives them 'the right to govern'.[8] Its function is to ensure effective and democratic government in liberal polities: citizens are obliged to comply with government policies even if they violate their own interests or preferences. Government is obliged to serve the 'common good' of the respective constituency, which must be protected against both the self-interest of governors and the strategies of special societal interests or the potential tyranny of the majority. Legitimacy, therefore, depends on political institutions that protect public policy against dangers (electoral accountability, independent judiciaries, complex interdependencies between political actors, etc) and protect the trust of citizens in these institutions.[9] Finally, legitimacy makes up an important element of citizens' (political) identity. It is contextual or 'situated' because it is based on the shared norms of a particular community which thereby grants authority.

In social scientific literature, legitimacy usually enters the analytical picture when it is missing or deficient. Only when a political order is being manifestly challenged by its citizens do scholars tend to invoke lack of legitimacy as a cause for the crisis. When it is functioning well, legitimacy recedes into the background and citizens seem to take for granted that the actions of their political authorities are justified. If this is true for polities—i.e., nation states—that have fixed boundaries, unique identities, formal constitutions, well-established practices and sovereignty over other

[8] JM Coicaud, *Legitimacy and Politics. A Contribution to the Study of Political Right and Political Responsibility* (Cambridge: CUP, 2002), at 10.

[9] Undoubtedly, democratic legitimacy, i.e., legitimacy provided by democratic procedure, is not the only basis for legitimacy. Others include, for example, the rule of law, the protection of human rights and fundamental liberties, the problem-solving capacity of competent institutions, etc.

claimants to authority, it is much more difficult to make any sense of the legitimacy of governance 'beyond the nation state'. Who is the audience: the states or the citizens?[10] By whom are the decision-makers of international institutions authorised? And what conditions of a political community (*demos*) apply in the international system? If legitimacy is to be as relevant to international governance as it is taken to be within the state, then there is a real issue in how legal and political theorists contribute to the potential for rule-making 'beyond the state' through their conceptual constructions. Legitimacy has, in fact, come to the fore as a 'master question' in IR, the struggle being over its proper location, its appropriate criteria and, most importantly, the very meaning of this concept.

I.1 Different Strands of the Legitimacy Debate

In the general discussions of the legitimacy *problématique*, we can identify at least six different objects or levels of legitimacy: a particular political decision (for example, a policy or a piece of legislation), the political actors or office-holders, a particular public institution (for example, the European Central Bank), a political order or regime as a whole, and the regime principles (for example, general welfare), and the political community (*demos*).[11] We also find many mechanisms which are supposed to generate legitimacy, for example, delegation, output, democratic rule, responsiveness, transparency, participation, political accountability, actual consent through deliberation, etc.[12] In political science literature, there are many uses of the term 'legitimacy'. It invokes compliance, justifiability, fairness and many other notions.[13] It is often conceptually linked to different sources of legitimacy: efficiency, the rule of law and democracy. But neither efficient problem solving nor the rule of law and democracy is, in itself, sufficient for securing the legitimacy of governance. Instead, my argument will be that an adequate constitutionalisation of transnational governance must guarantee that several functional, legal and democratic sources of legitimacy merge (see Section III).

[10] See, e.g., the Union of People *v* Union of States dilemma, which led to the search for a form of dual legitimisation (supranational and intergovernmental). Following Art 1, the draft 'Constitution of Europe' establishes the EU as 'reflecting the will of the citizens and states of Europe to build a common future'.

[11] A Føllesdal, 'Normative Political Theories of the European Union', in M Cini and A Bourne (eds), *Palgrave Advances in European Union Studies* (Basingstake: Palgrave Macmillan, 2006).

[12] For a typology of relevant international accountability mechanisms, see R Grant and R Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 *American Political Science Review* 29 ff.

[13] And there are many taxonomies; see, e.g., Føllesdal, n 12 above; M Jachtenfuchs *et al.*, 'Which Europe? Conflicting Models of a Legitimate Political Order' (1998) 4 *European Journal of International Relations* 4; and, of course, M Weber, *Economy and Society* (Berkeley, Cal: University of California Press, 1978).

The legitimacy debate has been divided between normative and descriptive lines, between the 'ought to be' and the 'is'. In normative terms, legitimacy refers to the validity of a political order (or its elements) and its claim to legitimacy. It means that they 'deserve support and compliance in accordance with certain normative criteria'.[14] In this sense, the EU or the WTO could be said to lack legitimacy in the light of someone's (or a generally accepted) normative criteria[15] (for example, popular sovereignty[16]). In descriptive or empirical terms, legitimacy refers to the belief, on the part of the subjects of rule, in the legitimacy of the system. It means the *de facto* support and compliance of the people with the decisions of a political order that goes beyond coercion.[17] In this sense, the EU or the WTO could lack societal acceptance (for example, voiced in mass protests or referenda, or expressed in opinion polls). The normative validity of a political order (or parts of it) is, of course, intertwined with its societal acceptance or the empirical belief in its legitimacy.[18] When assessing the legitimacy of a governance arrangement, one should be careful to use normative standards that are appropriate for the specific tasks and scope of the dispositions. It certainly depends on the degree of the pervasiveness of the effects of a certain decision on citizens or of the regulatory power of an international institution.[19]

Another (often implicit) distinction in the debate is the one between procedural and substantive legitimacy. In the normative sense, certain procedures are a necessary condition for the legitimacy of a political order. Following a procedure may even be regarded as sufficient for the legitimacy of a decision (the most important example of this kind of procedural legitimacy being majority rule). We should, however, be cautious not to overestimate the role of procedural legitimacy or to understand it as a substitute for substantive grounds of legitimacy.[20] Substantive legitimacy means that legitimacy is based upon (substantive) judgements on the merits of a

[14] B Peters, 'Public Discourse, Identity, and the Problem of Democratic Legitimacy' in EO Eriksen (ed), *Making the European Polity. Reflexive Integration in the EU* (London: Routledge, 2005).

[15] Normative criteria are not necessarily rational. See, e.g., some of Max Weber's famous types of legitimacy beliefs (traditional, religious, charismatic legitimacy, etc).

[16] Although the EU and the WTO are institutions with a very different degree of integration (see E Stein, 'International Integration and Democracy: No Love at First Sight' (2001) 3 *The American Journal of International Law* 95), they are both concerned with the accomplishment of free trade in conjunction with 'social regulation'. I will use these two institutions to illustrate more general, political-theoretical arguments on the legitimacy of transnational trade governance.

[17] Weber, n 13 above.

[18] Michael Zürn has argued that normative legitimacy deficits (here equated with democratic deficits) of international institutions increasingly create problems with respect to their societal acceptance (see Zürn, n 3 above). The aim of this chapter is to clarify in general terms the problems of normative legitimacy of transnational governance.

[19] This can be judged only on the basis of empirical facts.

[20] Peters, n 14 above.

political decision. Even for the assumption that democratic procedures 'legitimise' a political order, we need to give substantive reasons. Deliberation is, for example, substantive in itself, not only because it depends on the capacity to convince people that a particular political decision is right on its merits, but also because it realises agreed (substantive) values such as equality and liberty—values which are independent of the presence of democratic institutions. In this sense, the legitimacy of a political order is, in part, dependent on the content of outcomes, not simply on the processes through which they are reached.[21]

I.2 Three Sources of Legitimacy

In the literature, we find three main sources of legitimacy: the functional, legal and democratic sources of legitimacy.[22] Unfortunately, we often find that one source is overstated at the expense of the others. However, it is important to emphasise that the legitimacy of transnational governance depends on a 'right' balance between the three sources. First, the problem-solving capacity of international institutions is often seen as enhancing their (substantive) legitimacy, in particular, when they secure certain goals which are otherwise unattainable, for example, economic growth in the EU. In this sense, functionalist approaches[23] have often emphasised the 'institutional performance' of international organisations, i.e., the 'material' output of supplying goods and services, by international organisations.[24] Much of this literature highlights the importance of scientific expertise and consensus-seeking in epistemic communities. However, decision-makers deal

[21] J Cohen, 'Procedure and Substance in Deliberative Democracy' in S Benhabib (ed), *Democracy and Difference. Contesting the Boundaries of the Political* (Princeton, NJ: Princeton UP, 1996), at 95–119.

[22] Unfortunately, there do seem—at first sight—to be some trade-offs between the three sources of legitimacy. Increased legalisation of international governance, e.g., is seen as a threat to democratic politics. And increased democratisation of international institutions is said to threaten its problem-solving capacity. See G Majone, 'Regulatory Legitimacy in the United States and the European Union' in N Kalypso and R Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the US and the EU* (Oxford: OUP, 2000).

[23] See, e.g., E Haas, *Beyond the Nation-State: Functionalism and International Organisations* (Stanford, Cal: Stanford UP, 1964); E Haas, *Saving the Mediterranean: The Politics of International Environmental Co-operation* (New York: Columbia UP, 1990).

[24] This roughly corresponds to 'output-oriented' legitimacy, i.e., that political choices are legitimate 'if and because they effectively promote the common welfare of the constituency in question': F Scharpf, *Governing Europe: Effective and Democratic?* (Oxford: OUP, 1999) at 10. In contrast, 'input-oriented' legitimacy, which roughly corresponds to democratic legitimacy, means that political choices are legitimate 'if and because they can be derived from the authentic preferences of the members of a community': ibid at 6. Whereas the latter must always rely on a strong 'we-identity' among actors, 'output-oriented' legitimacy requires only a range of common interests that are sufficiently stable to justify an institutional arrangement. I have criticised this distinction elsewhere: P Nanz, *Europolis. Constitutional Patriotism beyond the Nation State* (Manchester: Manchester UP, 2006 forthcoming).

with 'trans-scientific questions'.[25] In general, one could object that legitimacy always includes a judgement of appropriateness which is determined by the values of the relevant constituency: regulations and even particular policies cannot be judged merely on standards of efficiency, but must often also be judged on standards of justice. Even efficiency-oriented decisions or policy areas such as 'market building' rules have effects in terms of risks to life, health and well-being, and it would seem odd to refer to the protection of such (social) regulatory concerns as the 'output' of a political institution.

Secondly, legal legitimacy refers to the fact that an international institution is based on the rule of law.[26] Norms of international law are legitimised through the procedural requirement of the consent of states laid down in treaties or customary law as well as through the conditions of co-operation and peaceful settlement of disputes. The EU, for example, is legally legitimate in so far as Member States have transferred limited parts of their sovereignty by treaty in order better to achieve their goal by co-ordinated action.[27] One consequence of the EU's basis in the rule of law is the 'principle of legality' which requires that administrative measures are compatible with the legal act on which they are based. At international level, 'juridification' has clearly intensified. It denotes the increasing expansion of law and the law-like methods of formal rules and adjudication with the effect of creating a system of obligations for individuals, states and corporations. Accordingly, studies of transnational governance regimes increasingly focus on its legal legitimacy in terms of justice or principled reasoning.[28] The (legal) legitimacy of an international institution is ultimately based on its potential for legal justification.[29]

[25] See C Joerges, 'Scientific Expertise in Social Regulation and the European Court of Justice: Legal Frameworks of Denationalized Governance Structures' in C Joerges, K-H Ladeur and E Voss (eds), *Integrating Scientific Expertise into Regulatory Decision-Making. National Traditions and European Innovations* (Baden-Baden: Nomos, 1997), editorial (with K-H Ladeur) 7 ff as well as C Joerges' contribution, 'Scientific Expertise in Social Regulation and the European Court of Justice: Legal Frameworks for Denationalized Governance Structures', at 295.

[26] 'Legitimacy', in fact, emerged from the language of Roman law, with a root in the Latin *lex*. The purpose of the term was to declare a practice or an action 'lawful, according to the law' and thus to 'legitimise' it.

[27] But, although, from a purely legal point of view, there is no legitimacy problem with EU political authority, it may be difficult from a democratic perspective to accept legally binding decisions of which citizens cannot recognise themselves as being co-authors.

[28] In fact, the functioning of international regimes depends 'on the extent to which the diverging practices of actors express principled reasoning and shared understandings': F Kratochwil and J Ruggie, 'International Organisation: A State of Art on an Art of State' (1986) 40 *International Organisation* 753, at 771.

[29] From an IR perspective, Jens Steffek has, e.g., proposed a 'thin' conception of legitimacy based on consensus on certain (substantive) values and the rule-guidedness of the executive process. See J Steffek, 'Sources of Legitimacy Beyond the State: A View from International Relations' in C Joerges *et al.* (eds), *Constitutionalism and Transnational Governance* (Oxford: Hart Publishing, 2004).

A special *International Organisation* issue on 'Legalisation in World Politics' is a fine contemporary example of international 'legal positivism'.[30] Here, legalisation is defined as 'a particular form of institutionalisation [that] represents decision in different areas to impose international legal constraints on governments.'[31] It assumes that legal rules can be made precise once and for all by delegated third parties, for example, the courts. Yet, what makes regulatory rules legitimate rests on ('higher') 'constitutionalised' rules as a basis by which to make judgements of their acceptability or appropriateness; and, given the heterogeneity of normative perspectives, the meaning of 'constitutional' rules is highly indeterminate (see Section III). Consider, for example, the (open-ended interpretatory) process of balancing between the interest in the promotion of free trade and the protection of health, safety and environmental interests. Today, it is widely acknowledged that the new phenomena of global legalisation—which simultaneously contain latent constitutional norms—implies the possibility of normatively reflecting its *de facto* constitutionalisation.[32] They point to the need for constitutionalism[33] as an ideal to expose global rule-making to claims of legitimacy. If—as Christian Joerges has pointed out—constitutionalism is used as 'a metaphor for the challenges that the emerging transnational governance presents to the notion of democratic legitimacy',[34] then the crucial question concerns the inter-relationship between law and politics, in particular, between jurisdictional competences and 'political' decision-making processes.

Thirdly, the idea of democratic legitimacy is that citizens decide for themselves the content of the laws that organise and regulate their political association:[35] '[t]he authorisation to exercise state power must arise from the collective decisions of the members of a society who are governed by that power'.[36] Here, the legitimacy of a political order depends on whether

[30] It implies a 'discourse primarily in terms of the text, purpose, and history of the rules, their interpretation, admissible exceptions, applicability to classes of situations, and particular facts': K Abbot *et al*., 'The Concept of Legalization' (2000) 54 *International Organisation* 401, at 409.

[31] J Goldstein, 'Introduction: Legalisation in World Politics' (2000) 54 *International Organisation* 385, at 386.

[32] G Teubner, 'Societal Constitutionalism' in Joerges, n 29 above, at 18.

[33] In the discourse of international scholarship, constitutionalism is, as yet, mostly clearly understood as a 'self-emerging process that invents its own standards of fairness without the intervention of the political organs which are created by standards of democratic equality': C Möllers, 'Transnational Governance without a Public Law?' in Joerges, n 29 above, at 335.

[34] C Joerges, 'Constitutionalism and Transnational Governance. And Introduction to the Workshop Agenda' (2001) (on file with the author) at 2.

[35] Democracy is understood here as the participation of citizens in processes of political decision-making (e.g., through voting, the influence of political parties and interest groups or voluntary associations).

[36] Cohen, n 21 above, at 95, and see, also, John Rawls' famous liberal principle of legitimacy, according to which 'our exercise of political power is justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may be expected to

all those possibly affected by its regulations could consent to its principles, rules and procedures. For citizens to accept a political order (or parts of it) on the basis of good reason, public deliberation is a necessary condition. What, then, is the problem of governance 'beyond the state' in terms of democratic legitimacy? In the area of social regulation, for example, EU directives and the rules of the WTO increasingly determine the environmental, agricultural, health and food safety rules of democratic communities, and, thus, affect the fundamental welfare of their citizens.

The democratic deficit in the emerging supranational system of political authority shared among the EU Member States has been extensively discussed in the literature.[37] While this system of political authority is based on international treaties and thus has its ultimate source of legitimacy in the sovereignty of the Member States, the authority of the single nation-state is nonetheless gradually being diminished by accretion of substantial authority on the part of the EU institutions. The Member States do not control the constitutional-legal context within which the European-level decision-making process takes place, and EU law is gradually developing into an autonomous, distinct and independent supranational legal order, the provisions of which take precedence over national law and are directly applicable to the citizens of the Member States. The resulting democratic deficit can, therefore, be formulated as 'the possibly unbridgeable discrepancy between the pervasive effects of the regulative power of the EU and the weak authorisation of this power through the citizens of the Member States, who are specifically affected by those regulations'.[38]

Global governance regimes are also eroding the regulatory autonomy of nation-states. The economic, sanitary and technical standards of WTO law, for example, greatly affect national and social policies. Recent WTO cases show that it has an impact not only on foreign trade, but also on environmental, consumer protection, health and medical, tax, national security and even human rights policies.[39] The WTO's capacity to generate laws and regulations which affect the welfare of citizens has gradually come into conflict with the idea of democratic legitimacy. There is, in fact, a growing consensus on the need for democratic norms of global rule-making.[40] But does democracy understood as popular sovereignty or self-government

endorse in the light of principles and ideals acceptable to them as reasonable and rational' in J Rawls, *Political Liberalism* (New York: Columbia UP, 1993), at 217.

[37] See G de Bùrca, 'The Quest of Legitimacy in the European Union' (1996) 56 *Modern Law Review* 349; D Grimm, 'Does Europe need a Constitution?' (1995) 1 *European Law Journal* 3; JHH Weiler, *The Constitution of Europe. 'Do the New Clothes have an Emperor' and Other Essays on European Integration*, (Cambridge: CUP, 1999).

[38] UK Preuß, 'Citizenship and Democracy in Europe: Foundations and Challenges', paper presented at the Conference on European Citizenship at Columbia University, 21 Nov 2003, at 3.

[39] See M Krajewski, 'Democratic Legitimacy and Constitutional Perspectives of WTO Law' (2001) 35 *Journal of World Trade* 170.

[40] See A Sen, 'Democracy as a Universal Value' (1999) 10 *Journal of Democracy* 3 at 3–17.

make any sense at international level? And how can international governance deal with the problem of the heterogeneity of its constituency? International governance clearly differs from the model of liberal Western electoral democracies. It provides for neither parliamentary structures to represent citizens, nor a shared collective identity of world citizens. But the traditional model of national democracy does not seem appropriate for decision-making 'beyond the state', and, in any case, fails to capture governance with its structural democratic deficits even at national level.

While few proponents of global democracy base their hope on accountability in the form of direct competitive elections by the people of the world, many envisage multiple sites of authority with an emphasis on retaining local autonomy and self-determination under the principle of subsidiarity. The proposed mechanisms of participation include referenda and elected representative institutions such as a global parliament that can hold global institutions accountable.[41] Increasingly, proposals to overcome the democratic deficit of international governance are rooted in deliberative models of legitimation, following Jürgen Habermas' discourse theory.[42] In this alternative model, democracy is deliberative when collective decisions are founded not in simple aggregation of interests, but on arguments both from and for those governed by the decisions. Here, it is the existence of a wider public sphere that requires decision-makers to explain and justify their action regularly, and enables citizens to establish what is actually happening (and eventually criticise it).[43] From such a perspective, the democratic legitimacy of international governance depends on the openness of its (political) deliberation to public scrutiny and to the input from citizens' concerns. As we will see in the following sections, deliberative democracy may be linked to international constitutionalism.

II. PROBLEMS OF INTERNATIONAL CONSTITUTIONALISM

II.1 The 'Libertarian' View

After these operational clarifications of the crucial aspects of legitimacy 'beyond the state', we may now rephrase this *problématique* in terms of

[41] D Held, *Democracy and Global Order: From Modern State to Cosmopolitan Governance* (Stanford, Cal: Stanford UP, 1995). For the idea of democratic representation in post-national parliaments at EU level, see C Lord and D Beetham, 'Legitimizing the EU: Is there a "Post-Parliamentary Basis" for its Legitimation?' (2001) *Journal of Common Market Studies* 443.

[42] J Habermas, *Between Facts and Norms* (Cambridge, Mass: MIT Press, 1999).

[43] Public deliberation (i.e., collaborative reasoning about how best to address a practical problem) ensures that the concerns of citizens feed into the decision-making process, and that they are *de facto* taken into account. What is important for the notion of public deliberation is less that everyone participates than that there is a warranted presumption that public opinion is formed on the basis of adequate information and relevant reasons and that those whose interests are involved have an equal and effective opportunity to make their own interests (and their reasons for them) known.

international constitutionalism.[44] The traditional constitutional debate about legitimate governance beyond the nation-state leaves us with a dilemma between global markets and national democracy.[45] On the one hand, there is the 'libertarian view'—exemplified by the tradition of economic liberalism—that separates international governance from the idea of democracy. It claims that there is a purely utilitarian or functionalist legitimation for it, on the grounds that the rules it produces are market-enhancing, i.e., they remove national barriers to the free movement of goods, services, capital and persons. On this account, international economic law and its role in rendering production and exchange more efficient are already a legitimate constitutional basis for the international legal regimes such as the WTO.[46] Consequently, there is no need for democratic legitimacy, which would imply the extension of political participation from the national to the global level. The vision of the EU suggested by the tradition of 'economic constitutionalism' is the following: while democratic politics remains bound to nation-states, the economic rights and liberties of the market citizen are the true constitution of the EU.[47] From this perspective, it is the task of the EU to implement and protect a system of open markets and undistorted competition, whereas political rights remain vested in the Member States, which retain those legislative powers that are compatible with open markets.

By a different line of reasoning, Giandomenico Majone comes to similar conclusions: the EU is primarily a 'regulatory state', committed to the definition and enforcement of rules which promote (economic) efficiency. Such a view leads to an understanding of the EU institutions as a (de-politicised) regulatory branch of the Member States as a defence against 'democracy' being identified with purely strategic bargaining, preference-aggregation and the majority principle. European law has its own, democracy-independent, utilitarian substitute legitimation: if a rule is market-enhancing, then it is legitimate. The very goal of the European Community is to separate economics from politics as much as possible. Majone's whole argument depends on a sharp distinction between efficiency-oriented and distribution-oriented standards of legitimacy. The former are geared towards the correction of market failures and must be handed over to independent expertocratic agencies, whereas the latter belong to the 'political' process of bargaining among groups with divergent preferences and majoritarianism. He assumes that it is possible to identify (predominantly)

[44] For an extended analysis of the European constitutional debate, see Nanz, n 24 above at Chap 2.

[45] O Gerstenberg, 'Law's Polyarchy: A Comment on Cohen and Sabel' in C Joerges and O Gerstenberg (eds), *Private Governance, Democratic Constitutionalism and Supranationalism* (Brussels: European Communities, 1998), at 31–48.

[46] E-U Petersmann, 'Constitutionalism and International Organisations' (1997) 17 *Northwestern Journal of International Law and Business* 398.

[47] EJ Mestmäcker, 'On the Legitimacy of European Law' [1994] *RabelsZ* 58 at 615 ff.

efficiency-oriented decisions and policy areas, with regard to which the 'delegation' to independent institutions is democratically justifiable. Accordingly, the task of European law is to 'constitutionalise' the legal basis of this independence. Since de-politicisation is a precondition of accountability, the European democratic deficit is, Majone claims, 'democratically legitimised' at a deeper level, i.e., as a legitimate way of respecting the normative differences between the efficiency-oriented and the distribution-oriented realm.[48]

However, it has been shown, both theoretically and empirically, that it is difficult to separate regulatory and distributive policies: any regulation of competitive practices will generate winners and losers among the competitors involved; the liberalisation of monopoly services may have benefited consumers, but it has also destroyed many thousands of jobs; there are 'spillover' effects of economic and monetary integration on employment and social policy.[49] Regulatory policies have distributive consequences. And, in fact, although most European policy has so far been oriented towards the creation of markets and the regulation of competition and of product standards, it is increasingly also oriented towards environmental and consumer protection. However, by the logic of the 'European Economic Constitution'—according to which, policy outcomes should be determined by the interest in cost-avoidance of the median producer (the state)—it cannot be explained how the EU is successfully managing to achieve not only an integrated market (by eliminating obstacles to internal trade), but also to protect public health and safety, thereby avoiding regulatory races to the bottom.

II.2 The '*Demos*' View

On the other hand, there is the '*demos*' viewpoint, which is concerned with safeguarding the priority of (democratic) politics over markets. It fears, above all, that the emergent form of transnational regulatory governance will endanger the achievements of the redistributive welfare state. These proponents argue that democratic politics—understood as the capacity to solve problems through collective action and will-formation—presupposes, for both normative and functional reasons, a *demos* as a guarantor of collective identity, and they are led to conclude that the democratisation of decision-making 'above the nation state' may be necessary but not possible. Accordingly, they assume that rules that are made and interpreted within a transnational constitutional framework without a *demos* or role for the

[48] G Majone, 'Europe's "Democratic Deficit": The Question of Standards' (1998) 4 *European Law Journal* 1.

[49] A Héritier and V Schmidt, 'After Liberalization: Public-Interest Services and Employment in the Utilities' in F Scharpf and V Schmidt (eds), *Work and Welfare in the Open Economy* (Oxford: OUP, 2000), ii.

citizenry are usurping legitimate democratic choices that would support greater market regulation. They insist that collective will-formation can take place only within the boundaries of a (political) community, a homogenous *demos*.[50] Along these lines, Robert Dahl has argued that international organisations cannot be democratised because of the heterogeneity of the global citizenry.[51]

The '*demos*' view is mainly discussed within the debate about European constitutionalism.[52] The argument is roughly as follows: democratic politics—in the strong sense of solidaristic redistribution between free and equal citizens—cannot be established at a European level. Claus offe, e.g., claims that democratic politics presupposes trust and solidarity among strangers, and trust and solidarity, in turn, presuppose a culturally integrated homogenous political community or *demos*.[53] Trust and solidarity, two fundamental socio-cultural resources of democratic politics, are generated by a belief in 'our' essential sameness, a *Gemeinschaftsglaube* (Max Weber) which is based on pre-existing commonalities of history, language, culture and ethnicity. Only if this belief in a 'thick' collective identity is taken for granted will majority rule lose its threatening character, and interpersonal and inter-regional redistributive measures, which would not otherwise be acceptable, will be legitimated. European integration would therefore presuppose a European people as a cultural and cognitive frame of reference. However, Offe's argument is plausible only if we accept that solidarity and trust are parasitic upon pre-existing commonalities (for example, territory and history) which are 'out there' in some extra-discursive sense, and that the socio-cultural resources or background convictions

[50] Interestingly, Robert Howse argues that the provisions of the WTO (and their interpretation by the dispute settlement body) can be understood not as usurping legitimate democratic choices for stricter regulations, but as enhancing the quality of deliberation among citizens about risk and control, albeit *only* at the level of membership. See R Howse, 'Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organisation' (2000) 98 *Michigan Law Review*. Thus, political autonomy remains ultimately locked in the nation state.

[51] R Dahl, 'Can International Organizations Be Democratic? A Sceptic's View' in I Shapiro and C Hacker-Cordon (eds), *Democracy's Edges* (Cambridge: CUP, 1999), at 19 ff.

[52] See C Offe, 'Demokratie und Wohlfahrtsstaat: Eine europäische Regimeform unter dem Stress der europäischen Integration?' in W Streek (ed), *Internationale Wirtschaft, nationale Demokratie. Herausforderungen für die Demokratietheorie* (Frankfurt and New York: Campus Verlag, 1998), at 99 ff.; C Offe, 'The Europen Model of Social Capitalism. Can it Survive European Integration?' (2005) 11 *Journal of Political Philosophy* 437 ff.; F Scharpf, 'Demokratie in der transnationalen Politik', in Streek, above at 151 ff; Grimm, n 38 above.

[53] Trust is defined as the passive dimension of the socio-cultural resources of democratic politics, i.e., the absence of fear and the belief that all the other citizens of the polity are willing to respect the same duties: Offe, 'Demokratie und Wohlfahrtsstaat' in Streek, n 52 above. Trust is thus the moral basis of democracy without which a citizenry would not accept its risks. Solidarity, on the other hand, means the active dimension of the socio-cultural resources of democracy and the welfare state, i.e., an outlook that does not view distributive justice with indifference but believes that there are duties towards other citizens. Solidarity is the moral basis of the welfare state without which citizens would not be willing to accept sacrifices imposed in the name of the collectivity by redistributive policies.

of a national society are static, i.e., given with the '*Gemeinschaftsglaube*' of a *demos*.[54] Accordingly, we must also accept that EU institutions cannot produce a supranational alternative (for example, solidarity grounded on transnational co-operation and exchange).

There are, of course, different versions of the *demos* viewpoint on constitutionalism.[55] In brief, we can say that, whereas Offe focuses his argument on the moral resources of democracy (trust and solidarity), and therefore puts forward a 'strong' *demos* thesis, Fritz Scharpf's argument is more concerned with the effectiveness of political choices and the definition of the common good in a pluralistic society, and thus amounts to a 'weak' *demos* thesis.[56] He suggests that European government should be confined to the maintenance of a capacity for judicial law-making that safeguards the democratic legitimacy of the European multilevel polity precisely by assuring the reflexivity of national policy choices. Ultimately, however, both authors have a substantialistic view of democratic politics based on the presupposed 'we-identity' of a homogenous *demos*. Dieter Grimm, although he adopts a deliberative theory of democratic legitimacy, in the end also falls back into a substantialistic view which relies on a common language to form a socio-cultural substratum for public communication and is necessarily confined to a specific community of people.[57] Given the historical, cultural, ethnic and linguistic diversity of its Member States, there is no question for the protagonists of the *demos* argument that the European Union is very far from having achieved the collective identity that we have come to take for granted in national democracies. In its absence, institutional reforms (or a constitution) will not greatly accelerate the formation of a European people.[58] Although the 'libertarian' and the

[54] Offe, in fact, gives no argument in support of these assumptions. He simply posits the 'fact' that trust and solidarity between strangers presuppose a shared sense of belonging to a *demos*.

[55] For an extended critique of these 3 *demos* theorists, see Nanz, n 24 above.

[56] In his view, 'output-oriented' legitimacy presupposes the existence of an identifiable constituency with a 'thin' 'we-identity' and thus allows, in principle, for the co-existence of multiple collective identities. But although there is, in principle, no reason why governance at European level should not be supported by output-oriented legitimacy arguments, Scharpf argues that the European capacity for effective problem-solving is doubtful: Scharpf, n 24 above, at 18, because of the 'locational competition' (*Standortkonkurrenz*) between the highly industrial and the less developed Member States. Without a shared 'we-identity', European citizens would not be willing to accept the sacrifices imposed in the name of a European collective good via measures of inter-regional redistribution.

[57] In his famous articles 'Does Europe Need a Constitution?' (1995), Grimm warns the federalists, who, after the Maastricht Treaty, expected a European Constitution to provide the solution to Europe's democracy problem, that the creation of a European constitution would only mediate a fictitious legitimation for a European federal state since, as yet, no European people exists as its legitimating basis. See Grimm, n 37 above.

[58] Joseph Weiler, in contrast to the *demos* theorists, tries to 'square the circle' by both upholding and normatively limiting the reach of the *demos* thesis: rights-based supranationalism and organicist national citizenship stand, according to his argument, in a mutually supportive and correcting relationship to one another. The national level is the realm of the

'*demos*' views differ as to whether the shift to political institutions 'beyond the nation state' is desirable, both agree that the process of market liberalisation is undermining the nation-state foundation for politics.

II.3 The Deliberative Democracy View

However, with regard to the democratic legitimacy of transnational governance, this debate leaves us with a dilemma: while the libertarians refuse to recognise that there is a problem, the *demos* theorists refuse to recognise that there can be a solution. There is, however, a third trend in the literature that deconstructs the notion of *demos* and bases democracy on weaker—communicative—presuppositions. Habermas' proceduralist theory of deliberative democracy formulates an idea of democratic constitutionalism which fully accounts for the universalistic core of this idea and detaches it from the particularism of any specific national (political) culture. Instead of presuming that democratic legitimacy presupposes a certain pre-political homogeneity, this alternative view claims that democratic legitimacy is ultimately created by the communicative power of the public as a collective body.[59] At the end of the day, citizens share a mutual bond (generated through political deliberation) of equal recognition instead of a pre-political bond of primordial affection. Thus, there is no *a priori* reason why democratic governance could not extend beyond national boundaries. The legitimation of transnational governance regimes would depend on whether all those possibly affected by its regulations would consent to its principles, rules and procedures.

From a deliberative perspective, the constitution is both the result of and the precondition for the democratic procedures of the production of law. It regulates the conditions of its own institutionalisation: political decisions are reached through a deliberative process in which participants scrutinise heterogeneous interests and justify their positions in view of the 'common good' or constitutional norms of a given constituency. And it is the democratic procedure for the production of law itself which is the only source of legitimacy of coercive law. The *telos* of deliberative constitutionalism then is to establish the internal relation between the rule of law and democratic forms of political will-formation, i.e., 'the conditions under which one can legally institutionalise the forms of communication necessary for

'good'—of identification and belongingness and 'Eros'—whereas the supranational level becomes the realm of 'liberal notions of human rights' and of 'civilisation': see Weiler, n 37 above.

[59] This communicative power 'springs from the interactions between legally institutionalized will-formation and culturally mobilised publics. The latter, for their part, find a basis in the associations of a civil society quite distinct from both the state and economy alike': J Habermas, *The Inclusion of the Other* (Cambridge, Mass: MIT Press, 1996), at 29.

legitimate law-making'.[60] Deliberative constitutionalism seems particularly suited to governance 'beyond the state'. However, from the point of view of political theory, it leaves a number of open questions with regard to the democratic legitimacy of transnational governance. How could deliberative constitutionalism be applied to transnational governance where there is an increasing involvement of private actors, intensified 'judicialisation', and, as yet, a scarce resource of transnational public sphere? The last section of this chapter is meant to offer a preliminary starting point to address them.

III. ELEMENTS OF A DELIBERATIVE DEMOCRATIC CONSTITUTIONALISM

In proceduralist theories of deliberative democracy, deliberation is regarded as intrinsically enhancing the legitimacy of governance because it ensures the (procedural) conditions for a high quality of deliberation with respect to regulatory choices. It is understood as a process of collaborative reasoning about how best to address a practical problem. While deliberating, participants are required to engage one another in a process of mutual learning. It is important to underline that deliberative constitutionalism relies on a multiplicity of communicative forms of rational political will-formation, including pragmatic, ethical and moral forms.[61] Economic considerations are to be balanced as pragmatic reasons in the process of a mutual exchange with ethical (for example, health concerns or environmental protection) and moral reasons (for example, social justice). From such a perspective, processes of governance under the auspices of the WTO, for example, should ensure a balance between the interest in free trade and the interest in a high level of protection against the potential risks to life and to health. In this view, the legitimacy of a decision is judged by standards of efficiency as well as by standards of justice. The (perceived) democratic legitimacy strengthens the problem-solving capacity of governance arrangements. And legal legitimacy is enhanced when, in accordance with democratically consented to constitutional principles, the functional, legal and democratic sources of legitimacy are mutually enforced. At this point, it should also be noted that pure proceduralism cannot prevent law from being bypassed by economics in setting prescribing objectives: thus, substantive legal norms remain indispensable for legitimate trade governance.

III.1 The Involvement of Private Actors and the Problem of Heterogeneity

From the perspective of the deliberative theory of democracy, the legitimation of transnational governance is generated through deliberation

[60] J Habermas, 'On the Internal Relation between the Rule of Law and Democracy' (1995) 3 *European Journal of Philosophy* 1 at 16.

[61] See Habermas, n 42 above, at 25.

between a variety of social actors (for example, government officials from different national communities, scientific experts and the 'critical voices' of minority expertise, NGOs, advocacy and economic interest groups, etc).[62] In this view, deliberative arenas, for example within standard-setting entities, would force these actors to explicate and scrutinise heterogeneous interests (national, sectoral, technical or selfavowedly public interests), and eventually transform their preferences as part of the elaboration of shared interpretations. Deliberative arenas also place 'justificatory burdens' on non-state or private actors: they have to justify their positions in the light of substantive (public) values and are held accountable for the success of constitutional interpretation and balancing. As a method of institutionalising reflexivity, deliberative constitutionalism is not *per se* limited to states or public entities, but may include non-state or private actors. In fact, constitutionalism is 'internalised in deliberative institutions',[63] be it local, national or transnational. At the very least, the participants in deliberative processes are constrained to show the coherence of specific decisions with basic norms or constitutional principles.

These days, transnational civil society interacts with virtually all international organisations. There are, however, various degrees of institutionalisation and formalisation of this interaction.[64] The EU consults with a variety of civil society actors ranging from the social partners to NGOs and to religious communities. In terms of global economic governance, the World Bank has established extensive contacts with civil society for more than two decades, in Washington, DC, but also in the countries in which its projects are implemented. The GATT and the International Monetary Fund traditionally had much less interaction with civil society, but, since the 1990s, these organisations have been slowly opening up.[65] Furthermore, the role of transnational corporations in global economic governance has increased considerably during recent decades.[66]

It is often claimed that the heterogeneity of the participants in transnational governance is a problem for democratic constitutionalism. From a deliberative perspective, however, validity claims are always made from a certain national/ethical perspective, i.e., the 'facticity' of convictions and

[62] See my current research project with Jens Steffek and Claudia Kissling at the University of Bremen, 'Participation and Legitimation in International Organisations', which explores new governance regimes with a focus on the participation of civil society actors in the context of the EU and the WTO (Project 5 within the Sonderforschungsbereich 'Staatlichkeit im Wandel': see www.sfb597.uni-bremen.de); see, also, their contribution to this book: C Kissling and J Steffek, 'Why Co-operate? Civil Society Participation at the WTO'.

[63] J Bohman, 'Constitution-making and Democratic Innovation: The European Union and Transnational Governance', *European Journal of Political Theory* 356.

[64] S Charnowitz, 'Two Centuries of Participation: NGOs and International Governance' (1997) 18 *Michigan Journal of International Law* 1.

[65] N Woods and A Narlikar, 'Governance and the Limits of Accountability: the WTO, the IMF and the World Bank' (2001) 53 *International Social Science Journal* 4.

[66] M König-Archibugi, 'Transnational Corporations and Public Accountability' in Held and M König-Archibugi (eds), n 3 above.

the state of affairs that they call into question. The heterogeneity of comprehensive outlooks goes 'all the way up' into the realm of constitutional reasoning. Given the fact of enduring 'interpretative pluralism',[67] there are no uncontroversial constitutional principles for deciding upon the procedures by which to settle legal conflicts. Thus, the aspiration of a merely procedural constitutional theory to establish a set of relatively removed, framing principles for a law-making system leads to an infinite regress. Instead, the meaning of 'just' procedures and the 'best' interpretation of constitutional principles is constantly exposed to societal heterogeneity. Their precise meaning has to be figured out each time we apply them in practice in a continuous interpretative process. In this view, heterogeneity and interpretative conflict can be used as a valuable resource, rather than as an obstacle, for deliberative problem-solving: the epistemic contention of diverse national/ethical viewpoints in governance arenas may set in motion a process of inter-societal constitutional learning about the principles and procedures most suitable to a given case.[68] The idea is that principle-guided deliberative problem-solving in transnational arenas may foster a 'constructivist solidarity' among the participants of heterogeneous national/ethical backgrounds and become a powerful source of 'law without the state' (Teubner).[69] In such a view, law is not an ensemble of formal (positive) norms which can be made precise once and for all by delegated third parties, for example, the courts. Instead, it is conceived as a discursive space within which competing normative claims are debated and eventually negotiated by social actors.

III.2 The Tensions between Judicial and 'Political' Governance

In transnational trade governance, the tension between jurisdictional competences and 'democratic' decision-making has acquired a particular salience. As the WTO Appellate Body (AB) begins to develop its jurisprudence through the disputes coming before it, a parallel development between the WTO and EC decision-making bodies can be observed. Both emphasise the need to develop positive international standards through a legitimate process as one crucial way of addressing the problem of reconciling the goals of trade liberalisation and legitimate regulation. In both cases, the involvement of the judiciary—the European Court of Justice (ECJ) and the AB—in evaluating the right balance between economic freedoms and social

[67] Namely, that constitutional principles cannot be applied to real social controversies without some further specification that will itself necessarily be open to different interpretations. See F Michelman, 'Morality, Identity and "Constitutional Patriotism"' (2000) 76 *Denver University Law Review* 1010.

[68] See Nanz, n 24 above, at Chap 6.

[69] G Teubner, 'Contracting Worlds: The Many Autonomies of Private Law' (2000) 9 *Social and Legal Studies*.

policies has increased considerably. As an illustration for the evolving practice of principled justification in 'constitutional adjudication', let us briefly consider two legendary cases.

The *Cassis de Dijon* case drew the ECJ into the centre of constitutional balancing between market integration and social policy.[70] By imposing a duty on Germany to amend its liquor importation restrictions, the Court asserted its competence to assess the reasonableness of the health and safety regulations of the Member States. Furthermore, *Cassis de Dijon* established the legal principle of 'mutual recognition': if a regulatory measure of a Member State cannot be justified on the basis of European law criteria, there is no need for harmonisation. Goods complying with the technical standards required in one Member State can now be sold freely in all EU Member States if standards are functionally equivalent. 'Mutual recognition' was later redesigned as a means by which to grant EU citizens the fundamental right to choose between legal orders.[71] *Cassis de Dijon*'s innovation was to allow Member States to plead any non-economic policies as a justification for limiting economic freedoms (as long as the importance of such a policy trumps the interest in the free movement of goods and is proportionate). Thus, the case had the effect of expanding the class of legitimate social reasons and of broadening the process of constitutional balancing. These policy reasons can be seen as an evolving core of the EU's 'substantive constitutional commitments'.[72]

The WTO does not have its own standard-setting processes or political institutions for developing such norms, but other international bodies such as the Codex Alimentarius, the WHO, ISO and the OECD are indicated as a source of guidelines and norms for Member States. *Hormones*, one of the first cases before the WTO, broadened with regard to Article XX GATT[73] the scope of the admissible reasons that member states can plead in support of their regulatory policies. They require justification with reference to the 'higher law' of the WTO criteria. The constitutional task was to find a balance between the promotion of free trade and the protection of life and health. In 1998, the AB issued a report[74] stating that the EU legislation banning the use of certain growth-promoting hormones was not

[70] Case 120/78, *Rewe-Handelsgesellschaft Nord GmbH v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649. A duty was imposed on Germany to amend its liquor importation restrictions.

[71] See Case C–212/97, *Centros Ltd v Ervervsog Selskabsstrylsen* [1999] ECR I–1459.

[72] See O Gerstenberg, 'Expanding the Constitution Beyond the Court: The Case of Euro-Constitutionalism' (2002) 8 *European Law Journal* 173.

[73] Within Art XX, on general exceptions, the *chapeau* establishes the balance between the right of a member to invoke the exception and its duty to respect the substantive rights of other members.

[74] Appellate Body Report, *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R.

based on risk assessment as required by the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS).[75] The goal was to prevent the use of SPS measures as a restriction on international trade on the one hand, and allowing members to introduce measures necessary to protect human life and health on the other. In order to define its own jurisdictional authority, the AB had to find a balance between the jurisdictional competences conceded by the members to the WTO and the jurisdictional competences retained by the members for themselves. In the report, the harmonisation of the SPS measures on the basis of international standards is understood as a dynamic search for consistency to be realised in the future.[76] The AB seems to aim at a 'substantiation' of WTO law, whereby the 'harmonisation' of SPS measures can be seen as the product of a continuous process of constitutional justification, rather than 'conforming' to a prior agreement on the content of the applicable norm. In this sense, it has been argued that WTO law functions as a 'catalyst for deliberative processes'[77] of risk regulation in a transnational setting.

Both the *Cassis de Dijon* and *Hormones* decisions can be interpreted as a move from legal formalism to 'free' balancing, from interpretative certainty to a continuous 'interpretative struggle' (Michelman) over the meaning of constitutional principles. Both can be understood as cases of constitutional balancing, i.e., as a deliberative process of principle-guided justification. However, when the courts play the central role of constitutional interpretation and balancing, there is a danger of judicial supremacy *vis-à-vis* democracy. Does the incremental 'constitutionalisation' of the EU and the WTO necessarily come at the expense of 'political' decision-making processes? In the EU, there is a tendency to extend principled constitutional justification and balancing to 'political' regulatory arenas of law-making, such as Comitology, and to the Open Method of Co-ordination (OMC). Comitology provides a framework which enables contrasting views of regulation to be reasoned with regard to the problem of determining an adequate level of risk-protection.[78] Committees strike a balance between 'technical' and 'political' considerations, between functional and social/ethical criteria that inform European regulation. Oliver Gerstenberg has inter preted the rise of Comitology as a shift towards a 'horizontalised constitutionalism' in which the judiciary may be understood as 'part of a continuum on which governance arrangements are also placed according to their

[75] The SPS Agreement is constructed around the concept of scientific evidence: see A Herwig, 'Transnational Governance Regimes for Foods Derived from Bio-technology and Their Legitimacy' in Joerges *et al*. (eds), *Transnational Governance and Constitutionalism* (Oxford: Hart Publishing, 2004), at 199 ff.

[76] See *Hormones*, n 74 above, at 213.

[77] See Gerstenberg, n 72 above, at 185.

[78] C Joerges, 'Good Governance Through Comitology' in C Joerges and E Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Oxford: Hart Publishing, 1998).

deliberativeness and of their decision-making processes'.[79] In contrast with the OMC,[80] however, in comitology the importance of substantive protective as well as participatory rights in administrative regulation never entered the debate surrounding the European Convention and the Constitutional Treaty.

The OMC is a soft procedure of co-ordination of national policies which does not lead to the adoption of European legislation, but merely provides guidance and assessment. As in Comitology, the risk is that social/ethical objectives are subordinated to economic ones. OMC processes may be constrained to show the coherence of specific decisions with fundamental social rights or substantive values, which would serve as a constitutional threshold against potential de-regulatory tendencies. In particular, fundamental rights might enter into the judicial debate in relation to the interpretation of national or European legislation, for example, influenced by the European Employment Strategy (EES).[81] From a deliberative perspective, however, in order to monitor and to hold governance arenas accountable, the ECJ would have to define notions of constitutionality in terms of transparency, access to deliberation, responsiveness and inclusion.[82] The Court hither to only values the principle of transparency and scientific expertise as a procedural requirement for legitimate risk regulation.[83] Comitology,[84] as well as the OMC,[85] lacks the important procedural requirements for democratic participation: equal access to deliberation and the inclusion of affected citizens (or their representatives). The EES, for example, besides the explicit recognition of the role of the social partners at national level, lacks an institutionalised role of multiple actors in a multilevel polity, including civil society organisations and local and regional authorities.

At WTO level there is, as yet, no equivalent empirical research on the constitutional role of Comitology and its inter-relationship with the AB. In order to see whether there is an analogous constellation to that at the EU level, it would be necessary to analyse to what extent the AB has developed

[79] See Gerstenberg, n 72 above at 184.

[80] In the end, the idea that a general requirement of participation in the OMC should be included in the Treaty has not been taken up by the Constitutional Treaty agreed upon on 19/20 June 2004.

[81] S Smismans, 'Reflexive Law in Support of Directly Deliberative Polyarchy: Reflexive deliberative Polyarchy as a Normative Frame for the OMC' in O de Schutter and S Deakin (eds), *Social Rights and Market Forces: Is the Open Method of Co-ordination of Employment and Social Policies the Future of Social Europe?* (Brussels: Bruylant, 2005).

[82] P Nanz and J Steffek, 'Assessing the Democratic Quality of Deliberation—Criteria and Research Strategies' (2005) 40 *Acta Politica* 3.

[83] Case T–188/97, *Rothmans International v Commission* (1999) and Case C–269/90, *Hauptzollamt München-Mitte v Technische Universität München* [1991] ECR I–5469.

[84] The nature of Comitology is going to be revised: since the European Parliament will have a co-decision role in defining the Comitology procedures in a new European law, it is likely that at least the position of the Parliament in these procedures will be strengthened.

[85] C della Porte and P Nanz, 'Open Method of Co-ordination—a Deliberative and Democratic Mode of Governance?' (2004) 8 *Journal of European Public Policy* 2.

a form of judicial monitoring that strengthens the procedural requirements for democratic participation. From the perspective of democratic theory, however, the question of the political accountability of transnational regulatory arenas to citizens remains open.

III.3 The Transnational Public Sphere and the Role of Civil Society

As mentioned above, the idea of deliberative democratic constitutionalism ultimately includes citizens as constitutional interpreters in a continuous process of social learning. Constitutional debate tends to focus on highly formalised and juridified institutions such as the EU and the WTO, while an 'institution' such as the World Social Forum, which has taken on the task of broadening the public debate on transnational norms and the informal wider public sphere, is mostly ignored. It is important to acknowledge that constitutionalist justification of politics takes place not only in strong institutionalised (democratic and legal) procedures, but also in a decentred public sphere in which citizens deliberate about fundamental questions and ask for normatively legitimate treatment. The process of (political) deliberation within international organisations has to be opened up both to public scrutiny and to the input of citizens' concerns. Thus, the democratic legitimacy of international trade governance will ultimately depend upon the creation of an appropriate transnational public sphere. A European or global public sphere will hardly be as all-encompassing and unitary as national ones, but will instead be an ensemble of overlapping (national/sectoral) public communications about the same (sometimes very specific) issue. It links governance arrangements with national political deliberations and citizens (via the media).

As argued elsewhere, organised civil society plays an important role in creating transnational public discourse.[86] Civil society organisations participating in global governance arrangements enlarge the range of viewpoints and arguments present in political deliberation (for example, airing 'minority expertise' or giving a voice to citizens' concerns which would otherwise have been ignored). At the same time, they communicate international policy choices to their local networks and bring them to the attention of the media, and thus, ultimately, to the citizens. The fact that civil society interacts with international organisations does not mean that it is influential in determining policy outcomes. Yet, civil society can expose these organisations to public scrutiny and can force them to engage with certain issues that they would otherwise have ignored: it helps to create a public sphere in which the policies of international institutions are scrutinised and through which citizens' concerns can be brought to bear in decision-making

[86] P Nanz and J Steffek, 'Global Governance, Participation and the Public Sphere' in Held and König-Archibugi, n 3 above.

within these institutions. Thus, non-governmental actors play a dual role: they facilitate the dissemination of information and critical comment,[87] and they formulate political concerns and bring them into world trade policy.

The possibility for civil society to bring topics onto the official agenda of international organisations is still limited in practice. At the moment, the WTO invites the submission of papers from NGOs and grants a limited possibility of presenting issues at ministerial meetings. In its everyday business, however, the concerns of non-governmental and other inter-governmental organisations are not represented.[88] Symposia on trade-related issues that bring a wide variety of civil society actors in contact with WTO officials are a relatively new instrument for tackling this deficit.[89] In addition there is the possibility for non-state actors to present unsolicited statements as so-called '*amicus curiae* briefs' in the dispute settlement procedure. However, whether these will be considered or not still lies at the discretion of the panel.[90] The emerging picture is not very optimistic, but may point to transformative possibilities.

The idea of the democratic legitimacy of transnational governance can be summed up as follows: fostering extended deliberation among affected citizens (or their representatives) over the nature of problems and the best way to solve them, participatory arenas produce a pool of (transnationally) shared arguments which—often disseminated by civil society organisations—contribute to the emergence of a wider public sphere, in which the decisions of international organisations are exposed to 'transnational' public scrutiny. Ultimately, transnational governance arrangements should become sites of public deliberation between social actors (for example, government officials from different national communities, scientific experts and the 'critical voices' of minority expertise, NGOs, advocacy and economic interest groups, etc) that generate democratic legitimation in a heterogeneous global polity.

IV. CONCLUSION

The aim of this chapter was to analyse the democratic legitimacy of transnational trade governance from the perspective of political theory. First, I

[87] A prominent example for respected and widely used independent information on trade is the newsletter 'Bridges', published by the International Center for Trade and Sustainable Development (ICTSD); see http://www.ictsd.org. See, also, the newsletter 'Harmonisation Alert' published by the 'Public Citizen' organisation.

[88] For example, not even the representatives of international governmental organisations such as the UN Environment Programme are admitted as observers to the meetings of the WTO Committee on Trade and Environment.

[89] A symposium on the 'Doha Development Agenda' took place from 29 April to 1 May 2002 in Geneva; see, also, http://www.wto.org/english/tratop_e/dda_e/symp_devagenda_prog_02_e.htm.

[90] See the Appellate Body's report on *amicus curiae* briefs of 8 Nov 2000, and WTO Doc. WT/DS135/9 on the procedure of *amicus* brief submission.

endeavoured to clarify the different strands of the debate about the *normative* legitimacy of international rule-making. Thereby, I focused on the three main sources of legitimacy—their problem-solving capacity or efficiency, the rule of law, and democracy—and the inter-relationships between them. In particular, I pointed to the fact that the new phenomena of global legalisation simultaneously contain latent constitutional norms which expose transnational rule-making to claims of legitimacy. Secondly, I analysed the contemporary debate about international constitutionalism which seems, at first sight, to be caught between the 'libertarian' and '*demos*' viewpoints. My intention was to show how a constitutionalism based on deliberative theories of democracy may overcome the resulting false alternatives between global markets and national democracy. Thirdly, I outlined some elements of a deliberative democratic constitutionalism as a way of rephrasing the legitimacy *problématique* of transnational governance. Thereby, I pointed to open questions for further exploration concerning the involvement of private actors, and the inter-relationship between jurisdictional competences and political decision-making processes, and, ultimately, the broader transnational public sphere. This chapter was meant to offer only a preliminary starting point for addressing these issues. I suggested that principle-guided deliberative problem-solving in transnational arenas puts 'justificatory burdens' on private actors: They have to justify their positions in the light of substantive (public) values and are held accountable for the success of constitutional interpretation and balancing. I also suggested that, although the involvement of the judiciary in evaluating the right balance between economic freedoms and social policies has increased considerably, principled constitutional balancing may be extended to 'political' regulatory arenas of law-making. From the perspective of deliberative democratic constitutionalism, the democratic legitimacy of governance arrangements is to be assessed in terms of transparency, access to deliberation, responsiveness and inclusion. Further empirical research remains necessary in order to answer the question whether the WTO has developed a form of judicial monitoring that strengthens the procedural requirements for democratic participation in its committees. I finally suggested that, at international level, the public sphere—understood as a pluralistic social realm of a variety of sometimes overlapping or contending (often sectorial) publics engaged in transnational dialogue—should provide a political arena with actors and deliberative processes that can further democratise global governance practice.

Section I.2

Judicialisation: Empirical Inquiries and Constitutional Concerns

3

Dispute Settlement Under GATT and WTO: An Empirical Enquiry into a Regime Change

ACHIM HELMEDACH AND BERNHARD ZANGL

I. INTRODUCTION[1]

THE RULE OF law can be considered as one of the crucial dimensions of modern statehood. Nevertheless, until recently, even in the states in the OECD world the rule of law was only semi-institutionalised; state actors were only *internally* bound by domestic law, while *externally* state sovereignty implied that state actors were not equally bound by international law.[2] While, internally, the judiciary provided the institutional safeguard forcing state actors to comply with domestic legal obligations, externally, there was no corresponding judiciary to ensure that state actors complied with international legal obligations. Thus, internationally, the defining principle of the rule of law, according to which all actors are equal before the law, was not assured. Nor was it guaranteed that like cases of breaches of international law would be treated alike. On the contrary, the more powerful actors were able to do as they pleased, while the less powerful actors had to suffer what they must.[3]

Today, there are indications, however, that, due to the emergence of issue area-specific international judiciaries, the domestic rule of law is

[1] This chapter presents preliminary results from a current research project on 'The Judicialisation of International Dispute Settlement' within the context of the Bremen Research Centre on 'Transformations of the State'. The analytical framework presented here is a joint result of the project as a whole, which involved Aletta Mondré, Gerald Neubauer and Michael Zürn in addition to the authors. We thank Vicki May who substantially improved our limited English verbal skills.

[2] See SD Krasner, *Sovereignty. Organized Hypocrisy* (Princeton, NJ: Princeton UP, 1999).

[3] See HJ Morgenthau, *Politics among Nations. The Struggle for Power and Peace* (New York: A Knopf, 1948). For a helpful discussion of how to define 'rule of law', see A Watts, 'The Importance of International Law' in M Byers (ed), *The Role of Law in International Politics. Essays in International Relations and International Law* (Oxford: OUP, 2000), A Watts, 'The International Rule of Law', (1993)36 *German Yearbook of International Law* 15.

increasingly complemented by an international rule of law.[4] In fact, judicialised procedures designed to determine whether state actors comply with their international commitments are on the rise.[5] The diplomatic dispute settlement procedures of the General Agreement on Tariffs and Trade (GATT) have been replaced within the framework of the World Trade Organisation (WTO) by a judicial dispute settlement procedure which is authorised to condemn, and if necessary punish, states not meeting their obligations. Recently, an International Criminal Court was created which is empowered to adjudicate upon war crimes committed by state, as well as non-state, actors. The UN Security Council now regularly censures actors who threaten international peace and authorises or mandates sanctions against them. The rulings of the European Court of Justice and the European Court of Human Rights enjoy both direct effect and supremacy in domestic legal orders. Newly established international environmental regimes such as the ozone regime and the climate regime have various built-in, quasi-judicial procedures designed to cope with non-compliance, and an International Tribunal for the Law of the Sea has also been established.[6]

To many, the *judicialisation* of these *adjudication procedures* signifies an emerging international rule of law.[7] Indeed, some see the judicialisation of international adjudication procedures as a *necessary condition* for an emergent international rule of law. While traditional diplomatic adjudication procedures can hardly ensure that like breaches of international law are treated alike, judicialised adjudication procedures at least have the potential for similar breaches to be treated similarly.[8] However, the judicialisation of adjudication procedures can hardly be conceived of as a *sufficient condition* for an international rule of law.[9] An international rule of law could hardly be acknowledged as such if judicialised adjudication procedures were widely ignored. The judicialisation of adjudication procedures cannot, therefore, be regarded as an indication of an emerging international rule of

[4] See Watts 1993 and 2000, both n 3 above.

[5] See CPR Romano, 'The Proliferation of International Judicial Bodies. The Pieces of a Puzzle' (1999) 31 *New York University Journal of International Law and Politics* 709; RO Keohane, A Moravcsik and A-M Slaughter, 'Legalised Dispute Resolution: Interstate and Transnational' (2000) 54 *International Organisation* 457.

[6] See B Zangl and M Zürn, 'Internationale Verrechtlichung—Ursachen und Konsequenzen' in B Zangl and M Zürn (eds), *Verrechtlichung—Baustein für Global Governance?* (Bonn: Dietz-Verlag, 2004).

[7] See Keohane, Moravcsik and Slaughter, n 5 above; see, also, A Stone Sweet, *Governing with Judges, Constitutional Politics in Europe* (Oxford: OUP, 2000). For an overview of the discussion about so-called legalisation in international politics, see M List and B Zangl, 'Verrechtlichung internationaler Politik' in G Hellmann, KD Wolf and M Zürn (eds), *Die neuen Internationalen Beziehungen. Forschungsstand und Perspektiven in Deutschland* (Baden-Baden: Nomos, 2003), 361; K Raustiala and A-M Slaughter, 'International Law, International Relations and Compliance' in W Carlsnaes, T Risse and B Simmons (eds), *Handbook of International Relations* (London: Sage, 2002).

[8] See Keohane, Moravcsik and Slaughter, n 5 above; Romano, n 5 above.

[9] See Watts 1993 and 2000, both n 3 above.

law unless at least one additional condition is met: in practice, disputes over breaches of international law have to be settled in line with the relevant adjudication procedures. The formal judicialisation of dispute settlement *procedures* has to go hand in hand with a corresponding dispute settlement *practice*.[10]

It is far from evident, however, that the judicialisation of adjudication procedures alone will transform the practice of international dispute settlement. For example, the International Court of Justice (ICJ), established as early as the 1940s by the international community, constituted a remarkably judicialised adjudication procedure. But since the Court was rarely invoked and its rulings often ignored, it hardly transformed international dispute settlement practice. The same could even be argued with respect to the early European Court of Justice (ECJ). Although it was created in the 1950s and given all the competences of a judicial adjudication procedure, it was not until the 1970s that it was regularly used, its rulings accepted, and, hence, a European rule of law institutionalised.[11]

Hence, it is an entirely empirical question whether—and if so where and when—judicialised adjudication procedures can transform the practice of dispute settlement, thereby institutionalising an international rule of law. In order to provide answers to this question, our research project 'Judicialisation of International Dispute Settlement', within the context of the Bremen Research Centre on 'Transformations of the State', employs a twofold comparison. First, we compare, within one and the same issue area, dispute settlement practice in the 1970s and 1980s with that of the 1990s and 2000s. This allows us to establish whether the practice of dispute settlement has changed over time. Secondly, we compare dispute settlement across five issue areas, namely, international trade (WTO), international security (SC), international labour standards (ILO), international environmental policies (CITES) and international human rights (UNHRC). This gives us the opportunity to analyse whether the practice of dispute settlement depends on the issue area at hand.

In this chapter, however, we will focus on dispute settlement within the international trade regime of the GATT/WTO. We will present some preliminary evidence that, in the context of international trade, the judicialisation of adjudication procedures has led to a corresponding dispute settlement practice. The chapter will proceed in four steps. In a first step, we show that the GATT/WTO dispute settlement procedures have, indeed, become judicialised over the past two decades. In a second step, we discuss some conceptual issues concerning how to investigate adequately whether the judicialisation of GATT/WTO procedures has led to changing patterns

[10] See B Zangl, 'Is there an Emerging International Rule of Law?' in S Leibfried and M Zürn (eds), *Transformations of the State* (Cambridge: CUP, 2005).

[11] See K Alter, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe* (Oxford: OUP, 2001).

of dispute settlement. In a third step, we present some preliminary evidence that, within GATT/WTO, the practice of dispute settlement has changed. Finally, we discuss whether these changes can be understood as an indication of the emergence of an international rule of law with respect to international trade.

II. JUDICIALISATION OF GATT/WTO DISPUTE SETTLEMENT PROCEDURES

It is now common knowledge that the GATT/WTO dispute settlement procedures have become judicialised over the past two decades.[12] The diplomatic dispute settlement procedures of the old GATT have been replaced by quasi-judicial dispute settlement procedures under the WTO, which provide the institutional basis for like breaches of GATT/WTO law to be treated alike, regardless of the power position of the actors involved, ie, regardless of their military or financial resources. If one placed a particular adjudication procedure on a scale ranging from 'diplomatic' to 'judicial', the following four institutional prerequisites would have to be taken into account:[13]

— Independence: the political independence of the relevant adjudication procedures is of prime importance.[14] If states are allowed to exert their influence on international adjudication procedures, powerful states will be able to use this to their advantage and less powerful states will suffer disadvantages;
— Jurisdiction: the compulsory jurisdiction of the relevant adjudication procedure is an equally important institutional prerequisite for a comparable treatment of comparable cases.[15] If jurisdiction is not made compulsory, powerful states can force less powerful states to

[12] The term 'judicialisation' remains fuzzy. On the one hand, it is used to describe a process, i.e., institutional changes through which a given dispute settlement procedure becomes more judicialised. On the other, it can describe the state of an institution that has reached a certain threshold and is therefore classified as a 'judicialised procedure'. In this chapter, we use the term in both senses.

[13] For similar criteria for distinguishing diplomatic and judicial adjudication procedures, see Keohane, Moravcsik and Slaughter, n 5 above; B. Zangl, 'Bringing Courts back in. Normdurchsetzung im GATT, in der WTO und der EG' (2003) 7 *Schweizerische Zeitschrift für Politikwissenschaft* 49; BV Yarbrough and RM Yarbrough, 'Dispute Settlement in International Trade: Regionalism and Procedural Coordination' in ED Mansfield and HV Milner (eds), *The Political Economy of Regionalism* (New York: Columbia UP, 1997); J McCall Smith, 'The Politics of Dispute Settlement Design. Explaining Legalism in Regional Trade Pacts' (2000) 54 *International Organisation* 137; Zangl and Zürn, n 6 above

[14] See Keohane, Moravcsik and Slaughter, n 5 above; LR Helfer and A-M Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273.

[15] See Morgenthau, n 3 above. For a helpful discussion of how to define 'rule of law', see Watts 2000, n 3 above; McCall Smith, n 13 above.

accept the procedures, while they retain the freedom to block procedures directed against themselves;[16]

— Authority to sanction: the authority to employ sanctions if states do not comply with rulings made under the adjudication procedures can be regarded as another institutional prerequisite.[17] If rulings arising out of agreed adjudication procedures cannot be enforced, powerful states in particular, and, to a lesser extent, less powerful states might easily ignore them;

— Accessibility: an additional institutional requirement for the comparable treatment of comparable cases is that it is not just states which are given access to adjudication procedures.[18] Since states tend to refrain from complaining about the violations of international legal rules by other states, only some violations—those by the less powerful states—lead to legal procedures, while others—especially those by the powerful states—do not. Therefore, non-state actors should also have access to international adjudication procedures.

In terms of three of these four conditions, the dispute settlement procedures of the international trade regime under GATT/WTO can be said to have been judicialised over the past two decades.

Their political *independence* has improved dramatically. Originally, the political independence of GATT dispute settlement procedures was rather limited.[19] In the late 1940s and early 1950s, the so-called working parties were assigned the task of deciding whether or not states violated their GATT obligations. Since these working parties were always made up of state representatives, and selected on a case-by-case basis by the states involved, their independence was rather weak.[20] This, however, changed in the late 1950s when the so-called panels took over the task of adjudicating on disputes about alleged violations of GATT obligations.[21] Even though the three panellists that made up a panel had to be selected on a case-by-case basis by the states involved, these panels were politically more independent than working parties. While the panel members were still state representatives, they did, nevertheless, have to act as GATT experts in their

[16] See B Zangl and M Zürn, 'Make Law, Not War: Internationale Verrechtlichung als Baustein für Global Governance' in Zangl and Zürn (eds), n 6 above.

[17] See Morgenthau, n 3 above; see, also, Zangl and Zürn, n 6 above.

[18] See Keohane, Moravcsik and Slaughter, n 5 above; see, also, Zangl, n 13 above.

[19] See JH Jackson, 'Die Rolle und die Effektivität des Streitbeilegungsverfahrens der WTO' in B Zangl and M Zürn (eds), *Verrechtlichung—Baustein für Global Governance? (EINE Welt-Band der Stiftung Entwicklung und Frieden)*, (Bonn: Dietz-Verlag, 2004); see, also, E-U Petersmann, *The GATT/WTO Dispute Settlement System. International Law, International Organizations and Dispute Settlement* (The Hague: Kluwer Law International, 1997), at 177–98.

[20] See R Hudec, *Enforcing International Trade Law. The Evolution of the Modern GATT Legal System* (Salem, NH: Butterworth Legal Publishers, 1993).

[21] See Petersmann, n 19 above, at 66–91; see, also, Jackson, n 19 above.

individual capacities, rather than in accordance with the instructions of their states.[22]

In the 1990s, after the WTO had been established, the political independence of the dispute settlement procedure was consolidated. While the composition of the panels did not change, a remarkably independent Appellate Body was established to revise panel reports in cases of appeal. Unlike the panels, the Appellate Body is composed of legal experts who are as independent as the judges of ordinary law courts. Instead of being selected by the disputing states, the seven judges of the Appellate Body are now elected to deal with all disputes that may arise during their four-year term, which gives them a significant amount of political independence from the states to which they belong. This political independence, in turn, translates into an increasing independence of the WTO dispute settlement system as a whole, because the panels now have to take into account that their reports may be revised by the independent judges of the Appellate Body.[23]

Beyond their independence, the *jurisdiction* of the dispute settlement procedures of GATT/WTO was also strengthened. Throughout the 1970s and 1980s, the jurisdiction of GATT panels was not compulsory.[24] The establishment of a panel to adjudicate on a dispute required a GATT Council decision, which could only be reached through the consensus of all member states. It was thus possible for the defendant state to block the establishment of a panel. This, however, changed in the late 1980s and early 1990s, when plaintiff states were gradually given the right to have their allegations heard by a panel.[25] Nevertheless, the adoption of a panel report still required the consensus of the GATT Council. Hence, defendant states could still easily block any decision made against them.[26]

This was changed in the mid-1990s when the WTO came into existence, after which neither the establishment of panels nor the adoption of panel reports required a consensual decision. The newly established Dispute Settlement Body (DSB) may only reject panel reports by consensus. Therefore, the adoption of panel reports can no longer be blocked by a single state accused of not observing its obligations.[27] The only possibility remaining for defendant states now is to invoke the Appellate Body. Again, however, its reports can be rejected only by a unanimous decision of the DSB.

[22] See Ibid.

[23] See Petersmann, n 19 above, at 177–98; A Stone Sweet, 'The New GATT. Dispute Resolution and the Judicialisation of the Trade Regime' in ML Volcansek (ed), *Law above Nations. Supranational Courts and the Legalisation of Politics*, (Gainesville, UP of Florida, 1997).

[24] See Hudec, n 20 above.

[25] See Ibid; Petersmann, n 19 above, at 66–91.

[26] See Jackson, n 19 above; Hudec, n 20 above.

[27] See JH Jackson, *The World Trading System. Law and Policy of International Economic Relations* (Cambridge, Mass: MIT Press, 1997) at 107–137; Stone Sweet, n 23 above.

Because the adoption of either report has, in practice, become automatic, the jurisdiction of WTO dispute settlement procedures is now mandatory.[28]

Most remarkably, the authority of the GATT/WTO dispute settlement system to employ *sanctions* was also strengthened. Under the GATT dispute settlement procedures, decisions over sanctions against states that were unwilling to comply with panel reports were hardly conceivable. Clearly, the aggrieved states could request the authorisation of sanctions against states that did not comply with GATT panel reports. But, as with the creation of panels and the adoption of panel reports, decisions to authorise sanctions required the unanimity of the GATT Council. Thus, sanctions to enforce panel reports could be blocked by any state—even the state whose non-compliant behaviour was the subject of the report in question. Consequently, under GATT, threats to enforce panel reports were not credible.

The WTO dispute settlement procedures brought substantial improvements, however. The WTO is still not able to implement sanctions against states that disregard panel or Appellate Body reports, but decisions to authorise aggrieved states to employ sanctions can be made without the consent of the defendant state. If a defendant does not comply with a WTO ruling—and is not prepared to offer adequate compensation—the complainant can request the Dispute Settlement Body to authorise sanctions. This authorisation is then automatically granted, unless the DSB unanimously decides otherwise. The defendant can no longer block the sanctions, but does have the right to invoke the original dispute settlement panel to decide on the amount of sanctions.

The fourth of our institutional prerequisites, namely, the *accessibility* of the GATT/WTO dispute settlement system, has hardly changed. The dispute settlement procedures still provide access only for states. Only states may file complaints in order to demand consultations with the states they accuse of violating their international obligations under GATT/WTO. Furthermore, if these consultations fail, only states can request the establishment of a panel to adjudicate on whether GATT obligations have been violated.[29] Beyond the access already granted to them under GATT, private actors may 'participate' in the WTO dispute settlement procedures only by means of the so-called *amicus curiae* briefs, in which they provide information that should be taken into consideration by the Appellate Body.[30]

In summary, the degree of judicialisation of the dispute settlement procedures under the GATT/WTO international trade regime has been

[28] See Petersmann, n 19 above, at 177–98; Jackson, n 27 above, at 107–37; Jackson, n 19 above.

[29] See Hudec, n 20 above; Petersmann, n 19 above.

[30] See J Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement* (London: Cameron May, 2002), at 328–31; see, also, S Ohloff, 'Beteiligung von Verbänden und Unternehmen im WTO Streitbeilegungsverfahren. Das Shrimps-Turtle-Verfahren als Wendepunkt?' [1999] *Europäische Zeitschrift für Wirtschaftsrecht* 139.

Table 1: The Judicialisation of GATT/WTO Dispute Settlement Procedures

	GATT procedures	WTO procedures
Independence	*Low* (panel members are mostly representatives of third states)	*High* (panel members are mostly neutral experts; Appellate Body members are independent judges)
Jurisdiction	*Very low* (establishment of panels and panel reports can be blocked by defendants)	*High* (neither establishment of panels nor reports of panels and the Appellate Body can be blocked)
Authority to Sanction	*Low* (authorisation of sanctions can be blocked by defendants)	*High* (authorisation of sanctions cannot be blocked by defendants)
Accessibility	*Very low* (only states can ask for panels)	*Very low* (only states can ask for panels)

remarkably enhanced, their political independence has been consolidated, their jurisdiction is now compulsory, and their authority to sanction has been strengthened. Therefore, the institutional requirements for comparable treatment of comparable violations of GATT/WTO law are, to a larger extent, met today far more than they were two decades ago.

III. GATT/WTO DISPUTE SETTLEMENT IN PRACTICE—CONCEPTUAL REMARKS

The judicialisation of dispute settlement procedures under the international trade regime of GATT/WTO is, however, merely a prerequisite for the emergence of an international rule of law with respect to trade. If, in practice, conflicting parties do not use the dispute settlement procedures, one cannot meaningfully speak of an emerging international rule of law. Clearly, it is a common feature of legal orders which provide a rule of law for the conflicting parties to seek settlements out of court. Consequently, the relevant dispute settlement procedures do not have to be invoked in every single instance of a violation of GATT/WTO obligations. However, for the rule of law within a legal order to be effective, the conflicting parties may not take the law into their own hands. We thus distinguish three types of dispute settlement behaviour:

— *Following:* a party may conform to the procedures. This entails its willingness to settle the dispute in question as envisaged by the

relevant dispute settlement procedure. The latest *Steel* case between the US and the EU is a good example of a dispute in which both parties strictly followed the WTO dispute settlement procedures.

— *Avoiding:* a party may seek a negotiated settlement outside the relevant procedure by legal means. As long as they do not resort to illegal means, disputing parties are often encouraged to settle their disputes outside the relevant dispute settlement procedures. In the 1980s, the *Airbus* case between the US and the EU, for instance, was resolved by a bilaterally negotiated settlement.
— *Disregarding:* a party may also choose to disregard or manipulate the relevant dispute settlement procedure. In such cases, at least one of the conflicting parties employs illegal measures such as threats of illegal sanctions in order to force the opposing party to compromise. In the 1970s, in the so-called *Citrus* case, the US applied unilateral sanctions in order to force the EU to give in.

In order to analyse the emergence of an international rule of law under GATT/WTO, we have to examine whether conflicting parties do, in fact, increasingly observe the relevant dispute settlement procedures; and, at the same time, whether the number of cases in which the relevant procedures are ignored has subsided. In doing so, however, we have to take into consideration the fact that during a dispute, conflicting parties typically switch back and forth between the three modes of behaviour. We therefore distinguish four phases that every dispute—not only within the GATT/WTO context—might pass through:

— First, a *complaints phase*, in which one party publicly accuses another party of violating GATT/WTO legal obligations;
— Secondly, an *adjudication phase*, in which at least one of the conflicting parties seeks a ruling under the GATT/WTO dispute settlement procedure;
— Thirdly, an *implementation phase*, in which the conflicting parties have to implement the ruling;
— Fourthly, an *enforcement phase*, in which sanctions may be employed because one of the conflicting parties ignored the ruling.

Clearly, there is a lively debate on the development of dispute settlement under GATT/WTO. For each phase, however, the available evidence that the judicialisation of the GATT/WTO dispute settlement procedures has led to a changed dispute settlement practice is somewhat ambivalent. With respect to the *complaints phase*, for example, one can point out that with 311 grievances registered since the mid-1990s, more disputes were brought under the new WTO dispute settlement procedures in that decade than in

almost five decades under the old GATT dispute settlement system.[31] From the 1950s to the early 1990s, the GATT dispute settlement procedures were invoked in only 207 instances; that is: 53 in the 1950s, only seven and 32 in the 1960s and 1970s respectively, and 115 throughout the 1980s.[32] This evidence is, however, less impressive if we consider that membership of GATT/WTO has increased from about 80 members in the 1970s and around 95 in the 1980s to more than 125 since the mid-1990s.[33] And it is even less convincing if we also take into account that global trade has substantively increased from an annual average volume of around US' 2,000 billion in the 1970s and US$ 3,500 billion in the 1980s respectively to an annual average of US$ 6,500 billion in the 1990s.[34] One might therefore plausibly argue that the increase in dispute settlement proceedings can be explained by the increased WTO membership as well as by the rise in trade volume covered by the WTO.

Evidence of changes in dispute settlement practice in terms of *adjudication* is also ambivalent. However, one can argue that the WTO dispute settlement procedures operate more effectively than formerly under the GATT. Since the mid-1990s—in less than a decade—more than 100 panels have been established under the WTO, and 80 panel reports have been issued.[35] By comparison, under the old GATT dispute settlement procedures, only 88 panel reports were issued over a period of four decades: 21 rulings were made in the 1950s, five in the 1960s, 15 in the 1970s, and 47 in the 1980s. Hence, while an annual average of two reports was issued under GATT, that figure jumped to about 10 under the WTO.[36] However, one can also argue that this evidence is unimpressive, given that the number of disputes brought to the attention of the GATT/WTO dispute settlement panels has also increased. In fact, the percentage of disputes in which a panel report was issued decreased from 38 from the late 1940s to the 1980s under the GATT, to about 33 in the late 1990s under the WTO.[37]

Equally, with respect to the *implementation phase*, there is no unequivocal evidence that dispute settlement practice has changed. One can emphasise that, under the WTO, most adverse rulings have been respected

[31] See K Leitner and S Lester, 'WTO Dispute Settlement 1995–2003. A Statistical Analysis' (2004) 7 *Journal of International Economic Law* 169; Jackson, n 19 above.

[32] See Hudec, n 20 above, at 287.

[33] See ML Busch and E Reinhardt, 'Testing International Trade Law. Empirical Studies of GATT/WTO Dispute Settlement' in DLM Kennedy and JD Southwick (eds), *The Political Economy of International Trade Law. Essays in Honour of Rubert E. Hudec* (Cambridge: CUP, 2002), at 464.

[34] As a percentage of the global GDP, global trade grew from around 30% in the 1970s and above 35% in the 1980s to more than 40% in the 1990s. See The World Bank, *World Development Indicators 2004* (Washington, DC: The World Bank, 2004).

[35] See Leitner and Lester, n 31 above, at 175.

[36] See Hudec, n 20 above, at 287.

[37] See Busch and Reinhardt, n 33 above, at 468.

by the defending parties. Indeed, in only 18 out of 81 cases did the respective complaining party protest to the WTO about the defendant's non-observance of an adverse ruling.[38] Even powerful parties such as the US and the EU complied with most rulings. Since the mid-1990s, 21 out of the 32 disputes between the US and the EU were concluded with full concessions by the defending party, three with partial concessions and only eight without concessions. Under the GATT, by comparison, from the 1960s to the early 1990s, full concessions by either the US or the EU were made in only 21 out of 53 transatlantic disputes; in 14 disputes, partial concessions were made, and 18 disputes ended without any concessions.[39] However, when the comparison between GATT and WTO disputes is narrowed down to similar cases, this evidence becomes weaker. For example, if one excludes from the WTO sample the disputes over trade issues that were not covered under the old GATT, the compliance records look fairly similar. And if one focuses only on high-stakes disputes, no difference in the compliance records of GATT and WTO can be found.[40]

Evidence of the changing practice of dispute settlement is also unclear when it comes to the *enforcement phase*. One can, for instance, point to the fact that because, under the WTO, complaining parties can obtain authorisation for sanctions it is possible to keep disputes within the WTO dispute settlement system when the defending party is not prepared to comply with an adverse ruling. For instance, the US in the *Banana* dispute and the EU in the *Foreign Sales Corporation* disputes were authorised to employ sanctions because the US and the EU respectively were not prepared to comply with the relevant WTO rulings. By contrast, under the old GATT dispute settlement system, it was very difficult to obtain authorisation for sanctions, so that aggrieved parties often employed illegal sanctions against defendants who were not willing to comply with panel reports. The famous *Citrus Pasta* dispute between the US and the EU is a case in point. However, one can also argue that, in some disputes in the WTO context, the aggrieved parties were hesitant to employ the authorised sanctions, knowing that, due to the sometimes enormous number of sanctions, this would bring the defending party into trouble. The *Foreign Sales Corporation* dispute between the EU and the US is a well-known case in point.

[38] See Leitner and Lester , n 31 above, at 178.

[39] See ML Busch and E Reinhardt, 'Transatlantic Trade Conflicts and GATT/WTO Dispute Settlement', Paper presented at the Conference on Dispute Prevention and Dispute Settlement in the Transatlantic Partnership at the European University Institute, Florence, Italy, 3–4 May 2002. More remarkably, these powerful states not only comply when WTO rulings are backed by equally powerful states, but also when less powerful states complain about their trade practices. The fact that, e.g., a state like Costa Rica was able to win a dispute within the WTO against a state like the US and induce its compliance with the ruling shows the remarkable acceptance that the WTO dispute settlement procedure enjoys: see Jackson, n 19 above.

[40] See Busch and Reinhardt, n 39 above, at 8–17.

Overall, there is insufficient evidence to establish whether it is as a result of the reform of the GATT/WTO dispute settlement procedures that the practice of dispute settlement has changed. From our point of view, an answer can be found only if we accept that the *absolute* numbers of disputes in which the GATT/WTO procedures were invoked, panels established, panel reports issued, rulings respected and sanctions authorised are an inadequate indicator of a change in dispute settlement practice; instead, *relative* numbers have to be analysed in order to understand the potential changes in the practices of GATT/WTO dispute settlement. However, the figures relative to the disputes that were brought to the attention of GATT/WTO can hardly be satisfactory, as they neglect the numerous disputes in which the GATT/WTO dispute settlement system was never actually invoked. In order to obtain an accurate picture of GATT/WTO dispute settlement, one should rely on numbers relative to a (representative) sample of GATT/WTO-related disputes irrespective of whether or not GATT/WTO was invoked.

This approach is absolutely imperative in order to obtain a precise picture with regard to the use of dispute settlement procedures in the complaints phase. This is because the real issue in this particular phase is actually whether the number of disputes brought before the GATT/WTO has increased relative to the total number of GATT/WTO-related disputes. Clearly, one could estimate the total number of GATT/WTO-related disputes on the basis of the number of GATT/WTO member states and trade volume. This, however, would be only a very rough estimate, as it is almost impossible to calculate the number of disputes on the basis of the number of states parties or global trade volume. Moreover, other factors, such as power structures between member states or their industrial structure might affect the total number of disputes. It would, therefore, seem to be more useful to draw a representative sample of the total number of disputes. Such a sample would not only enable us to calculate in how many disputes the dispute settlement procedures were invoked, i.e., a *complaints rate*, but it would also allow us to investigate how many of the remaining disputes were dealt with by either avoiding or not observing the correct procedure.

In order to obtain an accurate picture of the GATT/WTO dispute settlement during the *adjudication phase*, a sample of all GATT/WTO-related disputes would also be helpful. Selecting only disputes that were registered with the Dispute Settlement Body clearly creates a selection bias the effects of which are difficult to assess. It may well be that only the toughest disputes are brought before the Dispute Settlement Body, but it would be equally plausible if only the disputes that are easy to clarify were dealt with. However, one could also argue that only the disputes in the middle ground are brought before the GATT/WTO. And since the resulting bias may have changed with the introduction of the new procedures, the calculation of an *adjudication rate*, i.e., the rate of disputes in which a panel

was established and a ruling passed, can be misleading. A sample of all disputes, regardless of whether or not the dispute settlement procedures were invoked, would appear to be more convincing, in particular, because it is on the basis of such a sample that one can also calculate how often, relatively speaking, disputes were settled outside the GATT/WTO procedures and how often the GATT/WTO procedures were disregarded.

Focusing on a sample of all GATT/WTO-related disputes should also be helpful to obtain an accurate assessment of dispute settlement in the *implementation phase*. This is—again—partly to avoid the abovementioned selection bias, which is created when one focuses only on the disputes that were dealt with through the dispute settlement system. Moreover, an investigation of all GATT/WTO-related disputes also seems helpful because it enables us to determine whether the introduction of the new dispute settlement procedures has improved compliance with GATT/WTO obligations in general, i.e., whether it has led to a better *compliance rate*. It would not be possible to establish this by simply investigating whether conflicting parties respect adverse rulings made under the dispute settlement system. Such an analysis would ignore the fact that an effective dispute settlement system may lead to anticipatory compliance. Instead, an analysis of all disputes should allow us to observe these anticipatory effects. We expect them, for example, to indicate a relative increase in negotiated settlements, while the relative numbers of dispute settlement strategies that disregard existing procedures should decrease.

Focusing on a sample of all GATT/WTO-related disputes might be also helpful in obtaining a true representation of the *enforcement phase*. Clearly, the main issue here is whether, if a ruling is not respected by the defending party, the aggrieved party employs authorised, and therefore legal, sanctions or non-authorised, illegal sanctions. It is almost a truism that the WTO fares better on this count than the old GATT, because obtaining authorisation for sanctions is much easier under the WTO than it was under the old GATT. The question then arises, however, whether it really makes a difference for the practice of dispute settlement whether or not sanctions have been authorised. Indeed, one could conjecture that it makes a difference with respect to the potential counter-sanctions which the targeted party may employ: the propensity of parties facing non-authorised sanctions to react with counter-sanctions could be stronger than the propensity of those suffering authorised sanctions; after all, counter-sanctions are easier to justify in the former case than in the latter. In order to investigate whether this holds true in practice, one should study not only the sanctions and potential counter-sanctions in the disputes dealt with under the GATT/WTO dispute settlement procedures, but also the sanctions and potential counter-sanctions in disputes in which the respective dispute settlement bodies were not involved.

IV. GATT/WTO DISPUTE SETTLEMENT IN PRACTICE: PRELIMINARY EVIDENCE

There are good reasons for assuming that transformations in dispute settlement in international trade can be adequately traced only by focusing on a (representative) sample of GATT/WTO-related disputes regardless of whether or not the relevant dispute settlement procedures were invoked. However, the question immediately arises as to how such a sample should be drawn. In our project, we decided to proceed by examining public complaints of GATT/WTO parties about other parties' violations of GATT/WTO law as GATT/WTO-related disputes. We undertook in-depth case-studies to investigate—for each and every phase in each and every dispute within our sample—whether the conflicting parties followed, avoided or disregarded the GATT/WTO dispute settlement procedure. To keep the sample manageable, we decided to limit our sample to: (1) complaints about allegedly illegal import restrictions on agricultural products and foodstuffs; (2) complaints that were made with regard to the GATT between 1980 and 1985 and with regard to the WTO between 1995 and 2000; and (3) complaints that involve the US either as complainant or as defendant. Our reasons for narrowing down the sample as we did are as follows:

— Our focus on complaints concerning import restrictions on agricultural products and foodstuffs is explained by our desire to draw comparable samples of disputes for the old GATT and the new WTO. It was imperative to select complaints concerning products that were already common under the old GATT and are still common under the WTO. For this reason, we decided to include only complaints that concern alleged GATT/WTO violations with regard to import restrictions on the aforementioned products. Agricultural produce and foodstuffs have been a major focus of the Tokyo and Uruguay rounds, resulting in more inclusive agreements as well as in a liberalisation of trade in these products. And although this economic sector now has less significance for the national economy of the OECD countries, protection remains a constant feature in world trade, and led to serious trade conflicts in the 1980s as well as in the 1990s.[41]

— Our concentration on complaints that were filed either between 1980 and 1985 or 1995 and 2000 is, again, due to the necessity to

[41] Moreover, the general framework of international trade in agricultural produce qualifies the observation that this issue is a hard case. Powerful interest groups, a frequent rhetorical conjunction of agricultural autarchy, national security and a public that is sceptical of modern agricultural production processes can hardly be ignored by national governments. It therefore comes as no surprise that some of the most fervent trade conflicts are about agriculture and foodstuffs (e.g., the long-lasting disputes on Bananas, Chicken or the 1980s Japanese–US trade war, which, to a large degree, was about the opening of the Japanese agricultural market).

have comparable samples of disputes for the GATT and the WTO. The two time-spans are comparable because they cover the periods after the trade negotiations during the Tokyo and Uruguay rounds. In both time-spans, therefore, states were, on the one hand, liberated from the restrictions that had been imposed on filing complaints against each other during the negotiations, while, on the other, there was no longer the additional incentive to file complaints in order to strengthen their own respective positions in the run-up to the negotiations.

— Our focus on complaints that were either made by or directed against the US also reflects our desire to draw comparable samples of disputes under the GATT and the WTO, respectively. Ultimately, the project will study disputes involving all OECD states, but, for this chapter, we decided to limit our analysis to the US. Nonetheless, the US presents a hard case, as, in general, powerful states appear to be less prone to surrendering their autonomy in dispute settlement, and are more inclined to defy existing dispute settlement procedures. If it can be demonstrated that a powerful state like the US is increasingly prepared to subordinate itself to international dispute settlement procedures and abstains from disregarding such procedures, it is most likely that the same will hold true for less powerful states.

In order to find, for both time-spans, grievances made by or directed against the US concerning import restrictions on agricultural products or foodstuffs that are allegedly illegal under GATT/WTO law, we initiated intensive newspaper research. To ensure that we obtained a wide array of disputes, especially involving the US and the most important trading blocs—Europe, North America and East Asia—we included the following newspapers and newsletters in our research: the *New York Times* and the *Wall Street Journal* for North America, *Agence Europe* for Europe, and the *Far Eastern Economic Review* for East Asia. In addition, we selected the *Financial Times* as a newspaper with a more global orientation but with a strong coverage of international trade issues, and *Agra Europe* as a 'newspaper' with a strong coverage of agricultural and foodstuff issues.[42]

[42] While we received a sample that ultimately served our needs, some potential problems could be identified: evidently, the case selection shows a heavy bias towards cases actually entering the dispute settlement system. While our sample contains trade disputes that crop up in the media before escalation and a formal GATT/WTO complaint, frequently disputes are reported only when the official complaint is filed with the WTO. Thus, it is likely that trade disputes do not appear automatically in our sources in a nascent or low-profile stage. This bias appears to be especially important for our research on the GATT phase.

In general, the media coverage on international trade appears to be more extensive today than it was 20 years ago. This means more space to report on minor conflicts, on early trade talks, etc. The picture remains the same for products other than agriculture and foodstuffs. The disputes reported on are always the prominent and severe ones (Japanese cars, steel, DISC, newspapers, and so on).

Table 2: Dispute Settlement in the Complaints Phase

	Following	Avoiding	Disregarding
GATT	2	4	3
	(22%)	(44%)	(33%)
WTO	23	4	0
	(85%)	(15%)	

Ultimately, we arrived at a sample of 36 disputes, nine of which were related to the old GATT and 27 of which took place in the WTO context. In 25 cases, the US acted as complainant; in 11 cases as defendant. For each of the 36 disputes, we undertook an in-depth case-study, taking into consideration each of the four phases that each dispute in our sample might run through,[43] in order to establish whether the disputing parties conformed to the GATT/WTO dispute settlement procedures in order to settle the dispute, whether they tried to avoid these procedures by settling the dispute out of court by legal means, or whether they disregarded the procedures and employed illegal means of dispute settlement.[44]

(1) In terms of the behaviour of the parties in the *complaints phase*, we found clear differences between the old GATT and the newly established WTO (see Table 2).[45] In only two out of the nine GATT cases (22 per cent) in our sample did both parties to the dispute strictly follow the dispute settlement procedure on regular terms. Only in the Nicaragua–US *Sugar* case and the US–Japanese dispute on certain agricultural products were the formal consultations stipulated in the GATT dispute settlement system adhered to, with both parties desisting from illegal threats to employ sanctions. In four instances (44 per cent), the parties avoided the procedure by entering into bilateral negotiations outside the GATT dispute settlement system. To cite an example, the US–Japanese disputes on citrus products and beef were never brought to the attention of the GATT dispute settlement system. From the very outset, the US and Japan tried to solve the disputes out of court. In three out of nine instances (33 per cent), however, one or both parties disregarded the GATT dispute settlement procedure during the complaints phase. In each of three US/EC cases, concerning citrus fruits, pasta and walnuts respectively, at least one party threatened to employ illegal sanctions if the other party was not prepared to

[43] The resulting 112 observations are summarised in Table 6.

[44] Case summaries for all cases (including non-US cases) will be completed in early 2006, and will then be available on request from the authors (in German only, unfortunately).

[45] The disputes were classified as follows: did the complaining party follow the procedure and request consultations with the defending party, i.e., did the first move to invoke the GATT/WTO dispute settlement system happen? Secondly, disputants can agree on bilateral consultations without invoking the GATT/WTO mechanism and by that avoid the procedure. Thirdly, we observed whether sanctions were threatened or actually applied, which is, of course, a sign of disregarding behaviour.

compromise: in the *Pasta*[46] and the *Walnuts* cases, such a threat was made without invoking the GATT dispute settlement procedure; in the dispute on preferential tariffs for citrus products from Mediterranean countries, the dispute settlement procedure was invoked and consultations were held, but since threats to employ non-authorised sanctions were made anyway, this behaviour had to be coded as disregarding the GATT dispute settlement procedures.

By contrast, the WTO dispute settlement procedure has been respected to a much greater degree from the initial complaint onwards. In our WTO sample, the dispute settlement procedure was invoked in 23 out of 27 cases (85 per cent). In comparison to the GATT, the percentage of disputes brought to the attention of the Dispute Settlement Body under the WTO has increased incredibly.[47] Even in the *Hormones* and the *Bananas* cases, which later turned out to be particularly difficult to solve, both parties to the disputes—i.e., the US and the EU—strictly followed the agreed procedures. In both cases, the US requested consultations without threatening to use unauthorised sanctions, and the EU respected its obligation to accept the American request for consultations without relying on threats of sanctions to prevent the US from taking these cases to the WTO. In only four cases (15 per cent) did the disputing parties abstain from using the WTO procedure in order to cope with disputes. One of these cases was a trade dispute on rice, which the US and Japan agreed to settle bilaterally without aid from the WTO. The most remarkable finding was that, in contrast to the disputes under GATT, member states of the WTO were less inclined to resort to threats to employ non-authorised sanctions. In fact, not in one single WTO case in our sample did the disputing parties resort to illegal threats to sanction.

To sum up, at least with regard to the complaints phase, our findings not only confirm that the WTO system is used more frequently, but also demonstrate that the WTO system prevents states from using non-authorised sanctions. Hence, taking the law into one's own hands is less widespread under the WTO than it was under the GATT.

(2) With regard to the *adjudication phase*, the difference between states' dispute settlement behaviour under the old GATT and under the WTO is

[46] Eventually, the disputes on citrus and pasta were settled together, but as, initially, these were clearly stand-alone disputes and only later became settled in a package deal, we handle them as two separate cases. It may also be of interest to note that with regard to the pasta case, we were interested only in the way the dispute on US countervailing measures was handled. The initial pasta dispute on EU subsidies is clearly outside our self-imposed restraint on 'import restrictions'.

[47] One might argue that presenting percentages for the 9 GATT cases is meaningless. But as it can be useful for the WTO cases to present such relative numbers, we do it for both at the same time, bearing in mind that the GATT figures should only be interpreted as preliminary evidence. It does appear, however, that the small number of cases for the GATT period confirms common sense knowledge on the performance of the old dispute settlement system.

Table 3 Dispute Settlement in the Adjudication Phase

	Following	Avoiding	Disregarding
GATT	4 (44%)	5 (55%)	0
WTO	11 (41%)	16 (59%)	0

less obvious than in the complaints phase (see Table 3).[48] In four out of the nine GATT cases in our sample, the aggrieved party not only requested consultations, but also demanded the establishment of a dispute settlement panel. In these four cases, all parties to the dispute strictly followed the GATT procedures. In the *Citrus* case as well as the EC/US dispute over the so-called Wine Equity Act, the Nicaraguan sugar dispute, and the US/Japanese agriculture case, the defending parties accepted the complainants' demand for the establishment of a panel, and neither the defending nor the complaining parties blocked the respective panel reports. Hence, in four out of the nine cases under the GATT, the disputes were concluded with the issue of panel reports. However, in the remaining five cases of our GATT sample of nine cases, the disputing parties tried to avoid the involvement of the GATT. For example, both the *Pasta* and the US/Japanese *Rice* cases were never brought to the attention of a GATT dispute settlement panel, as the US and the respective disputants preferred to try to solve the disputes bilaterally. However, not only in these but also in the other four cases in which the GATT procedures were not invoked, both parties desisted from employing illegal means such as unauthorised sanctions.[49] Hence, in none of the GATT cases in our sample did the parties openly disregard the GATT procedures during the adjudication phase.

However, within the WTO, the behavioural pattern of disputing parties is somewhat different. Certainly, the vast majority of the 23 cases in our sample entered into the dispute settlement procedure because the complaining parties requested the Dispute Settlement Body to establish a panel. In

[48] Again, it has to be clarified how the disputes have been interpreted. Conflicts that enter the dispute settlement procedure are frequently decided in two ways: either the parties follow the procedure, i.e., they present evidence to justify their respective positions and await panel or Appellate Body reports, or the parties avoid the procedure when they achieve a mutual agreement, be it in the consultation phase or later when panels have already been established. For both the 1980s and the 1990s, it seems to be highly unlikely that the parties disregard the adjudication procedure. Within the GATT, both parties had explicitly to agree on a third-party resolution, and by that they indirectly desisted from taking unilateral measures—at least temporarily. And, as already stated, the new WTO procedure gives good grounds for awaiting the actual decision as well.

[49] Clearly, this statement is based only on the information which is publicly available. What happens behind closed doors can hardly be assessed, but, in our view, it is highly likely that threats are expressed publicly in order to increase the pressure on the threatened administration.

11 of these 23 cases, the disputing parties conformed to the procedure so that a panel report—or, in appeal cases, an Appellate Body report—was issued. For example, in a dispute on South Korea's discriminatory tax treatment of domestic and imported alcoholic beverages, the US demanded a panel, which was subsequently established by the DSB. In this case, the panel (the opinion of which was confirmed by the Appellate Body) issued a report criticising South Korea for 'dissimilar taxation... applied in a manner so as to afford protection to domestic production.[50] However, in 12 of the 23 cases, the issuing of a report was avoided because the disputing parties were able to resolve the case through bilateral consultations. Combined with the four cases that never came before the WTO Dispute Settlement Body (these are the cases mentioned above that were resolved before completion of the complaints phase), this means that nearly 60 per cent of all WTO cases were settled out of court. In some cases, such as the dispute between the US and Romania on minimum import prices,[51] this happened before a panel had been established by the Dispute Settlement Body, while, in other cases, the parties agreed on a negotiated solution after a panel had already been established. For example, in a US case against Australia concerning the importation of salmonids, a mutually agreeable solution was found by the disputing parties after the establishment of a panel.[52] After bilateral consultations, Australia agreed to establish amendments to its quarantine policies. As with the disputes under GATT, none of the parties in our sample of WTO cases resorted to non-observance of the dispute settlement procedure.

In summary, during the adjudication phase, the differences between the GATT and WTO systems, in terms of settling disputes, are less than one might expect. Under both the GATT and the WTO, more than 50 per cent of the disputes in our sample were dealt with and, in fact, resolved outside the agreed dispute settlement procedures; and under both the GATT and the WTO, fewer than 50 per cent of the cases were actually decided within the respective dispute settlement procedures. Most remarkably, however, neither under the old GATT nor under the WTO did the disputing parties resort to the non-observance of procedures during the adjudication phase. Hence, during the adjudication phase under both the GATT and WTO the dispute settlement procedures prevented states from taking the law into their own hands.[53]

[50] WT/DS75/R.

[51] WT/DS/198/1.

[52] WTO DS21: *Australia—Measures concerning the importation of salmonids*.

[53] However, what the results do not show is the sometimes substantial time-lag before a solution is found. For example, the US undertook massive steps in the early 1980s to induce the opening of the Japanese rice market. It claimed that Japan's extensive embargo on foreign-produced rice infringed GATT rules. During the 1980s, this row was a central feature of US/Japanese trade talks and thus a source of the considerable tensions between these trading partners. However, it took until the end of the 1980s for them to agree to suspend this dispute

(3) The same cannot be said of the *implementation phase*.[54] However, in five out of the nine cases under GATT, the disputing parties followed the relevant panel report or negotiated a settlement. In the case concerning 12 agricultural products, Japan agreed to comply with a panel report that criticised its restrictions on those products,[55] and, in the *Pasta* case, the US implemented a settlement, agreed upon with the EU, to suspend its tariffs. In one case out of the nine disputes in our GATT sample, renewed talks were necessary before the dispute could be settled. In one lengthy dispute Japan agreed, in 1985, to enlarge its importation quota on citrus fruit; however, US officials alleged that Japanese administrative rulings were undermining the agreement.[56] Only in 1988 did the parties come to full agreement on how to resolve the dispute (the Beef/Citrus Agreement). More interestingly, in three cases in which panels had been established, the panel reports were disregarded by at least one of the disputing parties. These were *USA v EC*: *Tariff Treatment of Citrus Products from Certain Mediterranean Countries*; *Nicaragua v USA*: *Imports of Sugar*; and *EC v USA*: *Definition of Industry Concerning Wine and Grape Products*, when the respective defendant blocked the adoption of the report and continued to ignore its findings.[57]

In contrast, under the WTO, 21 out of the 26 cases which were either decided through reports or resolved by amicable settlement were implemented to the satisfaction of the disputing parties. In the *Australian Lamb*

and to include the rice question in the forthcoming more comprehensive talks on agriculture during the Uruguay round. In a similar vein, conflicts that actually entered the dispute settlement procedure may run for years before they are settled bilaterally. One such case was the abovementioned complaint by the US against Australia concerning salmonids. From the request for consultations in 1995, it took until November 2000 to resolve the issue. In our definition, no disregarding behaviour could be detected in these cases, but, clearly, such long drawn-out trade rows are unfortunate as they can overshadow the overall relationship of the disputants and thus become a major source of even more conflicts.

[54] There is no easy indicator available for judging whether implementation occurred in accordance with the recommendation of the DSB or what was agreed upon bilaterally. What may be researched, however, is whether the disputing parties make public statements on the adequacy of the measures undertaken for implementation. Then, a clear sign for disregarding behaviour would be a defendant's forthright refusal to implement his obligations. Instances in which the complainant approved of the measures taken by the defendant are counted as following behaviour. Cases in which the complainant rejected the measures undertaken as inadequate or flawed suggest implementation problems and thus possibly disregarding behaviour by the defendant. Thirdly, avoiding the procedures is possible in this phase as well. The parties may—for whatever reasons—negotiate again and agree on alternative implementation measures or a partial implementation only.

[55] This case was difficult to classify, as implementation took place for the majority (10 out of 12), but not for all the products in question. The procedure could be avoided for the two remaining products (see Hudec, n 20 above, at 531–3). Nevertheless, we decided to classify this as following the procedure.

[56] *Business Farm Reporter*, 20 Aug 1985.

[57] While this was legitimate under the GATT, we, nevertheless, count it as disregarding the panel report because it is a clear sign that the party refused to accept third party dispute resolution, and this, in our definition, is not compatible with judicialised dispute settlement behaviour.

Table 4: Dispute Settlement in the Implementation Phase

	Following	Avoiding	Disregarding
GATT	5 (55%)	1 (11%)	3 (33%)
WTO	21 (81%)	3 (12%)	2 (8%)

case,[58] for instance, the US complied with an Appellate Body report requiring the abolition of the safeguard measure on imports of lamb meat within 15 months. In only three WTO cases in our sample did the disputing parties have to re-negotiate an amicable settlement that they had previously agreed upon, thereby avoiding WTO dispute settlement. Moreover, in only two out of the 26 WTO cases in our sample was a WTO ruling widely disregarded by at least one of the disputing parties. It goes without saying that these two cases are the infamous *Hormones* and *Banana* cases.[59] In both cases, the US sued the EU for violating its international commitments under WTO law and, in both cases, a panel established by the WTO as well as the Appellate Body criticised the EU. In the *Hormones* case the EU simply ignored the WTO rulings, while in the *Banana* case it made only cosmetic alterations to its illegal banana regime. Nevertheless, the non-observance of rulings made under the WTO dispute settlement procedure has become the exception.

The disputing parties' behaviour in the implementation phase is summarised in Table 4. It demonstrates that, in contrast to the adjudication phase, the WTO dispute settlement procedures can be considered to be much more successful during the implementation phase than the dispute settlement procedures of the old GATT during the same phase, and the rulings made within the respective procedures as well as the negotiated settlements are respected to a greater degree in the context of the WTO than in that of the GATT.

(4) With regard to the *enforcement phase*, only the cases in which a GATT/WTO report or a negotiated settlement was not respected must be considered. Although the number of such cases in our sample is quite small, some differences between the behaviour of the disputing parties under the GATT and the WTO can be detected. Under the GATT, in two out of three cases in which panel reports were ignored, the aggrieved party followed the dispute settlement procedure and refrained from applying non-authorised sanctions against the offending party. In the *Sugar* case, Nicaragua

[58] DS178, *United States—Safeguard measure on imports of fresh, chilled or frozen lamb*.

[59] WT/DS26/ARB, *European Communities—Measures Concerning Meat and Meat Products (Hormones),* Decision by the Arbitrators; WT/DS27/ARB, *European Communities—Regime for the Importation, Sale and Distribution of Bananas,* Decision by the Arbitrators.

Table 5: Dispute Settlement in the Enforcement Phase

	Following	Avoiding	Disregarding
GATT	2 (66%)	0	1 (33%)
WTO	2 (100%)	0	0

barely had the means to take measures against the US, and in the *Wine* dispute the EU refrained from employing sanctions against the US.[60] However, one case—the *Citrus* case between the US and the EU—did escalate. Through the illegal sanctions and counter-sanctions, both parties clearly disregarded the GATT dispute settlement procedure, according to which sanctions always required GATT authorisation. In full knowledge that, under the GATT, sanctions could be approved only by consensus, none of the parties to the *Citrus* case tried to have their sanctions authorised.

In contrast, in the two WTO cases in our sample in which the reports of a panel or the Appellate Body were ignored none of the disputing parties resorted to non-authorised sanctions. Instead, in both cases—the *Bananas* and the *Hormones* cases—the complainant—i.e., the US—employed sanctions only after obtaining the approval of the DSB. Moreover, in both cases, the defendant—i.e., the EU—accepted these sanctions without employing—or threatening to employ—counter-sanctions. Clearly, one might argue that, in the *Bananas* case, the US employed unauthorised sanctions before gaining the approval of the DSB, but, given that, under the WTO dispute settlement procedures, the legal status of these sanctions was rather unclear, and given that it complied with a WTO report that criticised these sanctions, the US behaviour in this case should be regarded as compatible with WTO procedures.

Table 5 summarises the result with regard to the enforcement phase. Although based on a small number of cases, our findings confirm that the danger of un-authorised sanctions triggering un-authorised counter-sanctions was more severe under the GATT than it is under the WTO. Our findings seem to confirm the notion that sanctions that are approved by the WTO can appease trade conflicts because they are less likely to provoke counter-sanctions.

V. CONCLUSION

The results for US-related agricultural trade disputes in the two time-spans under consideration—the periods from 1985 to 1990 and from 1995 to

[60] The report could be adopted only in 1992 when the issue was already moot (see Hudec, n 20 above, at 523).

Table 6: Summarised Results

Phase Behaviour	Complaints phase		Adjudication phase		Implement-ation phase		Enforcement phase		Across phases	
	GATT	*WTO*	*GATT*	*WTO*	*GATT*	*WTO*	*GATT*	*WTO*	*GATT*	*WTO*
Following	2 (22%)	23 (85%)	4 (44%)	11 (41%)	5 (55%)	21 (81%)	2 (67%)	2 (100%)	1 (11%)	9 (33%)
Avoiding	4 (44%)	4 (15%)	5 (55%)	16 (59%)	1 (11%)	3 (12%)	0	0	4 (44%)	16 (59%)
Disregarding	3 (33%)	0	0	0	3 (33%)	2 (8%)	1 (33%)	0	4 (44%)	2 (8%)

Explanatory note: The first four columns recapitulate Tables 2–5. The last column states how each case was handled in the aggregate. The cases were categorises as follows: *following:* both parties followed the procedure continuously; *avoiding:* mixed behaviour of conformity and avoidance; *disregarding:* at least one phase with non-compliant behaviour shown by at least one party.

2000—are summarised in Table 6. Taking these results—even though they are based on small numbers—at face value, they would suggest that the handling of international trade disputes has changed substantially. This holds true at least for the complaints phase, as well as for the implementation and enforcement phases; only with regard to the adjudication phase does it seem that no major changes have taken place.

The overall differences between the GATT and the WTO become even more apparent when the dispute settlement behaviour of the parties involved is not coded separately for each phase that each dispute may run through, but receives only one coding for the parties' 'dominant behaviour' across phases. These figures are summarised in the last column of Table 6. While in nearly 50 per cent of the disputes from the 1980s the disputing parties resorted to disregarding the GATT dispute settlement procedures, this happened in only 8 per cent of the disputes in the 1990s. And while the old GATT procedure was only partially successful as an instrument for defusing international trade disputes, the WTO dispute settlement system seems to be more efficient in this regard. However, our findings should not be overestimated. The percentage of disputes that were predominantly dealt with through the dispute settlement procedures increased from 11 per cent to 33 per cent. But the parties to the disputes always preferred in the past—and still do in the present—to solve their disputes outside the dispute settlement procedures by negotiated settlement. As under the GATT, between 50 and 60 per cent of all WTO disputes are resolved through negotiated settlement within or outside the WTO. However, as long as the relevant dispute settlement procedures are not disregarded, avoidance of these procedures, rather than conformity with them, in order to come to a negotiated settlement out of court is perfectly compatible with an emerging rule of law.

Table 7: Summarised Results—Only US Behaviour

Phase Behaviour	Complaints phase		Adjudication phase		Implementation phase		Enforcement phase	
	GATT	*WTO*	*GATT*	*WTO*	*GATT*	*WTO*	*GATT*	*WTO*
Following	4 (44%)	23 (85%)	4 (44%)	11 (41%)	6 (66%)	25 (96%)	2 (67%)	2 (100%)
Avoiding	4 (44%)	4 (15%)	5 (55%)	16 (59%)	1 (11%)	1 (4%)	0	0
Disregarding	1 (11%)	0	0	0	2 (22%)	0	1 (33%)	0

GATT: USA as defendant in 4 cases, as complainant in 5 cases.
WTO: USA as defendant in 7 cases, as complainant in 20 cases.

As already suggested in Part IV above, due to its power position, the US may be especially hesitant to comply with GATT/WTO law and to conform to the GATT/WTO dispute settlement procedures. Hence, in terms of the judicialisation of dispute settlement behaviour in the GATT/WTO, the US may be considered as a hard case. For this reason, we not only analysed the behaviour of the disputing parties in US-related trade disputes, but also coded US behaviour in these disputes separately. However, as Table 7 suggests, there seems to be no great difference between US behaviour and the behaviour of other states involved in disputes with the US. The effect of the judicialisation of the GATT/WTO dispute settlement procedures seems to be the same for the US and for the other states with which it has been engaged in international trade disputes. This strengthens our contention that the judicialisation of the GATT/WTO dispute settlement procedures has indeed led to a judicialisation of dispute settlement behaviour, which, in turn, may indicate the emergence of an international rule of law.

Clearly, additional empirical research is required to establish whether, in the context of the GATT/WTO, an international rule of law is, indeed, truly emerging. For this reason, we intend to enlarge our sample of international agricultural trade disputes: instead of focusing exclusively on US-related disputes, we will investigate all agricultural trade disputes in which at least one OECD state was involved. However, from the empirical research we have done so far, we may answer the question of an emerging international rule of law in the affirmative. We cannot claim that an international rule of law has already emerged; to do so would require the definition of a threshold of judicialisation of dispute settlement procedures as well as dispute settlement behaviour, and to define such a threshold would seem to be impossible. Nevertheless, irrespective of whether such a threshold can be defined and whether it has already been crossed, we can claim

that not only the dispute settlement procedures but also the corresponding dispute settlement behaviour have been judicialised to a greater degree under the WTO than they used to be under the old GATT. In this sense, it seems safe to say that, in the context of the GATT/WTO, an international rule of law is emerging.

ANNEX: IDENTIFIED DISPUTES

Table A: Agricultural Products/Foodstuffs 1980–1985, Import Restrictions, GATT-related

Products	Complaint by	Complaint against
Wine	EC	USA
Pasta	EC	USA
Sugar	Nicaragua	USA
Canned Tuna	Thailand	USA
Citrus Fruits	USA	EC
Rice	USA	Japan
Beef	USA	Japan
Citrus Fruits	USA	Japan
Agricultural Products	USA	Japan

Table B: Agricultural Products/Foodstuffs 1995–2000, Import Restrictions, WTO-related

Products	Complaint by	Complaint against
Groundnuts	Argentina	USA
Agricultural Products (Beef, Orange Juice, *etc.*)	Brazil	USA
Wheat Gluten	EU	USA
Poultry	EU	USA
Shrimps/Turtle	India, Malaysia, Thailand	USA
Tomatoes	Mexico	USA
Lamb	New Zealand, Australia	USA
Dairy, Poultry Products	USA	Canada
Meat Hygiene	USA	EU
Apples, Cherries, Nectarines	USA	Japan
Rice	USA	Japan
Alcoholic Beverages	USA	Japan
Meat, Poultry	USA	Mexico
Pork, Poultry	USA	Philippines
Poultry and other products	USA	Romania
Grapefruits (Inspection Procedures)	USA	South Korea
Meat (Shelf life Rules)	USA	South Korea
Perishable Fruit and Vegetables		

Table B: (Continued)

Products	Complaint by	Complaint against
(Quarantine Regulations)	USA	South Korea
Salmon	USA (similar cases with other complainants)	Australia
Bananas	USA and others	EU
Walnuts	USA and others	EU
Beef	USA, Australia, New Zealand	South Korea
Grain, Grain Cereals	USA, Canada	EU
Veterinary Equivalence Agreement	USA, Canada	EU
Beef (Hormones)	USA, Canada and others	EU
GMOs (case still open)	USA, Canada, Argentina	EU
Alcoholic Beverages (Whisky)	USA, EU	South Korea

4

The Appellate Body's 'Response' to the Tensions and Interdependencies Between Transnational Trade Governance and Social Regulation

CHRISTIANE GERSTETTER*

I. INTRODUCTION

THE WTO DISPUTE settlement system has kept the minds of a significant number of scholars busy over the last decade. A category of cases that has inspired scholarly imagination more than other constellations is the one in which the WTO adjudicators decide about a regulatory measure taken by a member in pursuit of a non-trade objective such as the protection of the environment or human health.[1] When reviewing the *genre* of literature that describes or seeks to explain why the judicial[2] output took

* I would like to thank several of my former colleagues in Bremen for comments and discussions, from which I have learned a great deal, especially Christian Joerges, Josef Falke, Christine Godt and Leo Maier.

[1] For want of a better term, I shall call such cases 'trade and …' cases in the following, in line with the established terminology.

[2] A word on the use of the term 'judicial' in this chapter: the use of the term is usually reserved for reference to 'genuine' courts. Hitherto, academic writers have not agreed upon the use of the term 'judicial' to refer to the dispute settlement bodies, although everybody seems to agree that the WTO Dispute Settlement Body is quite a 'court-like' entity. Two former members of the AB use the term 'quasi-judicial': see J Bacchus, 'Groping toward Grotius: The WTO and the International Rule of Law' (2003) 44 *Harvard International Law Journal* 533 at 541, and C-D Ehlermann, 'Six Years on the Bench of the "World Trade Court": Some Personal Experiences as Member of the Appellate Body of the World Trade Organisation' (2002) 36 *Journal of World Trade* 605. Others are less hesitant and call the AB a court: see A von Bogdandy, 'Verfassungsrechtliche Dimensionen der Welthandelsorganisation' (2002) 34 *Kritische Justiz* 264 at 267; M Nettesheim, 'Von der Verhandlungsdiplomatie zur internationalen Verfassungsordnung—Zur Entwicklung der Ordnungsformen des internationalen Wirtschaftsrechts' in C-D Classen *et al*. (eds) '*In einem vereinten Europa dem Frieden der Welt zu dienen....*'—*Liber amicorum Thomas Oppermann*, (Berlin: Duncker & Humblot, 2001), 381 at 396. JHH Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2001) 35 *Journal of World Trade* 191 at 201, states that the AB is a 'court in all but name'. A Helmedach and B Zangl,

the shape it did in a specific case (putting aside for a moment that judicial decisions more often than not give rise to ambiguities of their own), a puzzling split, which is mainly disciplinary in nature, becomes visible.[3] With a degree of exaggeration, one might draw the following picture: one strand of the literature on WTO dispute settlement, which is mainly, though not exclusively, written by political scientists, conceives of the WTO dispute settlement decisions as a reaction to the—to use a quite unspecific term—political surroundings in which the decisions take place.[4] The political pressure and constraints which surround the proceedings are seen as being decisive factors for the outcome. Judicial bodies are essentially conceived of as strategic political actors, albeit of a distinct species. This does not mean that those who hold this perspective do not confirm that the text of the law imposes serious limits on the adjudicators. They do. But then they usually go on to claim that these limits are not so serious, after all. In quite the opposite mode, many contributions coming from the legal discipline focus mainly on the wording of the text, which is seen as what counts for the outcome of a case. These contributions either make suggestions as to how the WTO agreements should be interpreted or point to perceived shortcomings in the interpretations proffered by the dispute settlement bodies so far.

These seemingly conflicting approaches can, of course, be attributed to a certain degree to these different disciplinary backgrounds.[5] However, one still wonders whether this is sufficient as an explanation for the observed split. This chapter seeks to explore the middle ground. What it seeks to investigate is whether, and in what form, both strands—a strong commitment to textual interpretation and more normative,[6] interest or policy-oriented arguments—can be found at the argumentative micro-level of the judicial decisions of the Appellate Body (hereinafter AB).[7] As a heuristic

in this volume, use the term 'judicial' in a very broad sense, with reference not only to the WTO dispute settlement system, but also to a body such as the UN Security Council. I use the term 'judicial' not for lack of awareness of the differences between the WTO Dispute Settlement Body and a 'real' court, but because it describes a certain role (as compared to legislating or negotiating) within the WTO.

[3] A similar observations is made by J McCall Smith, 'WTO Dispute Settlement: the Politics of Procedure in Appellate Body Rulings' (2003) 2 *World Trade Review* 65.

[4] See C Arup, 'The State of Play of Dispute Settlement "Law" at the World Trade Organisation' (2003) 37 *Journal of World Trade* 897 at 900; RD Kelemen, 'The Limits of Judicial Power—Trade-environment Disputes in the WTO and the EU' (2001) 34 *Comparative Political Studies* 622; J McCall Smith, n 3 above, especially at 67 and 98; RH Steinberg, 'Judicial Law-making at the WTO: Discursive, Constitutional, and Political Constraints' (2004) 98 *American Journal of International Law* 243 at 264.

[5] See, for an instructive comparison between the disciplines, KJ Alter, 'A Political Science Perspective' in KJ Alter, R Dehousse and G Vanberg, Law, Political Science and EU Legal Studies: An Interdisciplinary Project (2003) 3 *European Union Politics* 113 at 117.

[6] 'Normative' is evidently not meant here as 'having to do with legal norms', but is used in the sense of 'relating to what is desirable', to avoid a potential misunderstanding by lawyers.

[7] A methodological *caveat* is in place: what can be done is the reading of the dispute settlement decision and drawing certain inferences from there. This does not, however, mean,

tool for becoming aware of the normative side of the AB's reasoning, I will use the—legal science—concept of balancing. To this end, I will first elaborate on the concept of balancing and its relationship with judicial interpretation (Section II). This leads to the insight that it is reasonable to expect some kind of balancing to take place at WTO level, but does not demonstrate that balancing is detectable in the dispute settlement reports. Section III therefore, offers some preliminary evidence on balancing as apparent in one of the most famous 'trade and …' disputes that the AB has had to handle so far, the *Shrimp–Turtle* case. Drawing on a comparison that M Lasser has undertaken between the US Supreme Court, the French *Cour de Cassation* and the European Court of Justice,[8] the reading of the report in the *Shrimp–Turtle* case (supported by some additional evidence) is taken as a starting point for the argument that the AB has developed a judicial 'style' of its own. This style is characterised by a 'split' between a sharp turn towards textual interpretation on the one hand, and an equally strong current of balancing, i.e., a normatively oriented, non-deductionist kind of reasoning on the other (Section IV). Finally, by way of conclusion, some very brief comments on the implications of this finding are offered. At an abstract level, judicial decision-makers might be described as facing the dilemma of having both to demonstrate fidelity to the letter of the law *and* do justice in a specific case, i.e., provide an adequate response to the political, social and other interests at stake in order to gain acceptance for their decisions.[9] The AB's judicial style may be a way to 'respond'[10] to this dilemma in the context of the specific parameters of the WTO legal system.

II. BALANCING AND THE INDETERMINACY OF (WTO) LAW

Balancing is the process of deciding which of two or more values, interests, rights or objectives is to prevail, and to what extent, in a conflict. In the

that the adjudicators have chosen to interpret the law in the way that they did for precisely the reasons that they state in their decisions. It is merely more plausible to assume that this is so than to assume the opposite. In addition, even if the adjudicators might have taken their decisions for reasons other than those stated, it is the written down argument that, if at all, will be of precedential force, which is an additional argument for dedicating attention to it. On these methodological problems, see McCall Smith, n 3 above, at 98 and 99.

[8] M Lasser, 'Anticipating Three Models of Judicial Control, Debate and Legitimacy', *Jean Monnet Working Paper* 1/03 (New York, 2003).

[9] See for a description of this dilemma and possible judicial reactions to it D Kennedy, *A Critique of Adjudication (fin de siécle)* (Cambridge, Mass: Harvard UP, 1997), at 157–212.

[10] The quotation marks indicate that some caution is warranted here. Methodologically, it is hardly conceivable to 'unmask' the adjudicators' presentation of their interpretations as logically resulting from the text of the norms as mere strategy or tactics, unless the adjudicators say so themselves (which is, evidently, a highly unlikely event): see McCall Smith, n 3 above at 67 and 98 for this methodological problem. Judicial decision-makers acting in good faith, may, with equal plausibility be assumed to feel constrained by the text in some or all of the instances, where a finding is presented as necessarily resulting from the set of norms at issue.

legal realm,[11] balancing refers to the action that must be performed in situations where several legally-protected interests[12] compete to be put into practice.[13] In such constellations, it must be decided which of the two competing or conflicting (legally-protected) interests may prevail, and to what extent. The extent to which the different interests actually conflict is not always the same, and to assess the degree of conflict is itself part of the balancing process. Thus, balancing is always about determining a *relationship* between the interests that are balanced. Balancing situations can be understood as always involving an—at least—triangular constellation, with two (or more) interests that need to be balanced against each other in the light of a *tertium comparationis*.[14] This *tertium comparationis* is the importance and weight of the respective interests *in casu*.[15]

The judicial setting unites all the features of the balancing situation described above. A judicial procedure *always* involves a decision about the conflicting interests at stake (otherwise judicial proceedings would not have been initiated). At the same time, it is an absolute truism to state that it is the primary task of the judge to resolve the case brought before her through *interpretation*. But what, then, is the relationship between interpretation and balancing? Does any judicial decision involve balancing? Is

[11] The term 'balancing' is also applicable in the realm of morals: see W Enderlein, *Abwägung in Recht und Moral* (Freiburg: Albers, 1992).

[12] The term 'interest' is, of course, a highly aggregated term. 'Legally protected interests' is an inapposite translation of the German term '*Rechtsgüter*'. The term '*Rechtsgut*' is virtually un-translatable into English. A standard German–English dictionary provides paraphrases such as 'something enjoying legal protection'. A translation somewhat more resonant of the connotation of the German term would be 'a good recognised by the law'. This, however, is not a term feasible in English. Choosing the term 'interests' instead seems appropriate as the actors in the context of WTO dispute settlement are states. They do not have 'rights', which, in a municipal context, often make up the 'material' for balancing decisions. Where balancing is talked about at a more abstract level, it should be kept in mind that 'interests' may be individual rights, collective goals, societal interests and so forth.

[13] W Leisner, *Der Abwägungsstaat: Verhältnismäßigkeit als Gerechtigkeit?* (Berlin: Duncker & Humblot, 1997), at 33–5.

[14] Leisner, n 13 above, at 36–7; P Hector, *Das völkerrechtliche Abwägungsgebot—Abgrenzung der Souveränitätssphären durch Verfahren* (Berlin: Duncker & Humblot, 1992), at 187; F Schwab, *Der Europäische Gerichtshof und der Verhältnismäßigkeitsgrundsatz: Untersuchung der Prüfungsdichte: insbesondere in der Gegenüberstellung der Kontrolle von Gemeinschaftsakten und von Maßnahmen der Mitgliedstaaten* (Frankfurt aM: Peter Lang, 2002), at 272.

[15] The observation that balancing depends on the comparability of the interests balanced has led some to find the prevalence of balancing in public law much more surprising than in civil law: see Leisner, n 13 above, at 15–24. Public law—as compared to civil law—is marked by a relation of sub-ordination. Balancing, however, cannot take place between incommensurable interests. Balancing individual and collective interests thus implies their *ex ante* equality. Public interests do not automatically prevail over collective interests; the individual is, to a degree, perceived as 'equal' to the state. In contrast, the formal equality of different private law subjects is much more self-evident. See K-H Ladeur, *Kritik der Abwägung in der Grundrechtsdogmatik* (Tübingen: Mohr Siebeck, 2004), at 13: the incommensurable character of policy objectives or collective interests and private interests is one of the reasons for strongly criticising the performance of any balancing in constitutional cases involving fundamental rights.

interpretation the technique through which balancing is performed in a judicial setting? Is, then, any interpretation essentially balancing? Let me try to answer these questions by exploring some of the links between interpretation and balancing.

When looking at the outcome of a judicial process one might indeed be tempted to equate interpretation and balancing. Any interpretation of the law in a judicial context necessarily involves the favouring of one of the opponents.[16] If the conditions set out in a specific legal norm are seen as being fulfilled by the judge, the interest for which this norm is propitious will prevail.[17] Thus, any interpretation has an impact on, and is never neutral with regard to, the competing interests in a judicial setting.[18] This does not necessarily mean that the judge thinks about the interests that lie behind the judicial claims brought before her. She may be convinced that the law mandates a certain, maybe, in her eyes, even unjust, outcome of the case, and hence not look at the interests protected by the respective law at all. In the end, however, a certain interpretive decision will necessarily favour one or the other position and thus amounts to a balancing of these interests against each other.

However, the terms 'balancing' and 'interpretation' are different. Balancing has a connotation which the term 'interpretation' does not have. The use of the term 'balancing' draws attention to the legally protected interests that are at stake and lie behind the legal claims made. For example, the statement that the WTO judicial decisions in 'trade and …' cases involve 'balancing' draws attention to the fact that a measure taken at national level in pursuit of a non-trade objective is challenged on the basis of an international legal framework by and large designed to protect economic concerns. The use of the term also brings into a play a slightly normative bend: balancing—one would expect—leads to a 'balanced' outcome. The close relationship between balancing and concepts such as equity, single-case justice or the appropriateness of a decision has repeatedly been pointed out.[19] Balancing is described as entailing the impartial and comprehensive

[16] This would be true even for a *non liquet* situation in which a judge found he or she could not decide the case in substance in the light of a lacuna in the law: see J Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40 *Harvard International Law Journal* 333, note 18.

[17] Any norm can be seen as protecting certain interests to a certain degree. This is very obvious for norms protecting individual rights such as human rights, but can also be stated at a more general level: see Hector, n 14 above, at 190.

[18] Clearly, a judicial decision might also be taken on factual grounds, or a process might be lost due to certain procedural provisions. The kind of constellation that is of interest here is that where it is an interpretation of the law upon which the outcome hinges.

[19] See J Delbrück, 'Proportionality' in R Bernhardt, *Encyclopedia of Public International Law* (Amsterdam: North Holland, 1997), at 1140; Schwab, n 14 above, at 33 and the ICJ in the *Case Concerning the Continental Shelf* (*Tunisia v Libyan Arab Jamahiriya*), [1982] ICJ Rep 18, para. 71.

consideration of all the legally relevant interests at stake.[20] Balancing is thus and, I would submit, more so than mere interpretation seen as a way of reaching a just and adequate solution in concrete cases.[21] As balancing—where it is a legal requirement and does not just take place as a matter of course—does not mandate a specific substantive outcome, it must be the balancing *process* through which this is achieved. Implicit in the term 'balancing', and hence in the act of choosing it, is a specific conception of what a judge does. It is not the image of a faceless, impersonal judge who reaches a decision by drawing syllogistic and seemingly compelling conclusions. Instead, it is the image of an individual who takes the legal arguments forwarded by the parties to the dispute in his or her hand, looks carefully at both them and the interests at stake, determines their weight and, in this way, finally arrives at a decision.

Thus, it would seem that there are two 'modes' of argumentation that judges may use when giving reasons for their decisions. One is deductive, in the sense of being an 'interpretation of the letter of the law', which is more a technical exercise performed with the help of a dictionary in order to find the meaning of a word, by resorting to scholarly writing without really looking at the respective weight and importance of the interests involved. Such interpretation in the outcome constitutes a balancing decision: if the judge finds a certain norm's consequences to apply in the end, this is a decision about which of the competing interests is protected by the law in the respective case. But this kind of decision does not involve balancing in the sense that the judge bothers himself or herself openly with questions of the interests protected by the respective law, the values inherent in a certain legal order, equity and justice, and then writes it into the judicial decision. This kind of balancing—balancing as an argumentative structure—is also interpretation, because it serves the purpose of deciding a judicial case. The legal norms on which the parties to a case base their claims must therefore be interpreted. It can thus also be adequately described as 'interpretation through balancing'. In contrast, one could label the first way of deciding a case (the more deductive, technical, literal way

[20] See Leisner, n 13 above, at 37. The judicial setting has been described by some as a deliberative one; see, e.g., C Schmid, A theoretical reconstruction of WTO Constitutionalism and its Implications for the Relationship with the EU, EUI Working Paper 2001/5 (Florence, 2001), at 16. The parallel between 'deliberation' and 'balancing' is hard to ignore, with the—very important—exception that balancing is an exercise which may be done by a single person.

[21] This thesis implies that it is not the purpose of any legal judgment to reach just and adequate solutions in any case. Indeed, a judicial decision will usually serve not (only) the objective of creating justice, but (also) other objectives: A. Rafi, *Kriterien für ein gutes Urteil* (Berlin: Duncker & Humblot, 2004)—assuming that the main aim of a judgment is to settle the dispute. A more frequently held position seems to be that a judgment must enhance legal certainty, predictability and material justice: see, e.g., J Habermas, *Faktizität und Geltung* (Frankfurt aM: Suhrkamp, 1992), at 242–4. See, also, the ICJ's statement about the role of justice in the decisions of international courts and its relation with the *ex aequo et bono* decisions provided for in Art 38 II of the ICJ Statute, n 19 above, para. 71.

of interpretation which, still, substantively favours one of the interests at stake) as 'balancing through interpretation' or balancing in the substantive sense.[22] Both modes of reasoning are not necessarily distinct as regards the outcome, but are distinct as regards the reasons given for arriving at this outcome.

The two 'modes' are also different concerning the conditions under which they are possible or can, at least, most easily be used. The more indeterminate the wording of the law is prima facie, the easier it is to perform balancing, in the sense of a specific type of judicial reasoning.[23] Where the law is relatively determinate, it is difficult for a judge to take a decision mainly based on an analysis of the underlying interests, values and considerations of justice, because the 'classical' role of judges is to interpret the law, not to make it anew.[24] Where the wording of the law is strong and somewhat unequivocal, judges must use sophisticated argumentative means to circumvent it if they want to take a decision based on considerations of equity. Judges have to rationalise such decisions *ex post* as formalistic legal interpretations of the letter of the law. The admissibility of such *contra legem* decisions is quite controversial.[25] All this does not mean that indeterminacy is not also a prerequisite for a more deductive kind of interpretation. Where the meaning of the law is plain and clear at first sight, there is simply nothing which has to be interpreted. The degree of indeterminacy required to use balancing as an argumentative pattern is greater, though.[26]

[22] Hector, n 14 above, draws a somewhat similar distinction between 'legal balancing' and 'topic balancing' at 182 and 183.

[23] That balancing is needed where the decision-maker is relatively unbound by the law is also emphasised by P Berendt, *Die Bedeutung von Zweck und Zielbestimmungen für die Verwaltung* (Baden-Baden: Nomos, 2000), at 50–2; Hector, n 14 above, at 166 and 167; F Ossenbühl, 'Abwägung im Verfassungsrecht' in W Erbguth *et al.* (eds), *Abwägung im Recht* (Cologne: Heymanns, 1996), at 25.

[24] Even advocates of the jurisprudential idea that judges cannot, or not in all cases, answer the interpretative questions before them with the help of the law alone because the law has an 'open texture' or is—to use the terminology employed here—indeterminate, assume that judges will and must 'rationalise' their decisions as constituting formal interpretations of the law: see T Bechtler, 'American Legal Realism Revaluated I' in T Bechtler. (ed), *Law in a Social Context—Liber Amicorum Honouring Prof. Lon. L Fuller* (Deventer: Kluwer, 1978), 5 at 26–30; HLA Hart, *The Concept of Law* (2nd. edn, Oxford: Clarendon, 1994), at 136 and 153; Kennedy, n 9 above, at 23–38.

[25] This is especially true for international law: see M Krugmann, *Der Grundsatz der Verhältnismäßigkeit im Völkerrecht* (Berlin: Duncker and Humblot, 2004), at 75 and 76.

[26] It is tempting to use the distinction that R Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) at 31–4 makes between discretion in a strong sense and in a weak sense. Discretion in a weak sense exists where, for some reason, the standards an official must apply cannot be applied mechanically but demand the use of judgement. Discretion in a strong sense exists where an official is simply not bound by any specific standards set by the authority which usually sets such standards, although he or she might be bound by more general standards of fairness or impartiality. In terms of these definitions, balancing in the argumentative sense would require a kind of discretion which is much closer to 'discretion in the strong sense' than in the weak sense. However, it must be noted that it is not entirely fair to Dworkin's text to invoke it for such purpose, as Dworkin, of course, rejects the idea that judges ever have discretion in the strong sense.

The word 'indeterminacy' is, however, not in itself a really 'determinate' term. What is meant by the term? A rough formula would be that the law is indeterminate whenever and/or wherever it is not evident to a trained reader, be it immediately or after giving some thought to it, what the law mandates in a certain factual constellation, and whenever or wherever two readers acting in good faith might, after careful reflection, arrive at different conclusions. Another formula would be to state that the law is indeterminate wherever it is not predictable how a court would decide in a certain factual situation. Is WTO law, then, indeterminate in this sense? A quick answer to this question might be given by taking a glance at the more general literature on the indeterminacy of the law. The insight that law, in general, is pervasively and inherently ambiguous and indeterminate, and that more than one interpretation can often be justified by established methodological standards was called a '*Gemeinplatz*', a truism, more than 10 years ago.[27] It is a well-established assumption that there are norms which are—as one observer has put it—'clear, self-executing, fully specified in advance and not in need of interpretation',[28] and others which are not.[29] Naturally, there is no clear threshold which indicates precisely when a law can be called 'indeterminate' and when it cannot. Indeterminacy is a matter of degree. Moreover, a norm may appear determinate at first sight, but once the judge enters into the process of interpretation, it may become clear that it is not.[30] But the existence of cases which may not fit smoothly into one of the categories of 'determinate' or 'indeterminate' rules does not invalidate this basic distinction. One may apply this general insight to WTO law—'it's law after all'—and make the point that WTO law, too, *qua lege*, must be indeterminate.

The point can, however, also be made by focusing more closely on WTO law. The advantage of this method is that it will also yield some insights into which parts of WTO law or which norms are the 'most' indeterminate and therefore where reasoning by balancing interests is most likely to be observable. It is a strand in current international relations scholarship that provides the first useful insight in this context: the literature on legalisation.[31] Legalisation, in its mainstream use, is a term that seeks to describe legal norms or sets of legal norms in relation to how similar they are to an

[27] Enderlein, n 11 above, at 38.

[28] Trachtman, n 16 above, at 337, who draws on the distinction between rules and standards developed in the law and economics literature.

[29] This basic starting point is shared by some of the eminent authorities in current legal theory, even though they put it differently. Hart, n 24 above, describes at some length the 'open texture' of law at 124–35; Dworkin, n 26 above, speaks of 'hard cases', in which 'no settled rule dictates a decision either way' at 83; Habermas, n 21 above, at 266, writes that all legal norms, with the exception of a few highly specified ones, are originally ('*von Haus aus*') indeterminate.

[30] For an example from German civil law, see Rafi, n 21 above, at 41 and 42.

[31] See the various contributions in (2000) 54 *International Organisation* 3.

ideal-type of law, which is one of the legal norms at a national level. The degree of legalisation is measured in terms of the degrees of obligation and precision that the norms in question exhibit and the degree of delegation that they provide.[32] Measured by this kind of yardstick, at least some of the WTO agreements are described as highly legalised, comparable to municipal law, albeit with slight variations between different agreements.[33] With regard to the most interesting criterion in the present context, that of precision, these variations are, however, significant. By 'precision', it is meant that rules unambiguously set out the conduct which they require, proscribe or authorise.[34] The degree of precision of the WTO Agreement on Trade–related Aspects of Intellectual Property Rights (TRIPS) is, using this definition, categorised as 'high', while the national treatment obligation is described as displaying a 'low' degree of precision.[35] Several other observers have noted the openness or indeterminacy of WTO legal norms.[36] This indeterminacy may manifest itself in different forms.[37]

A typology of these forms would, at the very least, have to include the use of indeterminate words, the existence of *lacunae* in law or the existence of the collisions of several norms. For all of these types of indeterminacy, examples may be quoted from WTO law.[38] Indeterminacy has different reasons, for example, the limits of natural language, the limits of human imagination,[39] the absence of political consensus on a matter,[40] the use of indeterminate language as a means of delegating the matter to a court,[41] or

[32] For operationalisation and empirical application of the delegation criterion, see Helmedach and Zangl in this volume.

[33] See K Abbott *et al*., 'The Concept of Legalisation' (2000) 54 *International Organisation* 401 at 406; Schmid, n 18 above, at 11.

[34] Abbott *et al*., n 33 above, at 401.

[35] Ibid, at 406.

[36] See T Christoforou, 'Settlement of Science-based Trade Disputes in the WTO: a Critical Review of the Developing Case Law in the Face of Scientific Uncertainty' (2000) 3 *New York University Environmental Law Journal*, 622 at 622–6 for the SPS Agreement.

[37] For 'checklists' of situations of indeterminacy in the law and the steps of judicial decision-making, see U Fastenrath, *Lücken im Völkerrecht* (Berlin: Duncker & Humblot, 1991), at 213–35; H Hubmann, *Wertung und Abwägung im Recht* (Cologue: Heymanns, 1977) at 55; Rafi, n 21 above, at 18; Trachtman, n 16 above, at 337.

[38] See, for indeterminate language, Arup, n 4 above, at 911 (referring to the term 'like products'), for lacuna, Steinberg, n 4 above, at 252, noting also that the distinction between a 'real lacuna' and indeterminacy is ultimately fragile. Collisions exist both between WTO law and other international legal norms—the most comprehensive studies of such collisions are: J Neumann, *Die Koordination des WTO-Rechts mit anderen völkerrechtlichen Ordnungen* (Berlin: Duncker & Humblot, 2002) and J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: CUP, 2003)—and between different WTO agreements: see G Marceau and J Trachtman, 'The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: a Map of the World Trade Organisation law of Domestic Regulations of Goods' (2002) 36 *Journal of World Trade* 811.

[39] See, on these, Hart, n 24 above, at 125–135.

[40] See Steinberg, n 4 above, at 252–3.

[41] See Trachtman, n 16 above, at 335 and 336.

the existence of conflicting societal interests or even rationalities.[42] Altogether, then, it would seem that WTO law contains quite a number of 'openings' for balancing. The next issue is whether and how the adjudicators use these openings for balancing in 'trade and …' cases.

III. BALANCING IN THE DISPUTE SETTLEMENT REPORTS OF THE WTO

Before turning to a demonstration that the AB, at least sometimes, uses balancing to support its decisions, it is worth noting what is not meant by this statement. First, unlike in some other legal orders,[43] balancing is *not* a legal requirement in WTO law which obliges judges to perform a balancing exercise in specific constellations. Secondly, and with reference to the above distinction between balancing in a substantive sense and balancing in an argumentative sense, the WTO judicial decisions without any doubt, constitute balancing decisions in a substantive sense: they are decisions, in substance, about whether a member's regulatory measure is allowed to stand. But what about balancing in the argumentative sense? Can it 'empirically' be found in the text of the dispute settlement decisions? Some preliminary evidence suggests that the answer to this question is positive. Below, I will give some examples, taken from the AB's report on one of the most famous cases involving a member's non-trade measure, the *Shrimp–Turtle* case, and its interpretation of Article XX GATT, one of the core norms in WTO law for the trade/non-trade interface.[44]

The interpretation of Article XX GATT which the AB undertook in this case is an impressive example of the kind of equity-oriented and interest-oriented interpretation that the term 'balancing' denotes. The huge amount of scholarly attention that the case has received makes another summary of the factual background and the overall legal context of the case redundant.[45] We can thus turn immediately to the way the AB interpreted Article XX in this case and the reasons it gave for its decisions. The very first statement of the AB in the section on Article XX concerns the appropriate method of interpretation. The AB states very clearly the adjudicators' duty to give primary consideration to the wording of the text. This same

[42] This reason for the fragmentation of international law is emphasised by A Fischer-Lescano and G Teubner, 'Regime-collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law' (2005) 25 *Michigan Journal of International Law* 999 at 1004.

[43] See below for the proportionality principle in European and German law and balancing as one of its components.

[44] Quotations in this section refer to *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R.

[45] To name but a few: HF Chang, 'Toward a Greener GATT: Environmental Trade Measures and the Shrimp–Turtle case' (2000) 74 *Southern California Law Review* 31; R Howse, 'The Appellate Body Rulings in the Shrimp–Turtle Case: A New Legal Baseline for the Trade and Environment Debate' (2002) 27 *Columbia Journal of Environmental Law* 489; PC Mavroidis, 'Trade and Environment after the Shrimps–Turtles Litigation' (2002) 34 *Journal of World Trade* 73.

statement, however, already contains the seeds of it own subversion: the AB does not consider textual interpretation sufficient in itself, but states:

> It is in the words constituting that provision, read in their context, that the *object and purpose of the states parties to the treaty must be sought* [emphasis added].

Teleological interpretation thus seems to be inseparably linked to the textual interpretation to which the AB commits itself.[46] Teleological interpretation, in turn, is the interpretative method most closely linked to balancing.[47] Thus, right from the beginning, the AB embarks upon a road that will somewhat 'naturally' lead to balancing. And, in fact, in the further course of its argument, the AB reaches its interpretative conclusions, at least on paper, partially through balancing. In answering the very first interpretative question—in which order to apply the *chapeau* and the paragraphs of Article XX GATT respectively—the AB relies in part on the 'important and legitimate character' of the domestic policies protected through Article XX(a)–(g). Immediately afterwards, it ties up this argument from the character and weight of the interests at stake again to a textual argument.[48] Both arguments together lead the Appellate Body to reverse the Panel's order of investigation.

Similarly, the next interpretative step of the AB, the interpretation of the term 'exhaustible natural resources' in Article XX(g), is comprised of a mixture of textual arguments and a look at the interests at stake. The AB argues that this clause must be:

> read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy.[49]

This argument contains a specific twist: while the AB still looks at the interests at stake, their legitimacy and their importance, it does not present the conclusions as resulting from its own judgment, but instead as the opinion of the WTO members as reflected in the preamble to the WTO Agreement, and several non-WTO international agreements.[50] In summary, in both instances, the AB uses the language of balancing, but backs it up

[46] Clearly, it can make a huge difference whether the *telos* that is looked at is the one of the larger legal order or the one of the specific norm at stake: see R Howse, 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: the Early Years of WTO Jurisprudence' in JHH Weiler (ed), *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade?* (Oxford: Hart Publishing 2001), 37 at 52–4.

[47] See Berendt, n 23 above, at 44–7; Rafi, n 21 above, at 86 and 87.

[48] Para 121.

[49] Para 129.

[50] Paras 130–131.

by a demonstrated commitment to the text of the relevant agreements and the intentions of the parties as reflected therein.

The next interpretative question that the AB faced was whether the measure at issue 'related' to the protection of the exhaustible natural resource in question. After recalling its own interpretation of the norm in a previous case[51] and describing both the measure at issue and the factual background at same length, the Appellate Body concluded that the measure:

> is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The means are, in principle, reasonably related to the ends.[52]

This quotation demonstrates in an even more impressive way that the Appellate Body uses balancing in order to arrive at a decision. The quotation is fused with normatively tainted, rather vague expressions such as 'reasonably' and 'disproportionately'—which are not contained in the text of the norm itself. But then, it is the text of the norm itself which contains the word 'relating' and provides an opening for such kind of reasoning.

With regard to the interpretation of the *chapeau* of Article XX GATT, the picture more or less repeats itself. The Appellate Body is, again, careful to state that it begins its work with a textual analysis of the *chapeau*. It carries out this analysis by identifying several different elements contained in it.[53] The Appellate Body then proceeds to an analysis of the norm, with a view to both its *telos* and its systematic context.[54] As this does not seem to help much in clarifying the norm, the Appellate Body reiterates its commitment to performing the task 'to interpret the existing language of the chapeau of Article XX by examining its ordinary meaning, in the light of its context and object and purpose …'.[55] From there, the Appellate Body, without further ado, states that it considers the *chapeau* of Article XX as:

> the recognition on the part of WTO members of the need to maintain a balance of rights and obligations between the right of a member to invoke one or another of the exceptions of Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other members under the GATT 1994, on the other hand.[56]

This is an interesting formulation for two reasons.[57] Explicitly construing the norm as the embodiment of a balance of rights will enable the adjudicators to perform a kind of balancing in applying the norm more easily

[51] *United States Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, WT/DS/AB/R.
[52] Para 141.
[53] Para 150.
[54] Paras 152–155.
[55] Para 155.
[56] Para 156.
[57] These points are, to my mind, somewhat neglected in M Hilf, 'Power, Rules and Principles in WTO/GATT Law' (2001) 4 *Journal of International Economic Law* 111 at 121.

and still 'sell' it as a merely textual interpretation. And, indeed, several paragraphs later, the AB describes its task as 'marking out a line of equilibrium' between these rights,[58] in other words, as bringing them into the right balance. Besides this 'tactical' move, what is interesting about the above quotation is that the AB talks about the *chapeau* not as representing a balance between different substantive interests (unrestricted trade *v* the protection of endangered species), but as a balance of the rights of the WTO members. Nothing in the text of the law makes this kind of description seem preferable to putting the balance as one between trade and biodiversity protection.[59] Now, only the adjudicators themselves could ultimately explain why they chose the approach they did. From the outside, however, the reference to the balance of members' rights may be perceived as a kind of hand-waving in the direction of the members, a signal from the AB that it is *their* rights that are at stake.[60] The AB avoids the posture of a supreme judicial body that carries out a 'free-lance' balancing of the substantive interests at stake. The AB interpretation, undoubtedly, implies certain policy preferences, for example, that multilateralism is preferable to unilateralism, at least as far as the *Shrimp–Turtle* constellation is concerned. But it is different—if not in category, then at least in degree—from a decision taken by the AB itself about which interests are the more relevant ones in which type of case.

The next interpretative move of the AB is but a logical sequel of this demonstrated position: when dealing with the question whether there is any 'unjustifiable discrimination', the AB—without elaborating at all on a textual level about what this term may mean—right away and in a rather authoritative tone states that the US measure constitutes unjustifiable discrimination. The two main reasons given for this finding by the AB are the measure's inflexibility (it effectively imposes the US regulatory scheme on other countries without taking account of the specific conditions there[61]) and the failure of the US to enter into negotiations with the countries affected by the measure before its enactment, while negotiations had been conducted with other countries.[62] These statements of the AB can be read

[58] Para 159.

[59] The AB supports its reading by resorting to a general principle of international law, the principle of good faith: para 158. But if it had wished to read it as a balance between trade and environmental concerns, it might have done so by referring to the principle of sustainable development in international law, for example.

[60] A von Bogdandy, 'Legitimacy of International Economic Governance: Interpretative Approaches to WTO Law and the Prospects of its Proceduralization' in S Griller, *International Economic Governance and Non-economic Concerns: New Challenges for the International Legal Order*, (Vienno: Springer, 2003), 104 at 123, also observes that quite in contrast to the ECJ's frequent reference to the interest of the Community, the AB never refers to a WTO interest.

[61] Paras 161–165.

[62] Paras 166–170. The AB relates the latter requirement back to WTO law and and other international legal instruments, which it takes to be indicative of a recognition by the US itself of the importance of multilateral negotiations.

as saying that what the US failed to do was to engage in a process of balancing, i.e., in a process of first taking account of the viewpoint that the countries affected by the measure might express in the course of negotiations and then taking these into account when designing or applying its measures.[63] From a reader's perspective, the AB appears careful to avoid any impression of performing the balancing act itself. Instead, it sets out a duty for countries themselves, at least in specific constellations, to perform the balancing act. This is compatible with the AB's understanding of Article XX as a balance of the rights of the members, rather than of substantive interests: if it is the rights of the members that are at stake, it is a logical assumption that it should be primarily their responsibility to 'bring them into balance' in a concrete case.

IV. SOME TENTATIVE COMMENTS ON THE APPELLATE BODY'S JUDICIAL STYLE

In summary, the above reading of the *Shrimp–Turtle* decision has shown that the Appellate Body of the WTO does, indeed, engage in the kind of normative, interest-oriented reasoning that has been described as balancing. Thus, the AB does not, at least not in all parts, of the decision pretend to be just interpreting the letter of the law in a kind of technical exercise. Instead, it engages, sometimes openly, in arguments of a more or less normative kind, while at the same time demonstrating that it feels bound by the letter of the law and by the intentions of the parties. In order to be in a position better to assess these characteristics of what might be called the AB's judicial style, we may draw on a comparison that M Lasser has undertaken between what he calls 'models of judicial control, debate and legitimacy'.[64] Although all of the Courts that Lasser compares, the US Supreme Court, the French *Cour de Cassation* and the European Court of Justice (ECJ), have a comparable, functionally equivalent position within their respective legal systems, their judgments differ fundamentally in style.

The one extreme of judicial style, according to Lasser, is the *Cour de Cassation*. Its published judgments are extremely short, impersonal and corporatist in tone and entirely syllogistic in approach, presenting the findings made as the only and inevitable conclusion from the wording of the law. This does not mean, according to Lasser, that considerations of equity or the larger social needs and personal perspectives of the individual judge do not influence the judgments of the French *Cour de Cassation*. They are,

[63] This, in turn, might be one form that balancing assumes in international law: see Hector, n 14 above, at 101, 275–6. The finding of the AB has an interesting parallel in the *Lac Lanoux Arbitration* (*France v Spain*), [1957] ILR, 101 at 138–41 and the ICJ's *Fisheries Jurisdiction Case* (*United Kingdom of Great Britain and Northern Ireland v Iceland*), [1974] ICJ Rep 3 paras 73–78 where a duty of parties to negotiate in certain constellations and to take the interests of the other party into account is stated.

[64] See Lasser, n 8 above, for the following.

however, confined to the interaction of the different judicial players in the courtroom and do not appear in the judgments. The explanation of the judgments with a view to doctrinal as well as social and political consequences is left to academic observers, whose notes on the cases are published together with the judgments themselves. Thus, a split or, in Lasser's words, a 'bifurcation' occurs: the discourse of the *Cour de Cassation* is a formalistic legal one, while the more socially responsive elements of judicial decision-making are relegated to the non-public or less public realm or—as far as they are made public—pointed out only by academics.

In the jurisdiction of the US Supreme Court, at the other extreme, such a split is entirely absent. The US judicial style incorporates both kinds of discourse: the formal legal discourse and the more socially responsive, equity-oriented one. Both, in Lasser's view, tend to 'control' each other, in that neither a plainly deductionist style of judicial reasoning, nor an open reference to, for example, the term 'policy' as a justification for a judicial decision seems any longer to be acceptable. Supreme Court decisions, which have to incorporate both kinds of discourse, are extremely long and strive to make the judicial choices transparent to the utmost.

A somewhat intermediate position is taken by the ECJ. Originating in the French tradition, the Court's judgments are comparatively short and rather syllogistic in style. One particular feature of ECJ jurisprudence is, however, that by and large it adopts a teleological approach, frequently justifying decisions with reference to the noble objectives of the European legal order, such as legal certainty and predictability. This resort to the overall objective of the legal order is, in part, indebted to the fact that the ECJ has a public counterpart, the Advocate General, whose reasoning is much more subjective in tone than that of the ECJ, and also takes scholarly doctrines into account. Thus, the opinions of the Advocate General draw attention to the fact that the final decision of the ECJ represents a choice; it is incumbent upon the Court to justify the concrete 'choice'—and it does so by resorting to *telos*.

The interesting point about Lasser's comparison for the present purpose is that the courts (or the greater legal systems of which they are part) are all faced with the need to defend judgments as formalistic legal decisions, and, at the same time, to ensure their responsiveness to political and social needs. They have all developed different models for doing so. If we compare Lasser's findings with the way the AB argues in the 'trade and …' cases, the style to which the latter bears most resemblance is that of the Supreme Court. The AB's style displays a formal strong commitment to textual interpretation, while at the same time relying on normative, policy or interest arguments—in short: balancing—at critical junctures.[65]

[65] Moreover, other features of the US Supreme Court and its jurisprudence that Lasser has observed can be found in the WTO legal system. For example, the dispute settlement reports

Let us take a closer look at this. A first remarkable point is the method of interpretation that the AB uses. It has been stated that the AB relies extensively—and much more so than other courts—on the textual method of interpretation.[66] To get the picture right, this observation must—in the light of the above reading of the *Shrimp–Turtle* case—be complemented by a statement about the specific way in which the AB uses the textual method of interpretation. Only rarely does the method in itself serve to settle an interpretative matter; usually, it is the text of the WTO agreements (and other international agreements) that is seen as a reflection of the objectives and intentions that the parties had when they formulated the respective agreements.[67] The AB's method is hence not a 'pure', self-sufficient literalist approach. This statement is not meant as a criticism. Instead, it may well be that, given the indeterminacy of WTO law, there is no other way. But the manner in which the AB emphasises, over and over again, its commitment to a textual approach leaves the reader with the impression that the AB prefers the more teleological aspects of its interpretation not to receive too much attention. However, both the literalist approach and the teleological one, which is more closely related to a 'socially responsive'[68] jurisprudence, are present.

A similar picture of ambiguity presents itself with regard to the elements of balancing in the AB's reports. A quick glance at European level might help to get a better sense of what is happening at WTO level. In ECJ case law, balancing is—as in German public law[69]—a part of the application of the principle of proportionality.[70] As a final step in applying this test, the ECJ checks—not in all cases, but in some—how important the interests at stake are. A Member State's measure is sometimes pronounced to be in violation of the principle of proportionality because it restricts the freedom of intra-community trade too much and is hence disproportionate in comparison to the regulatory goal pursued.[71] This kind of balancing is rather

are of an exhausting length. On the other hand, the AB is more consensually-minded and corporatist in approach than would seem to be the case with the US Supreme Court from Lasser's account: see, on the AB's approach, McCall Smith, n 3 above, at 80–3. The US Supreme Court was, according to a study by TG Walker, L Epstein and WJ Dixon, 'On the Mysterious Demise of Consensual Norms in the United States Supreme Court' (1988) 50 *Journal of Politics* 361 less consensual in its earlier years.

[66] See Ehlermann, n 2 above, at 615–6; see, also, Howse, n 46 above, at 52–4.

[67] See, also, Howse, n 46 above, at 52–4.

[68] The term is Lasser's.

[69] See HD Jarass and B Pieroth, *Grundgesetz für die Bundesrepublik Deutschland—Kommentar* (7th edn, Munich: Beck, 2004), Art. 20, paras 83–86.

[70] A Desmedt, 'Proportionality in WTO Law' (2001) 4 *Journal of International Economic Law* 441 at 446; JH Jans, 'Proportionality Revisited' (2000) 27 *Legal Issues of Economic Integration* 239 at 240–1; J Neumann and E Türk, 'Necessity Revisited: Proportionality in World Trade Organisation law after Korea—Beef, EC—Asbestos and EC—Sardines' (2003) 37 *Journal of World Trade* 199 at 202–5.

[71] ECJ Cases C–169/91, *Council of the City of Stoke on Trent and Norwich City Council v B & Q plc.*[1992] ECR I–6635, para 15; C–40/82, *Commission v United Kingdom* [1984]

'freelance', and takes place when the body of positive law relevant to the case has been looked at from all angles. The same is, *mutatis mutandis*, true for German public law. These characteristics of the proportionality principle, and even more so of balancing as one of its components, have led some observers to describe the principle as an especially indeterminate and open-ended legal principle,[72] and sometimes describe it as a tool used by judicial decision-makers to enlarge their interpretative space.[73] It is not without doubt that the negative connotation inherent in some of these characterisations is the final word to be said about the proportionality principle.[74] But these statements shed light on one important point about the jurisprudence of the Appellate Body: unlike the ECJ, the AB has not construed any general principle of proportionality as part of WTO law,[75] feeling, presumably, that it is not in a position to assume the competences for wielding such powerful judicial tools.

Consequently, balancing is not a legal requirement in WTO law. However, some WTO norms—such as Article XX GATT, Article 2(2) and (4) TBT, and Articles 2(2), 5(1) and (6) SPS—may be understood as being positive legal expressions of the concept of proportionality.[76] The question, then, is whether the AB uses these norms as entrance doors for performing the kind of balancing that the ECJ, for example, carries out as part of the proportionality test. Of the TBT norms, only Article 2(4) has been at stake in a case so far. The AB decided the case on burden of proof grounds and did not engage much in any kind of balancing with regard to the second part of Article 2(4), which would seem to lend itself most easily to this kind of undertaking.[77] In contrast, the SPS Agreement has been at issue in several cases. Of the elements of Article 2(2) SPS, only the requirement that

ECR, paras 16, 17; C–384/93, *Alpine Investments BV v Minister van Financiën* [1995] ECR I–1141, paras 54 and 55. It has also been observed, however, that such explicit balancing is the exception rather than the norm and the ECJ mainly tends to avoid it: Jans, n 70 above, at 248–9.

[72] Habermas, n 21 above, at 522; Hector, n 14 above, at 209, 210.

[73] Lasser, n 8 above, at 26 observes that similar tests serve as an instrument of fusing a more formalistic and a more socially responsive, equity-oriented style of judicial argumentation in US American constitutional jurisprudence. Desmedt, n 70 above, at 442 also states somewhat mysteriously that the proportionality principle is a 'powerful tool wielded by the judiciary, not the legislature'.

[74] Instead, it has an intimate connection with considerations of justice and may be seen also as restricting political rule, for which reasons it is seen often as a central part of the rule of law or the idea of *Rechtsstaatlichkeit*. The Bundesverfassungsgericht, e.g., derives the proportionality principle, inter alia, from the rule of law principle (*Rechtsstaatsprinzip*) laid down in Art. 20 III of the German Constitution; see 19 BVerfGE 342 at 348; 69 BVerFGE 1 at 35; 92 BVerFGE 277 at 279 BVerFGE.

[75] Desmedt, n 70 above, at 442 and 443.

[76] See Marceau and Trachtman, n 38 above, at 826–34. Elements of proportionality can also be found beyond the norms relevant to the 'trade and …' cases, such as in the Agreement on Subsidies and Countervailing Measures; see Desmedt, n 70 above, at 451–2.

[77] See *European Communities—Trade Description of Sardines*, Report of the Appellate Body, WT/DS231/AB/R, paras 269–291.

'sufficient scientific evidence' be induced to support a measure has so far been interpreted by the adjudicators. In the *Japan—Apples* case, the Panel interpreted this clause to mean that the measure taken had to be proportionate to the risk, as indicated by the evidence.[78] Similarly, the Article 5(1) requirement that measures be based on a scientific risk assessment was interpreted as requiring a rational relationship between the measure and the evidence—a standard which the AB implied might be met more easily when the risks at stake were more serious.[79] Balancing again. These interpretations are, however, all about how much and what kind of evidence a party must bring before a panel for its measures to be allowed to persist. They do not entail any compromise set out by the AB between, for example, the level of health protection which a member seeks to achieve and the trade impact of a measure. Instead, the AB has emphasised over and over again that members are free to set their own levels of protection as they wish.[80] It has also described the establishment of the levels of protection as a sovereign act of the members and an important right.[81] If this right is something like an 'absolute' right and the AB will not pass judgment on whether the level of protection itself is adequate, reasonable or proportionate, no balancing of the protective objectives pursued or of the negative trade effects caused through the measure can take place.

The way that the AB has interpreted Article XX *chapeau* and (g) GATT has already been discussed above. The AB in this case used balancing to arrive at a decision, but it did not weigh the interests at stake in a manner detached from the text. What, then, about the other cases in which Article XX GATT was involved? Fairly blunt balancing language can be found in the *Korea—Beef* case, concerning the application of Article XX(d) GATT,[82] and in the subsequent interpretation of Article XX(b) in the *Asbestos* dispute.[83] Even here, however, most observers tend to assume that the fairly explicit balancing language in these cases does not involve any kind of ECJ-style balancing, i.e., striking down a measure because the level of protection that it aims at is disproportionate to the losses in trade.[84]

[78] *Japan—Measures Affecting the Importation of Apples*, WT/DS245/R, para 8.198, WT/DS245/R, para 8.181. This interpretation was accepted by the AB in WT/DS245/AB/R, paras 147–164.

[79] *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/D26/AB/R, para 194.

[80] *Australia—Measures Affecting Importation of Salmon*, WT/DS18/AB/R, para 199.

[81] *EC–Hormones*, n 76 above, para. 172.

[82] *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body, WT/DS161/AB/R, paras. 161–166.

[83] *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, WT/DS135/AB/R, paras 170–172.

[84] See DA Osiro, 'GATT/WTO Necessity Analysis: Evolutionary Interpretation and its Impact on the Autonomy of Domestic Regulation' (2002) 29 *Legal Issues of Economic Integration* 123 at 137–9; see, also, Desmedt, n 70 above, at 474; Neumann and Tuerk, n 70 above, at 212–4. Marceau and Trachtman, n 38 above, at 852, do not share this view, it seems.

Even if this issue may not be entirely settled, the controversy is, in itself, an indicator that, if the AB should be on its way to developing a fully-fledged, ECJ-style proportionality principle,[85] it is, at least at present, treading carefully. Altogether, then, we also find an ambiguous record with regard to balancing. On the one hand, the AB uses normatively coloured language to arrive at its findings, thus clearly moving away from a deductionist style which makes the finding appear no more than the interpretation of the letter of the law (which corresponds to the 'socially responsive' part that Lasser detects in the decisions of the US Supreme Court). It does, indeed, talk about the interests, the weight and the legitimacy of the objectives at stake. On the other hand, the AB demonstrates that it is careful not to move too far away from either the wording of the law or the intention of the parties, and thus creates the image of an interpreter of the law, rather than of a maker of the law (which corresponds to the formalist aspects in Lasser's analysis). It uses balancing in the application of norms that contain more or less explicit openings for such a venture, but does not, as a general principle, pay verbal tribute to the limits of its mandate for balancing. It also sometimes 'delegates' the balancing back to members.

Before pointing—in a preliminary way—to what this analysis may imply, it is worth noting that, when applied to WTO law, the term 'balancing' does not seem to denote precisely the same thing as it does (especially, for German ears, in the German form of '*Abwägung*') within a domestic or within the European legal system: it is not a supreme judicial decision-maker that—scales in her hand—makes findings on the adequate relationship between competing or conflicting substantive legal interests. The AB deals with the regulatory measures of sovereign states within a larger legal order that is much more fragmented than national law. This explains why, in a recent contribution, A Fischer-Lescano and G Teubner preferred the term 're-entry' to that of 'balancing', in order to denote what should happen where collisions between WTO law and other international law occur.[86]

V. CONCLUSION: SOME IMPLICATIONS

What, then, may the finding that the reports of the Appellate Body contain balancing while simultaneously testifying to an effort by the Appellate Body to demonstrate how it 'sticks with the law' actually teach us? The first avenue that it might be worth pursuing further is the idea that the occurrence of balancing in judicial decisions is indicative of a specific type of polity, i.e., a constitutional system[87] or that it might at least induce its

[85] This is what Hilf, n 57 above, at 127, seems to assume.
[86] Fischer-Lescano and Teubner, n 42 above, at 1030 and 1031.
[87] See R Alexy, *Recht, Vernunft, Diskurs* (Frankfurt aM: Suhrkamp, 1995), at 213–5.

constitutionalisation.[88] However, in the present context, this line of thought cannot be pursued further. If it is supposed to lead anywhere, then several obstacles, both 'empirical'[89] and normative[90] in nature, have to be overcome.

A second line of thought, which also deserves more consideration than can be offered here, is indicated by Lasser's contribution itself. Lasser does not content himself with describing the different judicial styles of the three Courts that he deals with. Instead, he relates the different judicial styles that he describes to certain features of the overall political order that the respective court is located in, and the function that individual 'cases' have within this system.[91] Central to his work is the idea that the different judicial styles represent, in the context of the respective overall setup, different modes of creating legitimacy.[92] The basic idea that courts must act and do act in a way that can rely on the acceptance of the relevant actors[93] is shared by others,[94] specifically with regard to the WTO.[95] If the ambiguous judicial style of the AB can be understood as a response to this need to create acceptance (a point which would clearly need more arguments in its

[88] For the WTO, this is advocated by D Cass, 'The "Constitutionalization" of International Trade Law: Judicial Norm-generation as Engine of Constitutional Development in International Trade' (2001) 12 *European Journal of International Law* 39.

[89] The important question is, evidently, whether the inference is valid that the occurrence of balancing is always and exclusively indicative of a constitutional system, or, to put it more broadly, of a specific type of polity. The use of balancing as a means of co-ordination between different legal systems in conflicts of law and its use by the ICJ in *Continental Shelf—Tunisia v Libya*, n 1 above, para 71 and in the *Fisheries Jurisdiction Case* (*United Kingdom of Great Britain and. Northern Ireland v Iceland*), n 63 above, paras. 55–78 speak against it.

[90] For a critique of attempts to conceive of the WTO as a constitutional entity or to 'constitutionalise' it, see R Howse and K Nicholaidis, 'Legitimacy and Global Governance: Why Constitutionalisng the WTO is a Step too Far' in RB Porter *et al.* (eds), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (Washington, DC: Brookings Institution Press, 2000) at 227; see, also, M Krajewski, 'Democratic Legitimacy and Constitutional Perspectives of WTO Law' (2001) 35 *Journal of World Trade* 167.

[91] Lasser, n 8 above, seems to be somewhat ambiguous about whether to describe the relationship between some more general features of the respective system and the judicial style in terms of causation. In some instances, he explicitly assumes that the phenomenon can only be understood as a 'chicken-and-egg type' of problem (at 33); other passages indicate that he assumes some sort of causality to be involved (see, e.g., at 56).

[92] Legitimacy is, of course, a much disputed term of late, especially in international relations scholarship. A distinction often made is the one between legitimacy in a normative sense and in an empirical sense; see, for an overview, J Steffek, 'The Legitimation of International Governance: A Discourse Approach' (2003) 9 *European Journal of International Relations* 249 at 251–4. A political system or legal norms that deserve recognition are legitimate in a normative sense; they are legitimate in an empirical sense when they meet with actual, empirical acceptance. Lasser is not very clear on the sense in which he uses the term and seems to be oscillating between the two.

[93] Using this formulation is, of course, a quite transparent manœuvre carried out with the aim of not answering the complex question of who actually needs to accept judicial decisions. The parties involved? The larger public? Academic observers?

[94] For the ECJ, see C Jetzlsperger, 'Legitimacy through Jurisprudence?', EUI Working Paper Law 12/03, Florence.

[95] See McCall Smith, n 3 above, at 75; see, also, Ehlermann, n 2 above, at 615 ff., and Howse, n 46 above.

support than can be offered here), it could be expected to be relatively stable over time (at least as long as neither the judicial set-up nor the external conditions change fundamentally). For now, all that can be said is that the AB has developed its own characteristic way of responding to the tensions and interdependencies that exist between transnational trade governance and social regulation—a way that makes it seem that both those who are primarily concerned with the wording of the WTO treaties and those who quickly dismiss the wording as irrelevant have a point, surprising as that may be.

Section I.3

Participatory Governance: Emerging Patterns and their Juridification

5

Why Co-operate? Civil Society Participation at the WTO

JENS STEFFEK AND CLAUDIA KISSLING*

I. INTRODUCTION

IN HIS CONTRIBUTION to this volume, Rainer Nickel calls for 'participatory arrangements ensuring the involvement of civil society actors, stakeholders, and the public in the arguing, bargaining, and reasoning processes of transnational regulation'.[1] He is certainly not the only one to suggest this. Civil society participation has become a buzzword in the debate about legitimacy, accountability and democracy in governance beyond the nation-state. It is therefore not surprising that many international organisations, prominent among them the World Trade Organisation (WTO), have come under considerable pressure to open up their policy-making process to non-state actors. However, although the WTO has become more transparent in recent years, direct stakeholder access to most of its 'arguing, bargaining, and reasoning processes' is still denied. How can this be explained?

In order to answer this question, we first present a general framework for the analysis of co-operation dynamics between international governmental organisations (IGOs) and civil society actors. This framework distinguishes between six different phases of international rule-making in international governance. It also spells out push and pull dynamics along the different phases of this policy cycle. Push factors are motivations for civil society to 'push into' the institutions of international public governance. Pull factors are motivations for these public institutions to pull non-state actors into their policy process. We illustrate the usefulness of this approach with reference to the United Nations system, in which civil society participation was institutionalised from the very beginning. In the second

* For helpful comments, we wish to thank Kerstin Martens and Peter Mayer, as well as the participants of the workshop on Legal Patterns of Transnational Social Regulation and International Trade, held in Florence in Sept 2004.

[1] See Nickel, at Part I, seventh para.

part of this chapter, we present some evidence on civil society participation at the WTO. Here we find that there are few incentives for the organisation itself to pull civil society actors into its policy-making process. Agenda-setting is the task of governments, research and analysis are delivered by the Secretariat, and compliance control is undertaken jointly by the organisation and its members. We also observe that the WTO—like the UN—is protecting an *intergovernmental core* of policy-making in which co-operation with civil society remains at the discretion of states parties. To push open the door to trade policy-making, civil society can rely only on public shaming, that is, by threatening to undermine the organisation's legitimacy as it violates widely accepted standards of good governance.

II. INTERNATIONAL ORGANISATIONS AND NON-STATE ACTORS: EXPLAINING PATTERNS OF CO-OPERATION

The existing literature about the interaction between IGOs and civil society[2] follows two separate lines of inquiry. First, there is a bulk of literature from law and (broadly conceived) political theory that asks whether civil society *should* interact with IGOs. The answers given are, for the most part, affirmative. Many authors argue that involving non-state actors in policy-making will contribute to the legitimacy and accountability of international governance. This case has been made for the United Nations system and for global governance in general.[3] It has also been made by authors who promote the enhanced participation of non-governmental organisations (NGOs)[4] in the WTO.[5]

[2] It is a contested question who is or should be regarded as part of civil society: see D Castiglione, 'Civil Society' in P Newman (ed), *The New Palgrave Dictionary of Economics and the Law* (Basingstoke: Macmillan, 1998). The term international (or transnational) civil society has been in use for only a decade or so and has usually been related to ideals of democratisation or citizen emancipation: see H Anheier *et al*., 'Introducing Global Civil Society' in H Anheier, M Glasius and M Kaldor (eds), *Global Civil Society 2001* (Oxford: OUP, 2001); RD Lipschutz, 'Reconstructing World Politics: the Emergence of Global Civil Society' (1992) 21 *Millennium* 389. We propose to define international civil society by its activity. Members of civil society are all those non-governmental actors who seek to influence political deliberation about public norms by means of argumentation.

[3] See, e.g., C Alger, 'Strengthening Relations between NGOs and the UN System: Towards a Research Agenda?' (1999) 13 *Global Society* 393; T Brühl and V Rittberger, 'From International to Global Governance: Actors, Collective Decision-Making, and the United Nations in the World of the Twenty-First Century' in V Rittberger (ed), *Global Governance and the United Nations System* (Tokyo: United Nations UP, 2001); JA Scholte, 'Civil Society and Democratically Accountable Global Governance' (2004) 39 *Government and Opposition* 211.

[4] Recently, the reference to NGOs has been at least partly supplanted by the term 'civil society', which has been increasingly used in academic literature on global governance and in statements of IGOs. Technically speaking, however, most IGOs interact only with organised civil society, and hence NGOs. Therefore, in our analysis, we use the term NGO to describe a non-state, non-profit-making organisation.

[5] See C Bellmann and R Gerster, 'Accountability in the World Trade Organisation' (1996) 30 *Journal of World Trade* 31; S Charnovitz, 'Participation of Non-governmental

Three major arguments for the desirability of enhanced co-operation can be distinguished in this debate. First, NGOs may possess technical expertise that international organisations cannot acquire on their own. Widening their knowledge base through consultation with non-state actors, IGOs will take more informed and more effective policy decisions. Hence, NGO participation improves the effectiveness of global governance. Secondly, NGOs may channel citizens' values, interests and concerns into international policy-making. They thus enlarge the range of viewpoints and arguments present in political deliberation. At the same time, they give a voice to (minority) groups of stakeholders that are inadequately represented in a governance system based on the principle of 'one state, one vote'. NGO participation is, therefore, an asset to the democratic legitimacy of global governance. Thirdly, NGOs may also contribute to the creation of a public sphere of global governance.[6] They communicate developments in international politics to the local basis of their own organisations or networks and bring them to the attention of the mass media. Through these channels, information on international policy-making feeds into national public debates and thus can reach citizens as the ultimate addressees of global governance. NGOs are often regarded as weaving a 'connecting tissue'[7] between the global citizenry and the institutions of international policy-making. This, in brief, is why so many authors believe that civil society *should* interact (or interact more) with international organisations.

As a normative rationale, this clearly highlights potential, rather than reflecting present practice. Quite detached from this normative debate, we find a second strand of academic inquiry: an equally rich literature, mainly from political science, which asks why (and how) civil society actually *does* interact with IGOs.[8] These two strands of investigation rarely speak to each other, yet, the empirical literature is relevant for normatively oriented scholars as well, because it seeks to explain the dynamics and motivations behind the current practice. If we plead for more co-operation of NGOs with IGOs from a normative point of view, we should also know why and how the present patterns of interaction came about. Most authors interested in such

Organisations in the World Trade Organisation' (1996) 17 *University of Pennsylvania Journal of International Economic Law* 331; DC Esty, 'The World Trade Organisation's Legitimacy Crisis' (2002) 1 *World Trade Review* 7; RG Shell, 'The Trade Stakeholders Model and Participation by Non-state Parties in the World Trade Organisation' (1996) 17 *University of Pennsylvania Journal of International Economic Law* 359.

[6] See P Nanz and J Steffek, 'Global Governance, Participation, and the Public Sphere' (2004) 39 *Government and Opposition* 314.

[7] See Esty, n 5 above at 17.

[8] The literature on NGOs in international affairs is extensive. For an overview of the role of non-state actors in international relations (both NGOs and multi-national corporations), see T Risse, 'Transnational Actors and World Politics' in W Carlsnaes, T Risse and BA Simmons (eds), *Handbook of International Relations* (London: Sage, 2002); for civil society, see Anheier, n 2 above.

empirical questions have adopted the perspective of NGOs or political activists, and investigate their strategies and tactics in dealing with IGOs and state representatives, with the aim of discovering the determinants of NGO success in influencing politics.[9] The title of an early work of this genre captures the approach well: '*International Non-Governmental Organisations: their Purposes, Methods and Accomplishments*.'[10]

However, it seems equally interesting to reverse the perspective and ask why international organisations might wish to interact with NGOs. In our view, an appropriate analytical framework should take both perspectives into account. There is some literature which tackles the question why IGOs—despite the pressure placed on them by NGOs—are reluctant to co-operate with civil society,[11] or why certain IGOs are more or less susceptible to NGO pressure.[12] However, it is not the case that IGOs always fend off NGOs. In fact, IGOs may have good reason to engage with non-state actors on their own initiative because they can expect certain advantages from co-operation. A variety of incentives for IGOs to collaborate with non-state actors has been mentioned throughout the existing literature. Yet, to date, there has been no systematic overview of the relationship between the actions of the two types of actors.[13]

III. MAPPING INCENTIVES FOR CO-OPERATION: A NEW FRAMEWORK FOR ANALYSIS

III.1 The Policy Cycle

So we start our own inquiry by asking what motivations NGOs and IGOs might have for engaging in co-operation. Co-operation between the two

[9] See, e.g., B Arts, *The Political Influence of Global NGOs: Case Studies on the Climate and Biodiversity Conventions* (Utrecht; International Books, 1998), at 55–61; ME Keck and K Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell UP, 1998), at 25–9; Risse, n 8 above, at 262–8.

[10] See LC White, *International Non-governmental Organisations: Their Purposes, Methods and Accomplishments* (New York: Greenwood Press, 1968).

[11] See C Alger, 'The Emerging Roles of NGOs in the UN System: From Article 71 to a People's Millennium Assembly' (2002) 8 *Global Governance* 93, especially at 98–100; United Nations, 'UN System and Civil Society—An Inventory and Analysis of Practices' (Secretary General, Panel of Eminent Persons on Civil Society and UN Relationships, May 2003), available at http://www.un.org/reform/pdfs/hlp9.htm (accessed 17 March 2005), at 18–19.

[12] See P Willets, 'From "Consultative Arrangements" to "Partnership": The Changing Status of NGOs in Diplomacy at the UN' (2000) 6 *Global Governance* 191 at 193; MP Riggirozzi and D Tussie, 'Pressing Ahead with New Procedures for Old Machinery: Global Governance and Civil Society' in V Rittberger (ed), *Global Governance and the United Nations System* (Tokyo: United Nations Press, 2001).

[13] Albin comes closest to what we have in mind, but she only touches upon many of these issues in her discussion of the roles that NGOs play in multilateral intergovernmental negotiations: see C Albin, 'Can NGOs enhance the Effectiveness of International Negotiation?' (1999) 4 *International Negotiation* 371.

types of actors can be the result of two different dynamics: NGOs might push into institutions of global governance; or IGOs might pull NGOs in.[14] Hence, we deem it useful to distinguish between the 'push' factors and the 'pull' factors that determine patterns of co-operation. To get an even more fine-grained empirical picture, a second distinction can be made between different phases in the process of international policy-making. A useful heuristic framework that allows for such a distinction of phases is the policy cycle.[15] We adopt a model of the policy cycle with six phases: agenda-setting, research and analysis, policy formulation, negotiation and decision, policy implementation, and policy evaluation. This differentiation of phases can help us account for the fact that the patterns of IGO–NGO co-operation may change over time and on both sides.

Potential for co-operation may depend upon the specific tasks that an IGO or an NGO is pursuing with regard to discrete phases of the policy cycle. In the following sections, we will present this framework and illustrate it with examples drawn from the United Nations (UN) system. Sixty years of IGO–NGO co-operation at the UN provide us with sufficient empirical material to demonstrate the usefulness (as well as some of the limits) of this framework of analysis.

III.2 Pull Factors

Based on the existing literature, we can identify four possible situations in which an IGO might be interested in co-operation with non-state actors. First, IGOs might seek NGO assistance in order to pinpoint new issues which should be dealt with. This is, presumably, often the case in 'forum organisations', whose task it is to identify and discuss emerging problems in the international system. Globalisation and the corresponding increase in the scope, *fora* and complexity of post-Cold War international negotiations have probably set the conditions in which outside assistance for agenda-setting, and for informing the policy formulation in general, is useful.[16]

[14] When speaking of IGOs in this context, we refer to their governance structure controlled by governments, rather than to the secretariat of the organisation. During most policy phases, both types of actors are supposed to have more or less identical interests, since secretariats have to implement governmental decisions, or their actions are at least expected not to run counter to governmental intentions. However, this can be significantly different in the policy formulation and policy decision phases. Here, secretariats may have an incentive to pull in NGOs in order to influence the final policy decision in their own interest.

[15] The policy cycle is a concept developed in public policy research that distinguishes certain phases in a standard procedure of policy-making. Although the overall structure of the various 'policy cycles' in use is always similar, models vary with regard to the number and description of the discrete phases.

[16] See Albin, n 13 above, at 372.

A prominent real-world example of co-operation in agenda-setting is the consultative relationship between NGOs and the Economic and Social Council of the United Nations (ECOSOC). Once accredited within one of three categories, NGOs can participate as observers at public meetings of the Council, its committees and sessional bodies, or at least be present at the meetings which are concerned with matters within their field of competence. In addition, they have large speaking and submission rights. Moreover, the number of NGOs in consultative status has grown significantly over the years. Whereas in 1948, there was a total of 41 accredited NGOs, this number had grown to 377 in 1968, to 1,350 in 1998,[17] and to 2,531 in 2004.[18] NGOs that have general consultative status (the most important category) in the ECOSOC have the right to suggest topics for the agenda.

Secondly, an IGO might seek NGO co-operation to acquire additional expertise for the formulation of its own policies.[19] This seems particularly useful when there is uncertainty about the problem that international governance is designed to resolve. The expert function of non-state actors in international environmental governance has been highlighted, *inter alia*, in the literature on epistemic communities of concerned scientists.[20] In the case of the UN, it has been argued that the consultative status of the ECOSOC also testifies to a certain need of the organisation to acquire expert knowledge with regard to formulating policy options.[21] The UN conferences organised since the early 1970s are an even more obvious example of the incentives to solicit the advice of NGO experts. Environmental politics is a case in which the expert advice of NGOs was much needed in order to understand the issues at stake and to formulate political responses to them. At the 1992 UN Conference on Environment and Development (UNCED), also known as the Rio Conference or Earth Summit, even NGO representatives whose organisations did not have consultative status with the ECOSOC were involved in the meetings of the four Preparatory Committees (PrepComs). Five NGO representatives were even allowed to sit among the working parties of the PrepCom sessions.[22] After the Conference, the General Assembly and the ECOSOC set up a special category for the

[17] Alger, n 11 above, at 95.

[18] See http://www.un.org/esa/coordination/ngo/about.htm, and for a list, http://www.un.org/esa/coordination/ngo/pdf/INF_List.pdf (both accessed 2 Aug 2004).

[19] See S Charnovitz, 'Two Centuries of Participation: NGOs and International Governance' (1997) 18 *Michigan Journal of International Law* 183; K Martens, 'Examining the (Non-) Status of NGOs in International Law' (2003) 10 *Indiana Journal of Global Legal Studies* 1.

[20] PM Haas, 'Introduction: Epistemic Communities and International Policy Co-ordination' (1992) 46 *International Organisation* 1.

[21] P-M Dupuy, 'Conclusions générales du colloque' in M Bettati and P-M Dupuy (eds), *Les O.N.G. et le droit international* (Paris: Economia, 1986), at 255.

[22] K Conca, 'Greening the UN: Environmental Organisations and the UN System' in L Gordenker and TG Weiss (eds), *NGOs, the UN, and Global Governance* (Boulder, Colo: Lynne Rienner Publishers, 1996), at 111.

participation of 550 NGOs which had taken part in the UNCED in the work of the new Commission on Sustainable Development, a functional commission of the ECOSOC.[23] The practice of bringing non-governmental expertise in is not confined to the UN. The IMF, for example, also keeps close ties with non-governmental research institutions and think-tanks in order to tap into their macro-economic expertise.[24]

Thirdly, and most importantly, an IGO might seek NGO co-operation in the implementation phase of the policy cycle. Many IGOs do not have sufficient staff to implement directly all the projects they are funding. So the UN and others increasingly rely on NGOs with regard to project implementation. In particular since the 1990s, the UN has intensified the transfer of funds and services through NGOs.[25] An area in which this is of particular importance is the field of development.[26] In the case of the World Bank, around 70 per cent of all its development projects are implemented by NGOs.[27]

Fourthly, an IGO might seek NGO co-operation to monitor parties' compliance with international norms or agreements.[28] Again, some IGOs do not have enough personnel and resources effectively to monitor compliance with their own policies. They hence make use of information provided by non-state actors about the situation 'on the ground'. Human rights protection in the United Nations is an excellent example of such co-operation: the system of surveillance would simply not work without NGO input.[29] Since the 1990s, we have seen evidence of an increasing need, on the part of the UN, for NGO involvement at the operational level in policy fields other than classic human rights protection, i.e., in peacekeeping or other on-site UN human rights field operations. Since human rights are nowadays seen not only as a distinct subject, but also as an integral part of other policies, this new incentive to work with NGOs increasingly concerns more and more UN operational agencies.[30]

[23] See Willets, n 12 above, at 194.

[24] See Scholte, n 3 above at 23–4.

[25] See A Donini, 'The Bureaucracy and the Free Spirits: Stagnation and Innovation in the Relationship Between the UN and NGOs' in Gordenker and Weiss n 22 above, at 88–97; Alger, n 11 above, at 116.

[26] See C Chabbott, 'Development INGOs' in J Boli and GM Thomas (eds), *Constructing World Culture: International Non-governmental Organisations since 1875* (Stanford, Cal: Stanford UP, 1999).

[27] Source: World Bank 'Civil Society Co-operation—Progress Report for Fiscal Years 2000 and 2001' at 4, available at http://siteresources.worldbank.org/CSO/Resources/Prog-RptFY0001.pdf (accessed 22 July 2004).

[28] UN, n 11 above, at 6.

[29] See Dupuy, n 21 above at 259; F.D. Gaer, 'Reality Check: Human Rights NGOs Confront Governments at the UN', in Gordenker and Weiss, n 22 above at 55.

[30] See K Martens, 'An Appraisal of Amnesty International's Work at the United Nations; Established Areas of Activities and Shifting Priorities since the 1990s' (2004) 26 *Human Rights Quarterly* 1050 at 1067–70.

III.3 Push Factors

By investigating push factors, we now reverse the perspective and adopt the viewpoint of an NGO. What reasons might they have to seek interaction with an IGO? First, they might seek to bring a new issue on to the international agenda. Having a topic on an IGO's official agenda generates more publicity and recognition for that topic. Publicity might also help NGOs to win allies among national governments. The campaign against land mines, for instance, was initiated by NGOs pushing for international recognition of these weapons as a problematical category in need of multilateral regulation.[31] Secondly, they might seek to influence the research process that informs the definition of problems and political options. In the early years of the UN, this mainly concerned social and humanitarian issues since the most active and effective international NGOs were those dealing with such concerns.[32] Today, much of NGO activity in the field of environmental politics falls into this category. In the case of climate policy, for example, environmental NGOs as well as business NGOs try to feed their assessment of the imminence and risks of man-made climate change into the fact-finding process of the international regime.[33]

Thirdly, and, arguably, in most cases, NGOs seek to influence an IGO's policy formulation and decision in an issue area. Thus, beyond informing research or discussion in an IGO, they try to achieve their goals and values by exerting political influence at intergovernmental level. A perfect example in this context is NGO commitment to the discussions taking place at UN Conferences. In the 1970s, ECOSOC–NGO relations had begun to stagnate, a situation which some referred to as 'under-achievement'.[34] At that time, development issues had come to the forefront, owing to the increasing number of developing countries that had attained independence. This stagnation led to NGOs becoming more and more politically oriented—a role which they had shunned before—and also brought trade issues or economic and social justice onto their action agenda. These new mandates, in turn, also constituted a spur for NGOs to use UN Conferences, mainly focusing on development issues, as a catalyst for exerting influence.[35] More flexible rules of procedure, parallel conferences and NGO *fora* have opened up

[31] See R Price, 'Reversing the Gun Sights: Transnational Civil Society Targets Land Mines' (1998) 52 *International Organisation* 613 at 619–23.

[32] See A Archer, 'Methods of Multilateral Management: The Inter-relationship of International Organisations and NGOs' in TT Gati (ed), *The US, the UN and the Management of Global Change* (New York: New York, UP, 1983), at 306.

[33] See P Newell, *Climate for Change: Non-state Actors and the Global Politics of the Greenhouse* (Cambridge: CUP, 2000).

[34] See Charnovitz, n 19 above, at 258–61.

[35] See Archer, n 32 above, at 309.

new avenues for NGO participation even if this has never resulted in giving NGOs any role in decision-making itself.

Fourthly, NGOs might also seek to monitor the compliance of parties with the rules or decisions of the IGO that they support. The classic way of introducing NGO observations on the human rights violations of states into the UN policy-cycle was, and still is, participation in the monitoring and complaint mechanisms set up through the UN Commission on Human Rights and the procedures of the Treaty Bodies.[36]

However, the wish to influence the process of policy-making is not necessarily the only motivation for NGOs seeking co-operation with an IGO. Many international NGOs are, in fact, in continual search for funding, and IGOs, in particular those active in the field of development and humanitarian aid, can represent considerable sources of finance for them.[37] Therefore, an additional explanation of why NGOs might push towards co-operation with IGOs is organisational self-interest: the non-state actor needs funding to survive. Along the phases of the policy cycle, there are two situations in which such financial self-interest may be of major importance: first, when NGOs provide studies or data to IGOs, i.e., commissioned expertise; secondly, when NGOs are paid for implementing the projects financed by an IGO. These financial dependencies have led some commentators to warn NGOs against falling into a trap of subservience.[38] Table 1 summarises all the explanatory factors examined so far.

III.4 The Intergovernmental Core of Governance

Table 1 displays the model of the policy cycle that we use here as a framework for analysis. It reveals that there is potential for IGO/NGO co-operation in almost all phases of policy-making, in particular, in the agenda-setting and research phase and during the implementation of projects. The factors that we identified in the model can help us to understand why this potential is realised in some cases and not in others. Some IGOs, for example, do not need any data or information from NGOs because they can rely on their own staff or national experts, or a combination of both. Likewise, rule-making IGOs quite simply do not have any projects to implement and hence no funding to give to non-state actors. Conversely, NGOs may not be interested in the policies of some international organisations because they do not perceive these policies as affecting their values

[36] See Martens, n 30 above, with regard to Amnesty International.

[37] See A Bichsel, 'NGOs as Agents of Public Accountability and Democratisation in Intergovernmental Forums' in W Lafferty and J Meadowcraft (ed), *Democracy and the Environment: Problems and Prospects* (Cheltenham: Edward Elgar, 1996), at 236–8; A Cooley and J Ron, 'The NGO Scramble: Organisational Insecurity and the Political Economy of Transnational Action' (2002) 27 *International Security* 5.

[38] See Donini, n 25 above, at 97–100.

Table 1: Incentives for Co-operation between IGOs and NGOs

Policy phase	Influencing factors	
	Pull factors (IGOs pulling NGOs in)	**Push factors (NGOs pushing into IGOs)**
Agenda-setting	IGOs seek NGO assistance in identifying new issues	NGOs seek to influence the IGO's agenda
Research and analysis	IGOs seek NGO co-operation to acquire additional expertise	NGOs seek to inform the research process and/or seek financing for the provision of expertise
Policy formulation	–	NGOs seek to influence the IGO's policy formulation
Negotiation and decision	–	NGOs seek to influence the IGO's policy choices
Policy implementation	IGOs seek NGO co-operation to implement their own projects	NGOs seek financing for implementation of projects
Policy evaluation	IGOs seek NGO data to monitor parties' compliance	NGOs seek to assure parties' compliance

and interests or those of their constituencies. The amount of *de facto* co-operation between IGOs and civil society in the different phases of policy-making will hence depend on the specific circumstances of the case.

It is striking, however, that pull factors are absent in the central stage of the policy-making process: the formulation of decisions. Many NGOs, quite clearly, would like to influence these policy decisions. Yet, the IGO or the state representatives negotiating in it is not likely to reap any benefits from NGO presence at this stage.[39] On the contrary, public exposure threatens to obstruct package deals being made among diplomats and politicians.[40] In the case of the UN, attempts at a further institutionalisation of the existing procedures of NGO–IGO relations (UN Conferences[41]) or an extension of participation procedures to other main UN bodies,[42] such as

[39] Individual state representatives, delegations or IGO staff members may still collaborate in this phase with NGOs if they have a common position on the issues at stake. They may, e.g., pass on selected information about the negotiation process to be made public by the NGO. However, it is unlikely that all state representatives will have a discernable interest in co-operation in the phase of decision-making.

[40] See D Stavasage, 'Open-Door or Closed-Door? Causes and Consequences of Transparency in Domestic and International Bargaining' (2004) 58 *International Organisation* 667.

[41] Apart from the changes adopted in ECOSOC Resolution 1996/31 of 25 July 1996, which provided for a standard procedure for accreditation by conference preparatory committees encompassing all conferences convened by any organ of the UN.

[42] With the exception of the formal inclusion of some NGOs, together with voting rights, in the governance structures of a few UN-related bodies which focus on specific issues (UNAIDS; Global Alliance for Vaccines and Immunisation; The Global Fund to Fight AIDS,

the General Assembly, have never succeeded. From the early days, NGOs attended meetings of the General Assembly committees, later its Special Sessions, and since the 1990s have also attended exceptional gatherings of the Assembly itself, meeting, however, as a committee of the whole, or during a formal suspension of the meeting to hear NGO representatives. In this context, NGO protests during the five-year review of human rights in a regular General Assembly session in 1998 led to an unofficial NGO meeting being convened.[43] Apart from this, some selected NGOs have been given observer status in the General Assembly. However, this remains limited to NGOs with some exceptional status,[44] and has, at times, been highly controversial.[45] Consequently, contact between civil society and Assembly members remains largely informal.[46]

The same pattern of informal and precarious consultation practice is evident in the case of the UN Security Council. In recent years, the Security Council, through the action of individual members, has opened to some degree towards NGOs. Before that time it was very much a closed policy circle, which is not really surprising, given the secretive nature of the security issues with which it dealt. With the emergence of the notion of 'human security', which embraces humanitarian and social issues, both governmental and civil society actors seemed to have become more inclined to allow NGOs in 'through the cracks in the floor'. Two procedures have developed for informal contact with NGOs. The first, baptised the 'Arria Formula', gives NGOs the opportunity to brief the Council on international peace and security issues. The second, the so-called NGO Working Group on the Security Council, allows NGOs to consult with Council members and to be briefed.[47] Meetings take place regularly (monthly/weekly), but remain informal, off-the-record and are held outside the official Council meeting and not in the regular formal or informal Council meeting rooms. They take place in a confidential setting. The Working Group, moreover,

Tuberculosis & Malaria). However, these new coalitions are organised on a UN inter-agency basis or outside the UN.

[43] See Willets, n 12 above, at 202.

[44] Such as the International Committee of the Red Cross, which enjoys international legal personality given its specific tasks with regard to humanitarian law, the International Federation of Red Cross and Red Crescent Societies, the international federation of the International Committee, and the International Union for the Conservation of Nature and Natural Resources, a hybrid organisation consisting of governmental and NGO representatives.

[45] In 1994, the General Assembly, at the request of the US, agreed to place a general block on any more NGOs being recognised: see UN GA decision 49/426 of 9 Dec 1994. Later, this was abandoned.

[46] Donini already stated this in the mid-1990s: see Donini, n 25 above, at 85.

[47] JA Paul, 'A Short History of the NGO Working Group on the Security Council', available at http://www.globalpolicy.org/security/ngowkgrp/history.htm, (accessed 2 Aug 2004); JA Paul, 'The Arria Formula' available at http://www.globalpolicy.org/security/mtgsetc/arria.htm (accessed 2 Aug 2004).

has a closed membership confined to major international NGOs in the fields of humanitarian relief, human rights, disarmament, global governance and development.

This 'pressure of everyday encounters'[48] might have spawned a culture of 'pulling strings' and networking. However, to date, there has been no formal institutionalisation of participation structures in the General Assembly and the Security Council. This brief account of NGO relations with the General Assembly and the Security Council shows how state representatives seek to protect these areas where crucial political decisions are negotiated from too much interference. In fact, all reform proposals that called for an extension of NGO rights and status at the political core of the UN ultimately failed. ECOSOC Decision 297 of 25 July 1996 recommended that the General Assembly examine the question of the participation of NGOs in all areas of work of the UN. Its adoption was made possible only by adding an interpretive statement which restricted the scope of this paragraph to the competence of the General Assembly as set out in Article 10 of the UN Charter, thus excluding peace and security matters dealt with by the Security Council. Subsequently, the General Assembly Working Group's sub-group on NGOs reached deadlock following disagreement over the scope of work, and was disbanded when the parent working group was wound up in July 1997.[49] The report of the Secretary-General of 1998 suggested that ECOSOC-accredited NGOs be allowed to occupy a number of seats in the General Assembly 'as available'.[50] This proposal, however, was discarded by state representatives.

These meagre results of the reform initiatives seem to confirm the assumption that governments want to keep tight control over the environment in which an IGO's main decisions are made. Developments at the UN suggest that even IGOs that have a long track record of co-operation with civil society are eager to protect an *intergovernmental core* of decision-making against NGO influence. By the metaphor 'intergovernmental core', we mean all those processes of negotiation in which a political decision is imminent and state representatives (and not bureaucrats or experts) are the driving force. As we have argued above, incentives for liaising with non-governmental actors are, presumably, low at this stage. If non-state actors are present in this phase of the policy cycle in an IGO, this can only be due to a massive push on the part of civil society. Having presented and illustrated our model of IGO–NGO co-operation, we now turn to an empirical analysis of the situation at the WTO.

[48] See Alger, n 11 above, at 114.
[49] See Willets, n 12 above, at 198–200.
[50] See UN Doc A/53/170 of 10 July 1998.

IV. PARTICIPATION OF NON-STATE ACTORS IN THE WTO

IV.1 Rise and Decline of the Club Culture in GATT

From the perspective of non-state actors, international trade governance came to a promising start after World War II. From 1946 to 1948, the predecessor of today's WTO, the International Trade Organisation (ITO), was negotiated, envisaged as an encompassing organisation in the field of international economic co-operation and only *inter alia* concerned with trade. However, it was originally supposed to tackle a much wider range of issues, including full employment and economic development.[51] On the initiative of the United States, non-state actors were admitted to the meetings of the preparatory committee that was in charge of producing a Charter for the ITO. Thus, NGOs were able to follow the negotiation of the ITO Charter and to submit documentation to state representatives.[52]

Provisions for an institutionalised consultation of NGOs were also made in the first draft of the ITO Charter that the United States had sponsored. Article 71(3) of the draft envisaged that the ITO 'may make suitable arrangements for consultation and co-operation' with NGOs and 'may invite them to undertake specific tasks'.[53] The rationale behind this formulation was that NGOs had research staff, expertise and facilities so that the ITO might ask them to carry out certain studies.[54] In the course of the Charter negotiations, the reference to these 'specific tasks' was dropped, but the call for consultation and co-operation remained.[55] The ITO Charter was adopted in March 1948 at the United Nations Conference on Trade and Employment in Havana, but, as is well known, was never ratified.

What remained from the multilateral effort was the General Agreement on Tariffs and Trade (GATT) that had already been concluded in 1947. Due to its status as a mere tariff agreement, the GATT regime was not supposed to develop into a proper international organisation. The original GATT was a treaty that dealt almost exclusively with trade in products and

[51] RN Gardner, *Sterling—Dollar Diplomacy. Anglo-American Co-operation in the Reconstruction of Multilateral Trade* (Oxford: Clarendon Press, 1956); J-C Graz, *Aux sources de l'OMC: La Charte de la Havane, 1941–1950* (Geneva: Droz, 1999).

[52] S Charnovitz and J Wickham, 'Non-governmental Organisations and the Original International Trade Regime' (1995) 29 *Journal of World Trade* 111.

[53] The Draft Charter is included in the *Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment* (London: Oct 1946), UN Doc. E/PC/T/33.

[54] See Charnovitz and Wickham, n 52 above, at 114.

[55] See the Havana Charter for an International Trade Organisation, Art 87(2), UN Doc. E/Conf.2/78, 24 Mar 1948, published in *United Nations Conference on Trade and Employment, Final Act and Related Documents* (Havana: UNCTAD, 1948).

> was not intended to be a comprehensive world organisation. It was a temporary side affair meant to serve the particular interests of the major commercial powers who wanted a prompt reduction of tariffs among themselves.[56]

Thus, the GATT was constructed following a 'club model' of international co-operation.[57] It relied on confidentiality of proceedings, excluded minor actors from them, and was geared towards establishing *faits accomplis* that would bind national governments to multilateral agreements and limit the influence of domestic protectionist lobbies. Insulating the GATT from the dynamics of wider international relations was also useful in a different respect. It helped to shield the GATT from too much political interference motivated by geo-strategic or other non-trade concerns. In turn, by resolving trade disputes within the GATT, economic tensions could be prevented from doing too much damage to 'high politics'.

Given its limited tasks and its institutional design, it is not surprising that the GATT did not develop arrangements for consultation or co-operation with NGOs. From the IGO's point of view, there was little to gain from the presence of NGOs in tariff bargaining. What crucial information could they have provided? The implementation of projects was not an issue with the GATT either. Enhanced publicity of proceedings would not have been conducive to the smooth functioning of intergovernmental tariff negotiations or dispute settlement. From the NGO point of view, too, there was little interest in a direct presence at the GATT. Tariff negotiations were of interest to industry associations that lobbied their national governments. General interest NGOs were little concerned with questions of trade. Moreover, media interest in the GATT was limited, due to the highly technical character of its agenda. In the age of confrontation between two rival geopolitical *blocs*, more exciting things were happening in international affairs than the mostly intra-Western struggles over trade rules and tariffs.

As actors within the GATT system did not see advantages in opening the regime, and actors external to it did not ask for it, it was almost overdetermined that trade governance became a secretive affair. Policy-making and dispute settlement in the GATT remained closed to observers and documents about its activity rarely emerged. Not least because of its insulation, the GATT also spawned a transnational community of trade experts and diplomats who cultivated considerable team spirit and an ethos of problem-solving.[58] Things changed at the beginning of the 1990s, as attention turned

[56] RE Hudec, *The GATT Legal System and World Trade Diplomacy* (Salem, NH: Butterworth, 1990), at 57.

[57] RO Keohane and JS Nye, 'The Club Model of Multilateral Co-operation and Problems of Democratic Legitimacy' in RB Porter, S Pierre, A Subramanian and AB Zampetti (eds), *Efficiency, Equity, and Legitimacy* (Washington, DC: Brookings Institution Press, 2001).

[58] JHH Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on WTO Dispute Settlement' in ibid.

to the GATT with the rise of the trade and environment debate.[59] Unlike trade, environment was a field in which activist NGOs had a huge interest. Representatives of environmental NGOs as well as academic commentators started to argue that, in resolving disputes such as *Tuna–Dolphin*, the GATT had gone beyond the scope of its trade facilitation mandate and had *de facto* adjudicated environmental policies.[60] At the same time, the negotiations of the Uruguay Round were coming to a close, and the World Trade Organisation appeared on the horizon with a much broader mandate than the GATT. The world trade regime entered a phase of enhanced (re-)politicisation.[61] Non-state actors played an important part in this process as emerging transnational NGO networks started campaigning against the pitfalls of globalisation and the neo-liberal principles that guided the institutions of global governance, in particular, the IMF and the World Bank. Not only did they expose international organisations to public scrutiny; they also knocked on their doors, demanding access, insight and a voice in their policy-making.

IV.2 Transparency and Access to Information at the WTO

Recalling the typology of factors outlined above, we can say that in the 1990s NGOs were pushing into the intergovernmental institutions of global governance, seeking to influence both their agendas and their policy choices. From the perspective of the WTO, the question of how to deal with transparency and access for non-state actors became imminent.[62] In the Agreement Establishing the World Trade Organisation, it is stated only that:

> The General Council may make appropriate arrangements for consultation and co-operation with non-governmental organisations concerned with matters related to those of the WTO [Article V(2)].

The 'may' in this paragraph leaves ample discretion to policy-makers to determine what this may mean in practice.

The WTO General Council took a first step towards clarification in July 1996, when it adopted its 'Guidelines for arrangements on relations with Non-Governmental Organisations'.[63] In this document, members pledged to enhance the transparency of WTO policy-making and stated that:

[59] DC Esty, 'Environmental Governance at the WTO: Outreach to Civil Society' in GP Sampson and WB Chambers (eds), *Trade, Environment, and the Millennium* (New York: United Nations Press, 1999).

[60] Ibid.

[61] R Howse, 'From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime' (2002) 96 *American Journal of International Law* 94.

[62] See Charnovitz, n 5 above.

[63] See WTO Doc WT/L/162, 23 July 1996.

> The Secretariat should play a more active role in its direct contacts with NGOs who, as a valuable resource, can contribute to the accuracy and richness of the public debate.[64]

Thus, the WTO officially views the main benefit of liaising with NGOs as their capacity to channel trade issues into public debate.[65] In this, the WTO seems to acknowledge that there is a deficit in its relationship with its global constituency. Assigning NGOs the task of improving the 'accuracy and richness of the public debate' sounds quite magnanimous, given that many vociferous NGOs campaign against WTO principles and policies. Yet, it does document that the WTO was responding here to a legitimacy challenge posed by non-state actors. The organisation did, in fact, acknowledge that there was insufficient public debate on its policy choices.

With regard to transparency and access to documents, the WTO has made some remarkable progress over the years, at least when compared with the old GATT regime. The organisation's website has been judged as among the best in the field of international organisations.[66] In fact, compared to the electronic jungle that the EU and the UN have created, the WTO's presence on the web is remarkably accessible, user-friendly and reasonably up to date. On 14 May 2002, the General Council eventually revised its procedures for the circulation and de-restriction of documents.[67] According to this decision, all official WTO documents will be unrestricted and made available via the website in the organisation's official languages.[68] This provision includes the minutes of meetings that will be de-restricted automatically 45 days after their circulation.[69] Hence, with regard to the documentation of its policy process, the WTO has become a reasonably transparent international organisation.

IV.3 Access to WTO Meetings

The situation is completely different, however, with regard to direct access for (non-state) observers. In its 1996 guidelines on relations with NGOs, the General Council states that 'there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings'.[70] Thus, NGOs are still excluded from almost all

[64] Ibid., para IV.

[65] See, also, para II of the Declaration, in which 'Members recognise the role NGOs can play to increase the awareness of the public in respect of WTO activities and agree in this regard to improve transparency and develop communication with NGOs'.

[66] One World Trust (ed), *Global Accountability Report* (London: One World Trust, 2003), at 15.

[67] See 'Procedures for the Circulation and Derestriction of WTO Documents', WTO Doc. WT/L/452, 16 May 2002.

[68] Ibid., paras 1 and 3.

[69] See, n 67 above, para 2(c).

[70] WTO Doc WT/L/162, 23 July 1996, para VI.

Table 2: Participation of NGOs in WTO Ministerial Conferences since 1996

Ministerial		Accredited NGOs	NGOs represented	Registered participants
Singapore	**1996**	159	108	235
Geneva	**1998**	153	128	362
Seattle	**1999**	776	686	1,500 approx.
Doha	**2001**	651	370	370
Cancún	**2003**	961	795	1,578

Source: http://www.wto.org/english/news_e/news03_e/ngo_minconf_6oct03_e.htm (Accessed 16 Mar 2005).

meetings of WTO bodies, even at the level of specialised committees. There is only one exception to this general rule: since 1996, some sort of accreditation has been possible for the Ministerial Conferences that are convened at least once every two years. Applications from NGOs are accepted 'on the basis of Article V, paragraph 2 of the WTO Agreement'.[71] In practice, this means that, when filing their request for registration, NGOs must indicate in detail how they are 'concerned with matters related to those of the WTO'. Although participatory rights are confined to attending the Plenary Sessions of the Conference, numerous NGOs have sought accreditation to the Ministerials in recent years.[72] Table 2 illustrates this development.

The possibility of watching plenary meetings is certainly not the main incentive for NGO representatives travelling to the ministerial conferences. Presence at the conference venue enables them to lobby national delegates, to contact journalists and to distribute information material in the designated NGO areas that the WTO provides at the conference. However, there is no way in which non-state actors could enter a regular and mutual dialogue with policy-makers or exchange views with the assembly of delegates as a whole. Intergovernmental and non-state areas remain separated.

The clear separation and protection of the intergovernmental realm from NGO activities is characteristic of other forms of the WTO's outreach to civil society. The WTO organises three kinds of outreach meetings. First, since 1997, there have been large-scale public symposia to consult with NGO representatives on topics that are of particular concern to NGOs, such as environment and development. The symposia take place approximately once a year, and, at times, have been co-organised with other Geneva-based IGOs, such as UNCTAD.[73] These symposia *inter alia* are attended by government representatives. They are designed, however, to cover a wide

[71] Source: http://www.wto.org/english/forums_e/ngo_e/intro_e.htm (accessed 16 July 2004).

[72] The politically most interesting part of the negotiation at international conferences, however, does not take place in the plenary sessions but in official or non-official meetings of smaller groups of delegates.

[73] In 1997, the WTO and UNCTAD co-sponsored an NGO meeting that preceded the 'High-Level Meeting on Integrated Initiatives for Least Developed Countries' Trade Development': see WTO Doc WT/LDC/HL/16, 24 Oct 1997.

range of trade topics and are rarely devoted to the discussion of the specific proposals on the WTO agenda. Secondly, NGOs that have published trade-related studies or reports on issues that fall within the WTO's mandate may be invited to the Centre William Rappard for an informal discussion of their work with interested delegations and Secretariat officials. NGOs are invited on the initiative of the WTO Secretariat or on the initiative of a member state. There are also issue-specific discussions organised by the Secretariat for NGO representatives. Thirdly, the Secretariat organises briefings for NGO representatives by WTO staff on current issues of world trade governance. But none of these activities entails a political dialogue with national delegates.

Finally, in the WTO dispute settlement system, there is the possibility for NGOs and private individuals to file *amicus curiae* briefs. There is no explicit reference to such a practice in the respective agreements, and, consequently, the issue has spurred a fair amount of controversy among WTO state parties and academic experts.[74] In several of its rulings, the WTO Appellate Body has affirmed that it has the authority to accept unsolicited statements by non-governmental organisations or individuals, even if the latter do not have a legal right to make such a submission or to be heard by it.[75] In one controversial case, the AB even devised an *ad hoc* special procedure, setting out modalities for the submission of *amicus curiae* briefs (without considering any of them in the end).[76] Given the legal uncertainty surrounding current practice, it is difficult to assess whether this is likely to become a valuable tool for non-state actors who wish to make their

[74] This controversy is focused *inter alia* on the interpretation of the Understanding on Rules and Procedures Governing the Settlement of Disputes which is Annex 2 to the WTO Agreement (DSU), and the Working Procedures for Appellate Review (WTO Doc WT/AB/WP/7, 1 May 2003): see AE Appleton, 'Amicus Curiae Submissions in the Carbon Steel Case: Another Rabbit From the Appellate Body's Hat?' (2000) 3 *Journal of International Economic Law* 691; PC Mavroidis, 'Amicus Curiae Briefs before the WTO: Much Ado About Nothing' in A von Bogdandy, PC Mavroidis and Y Mény (eds), *European Integration and International Coordination: Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (The Hague: Kluwer Law International, 2002); R Howse, 'Membership and its Privileges: The WTO, Civil Society, and the Amicus Brief Controversy' (2003) 9 *European Law Journal* 496.

[75] For a discussion by the AB on the admissibility of briefings from non-governmental actors to the Dispute Settlement Panel, see *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the AB, WTO Doc WT/DS58/AB/R, 12 Oct 1998, paras 104–110. For the right of the AB to receive and consider such briefs, see *United States—Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Report of the Appellate Body, WTO Doc WT/DS138/AB/R, 10 May 2000, para 42; and *European Communities—Trade Description of Sardines,* Report of the Appellate Body, WTO Doc WT/DS231/AB/R, 26 Sept 2002, para 164.

[76] This procedure was introduced by the AB in the *Asbestos* case, which was of great interest to environmental NGOs: see *European Communities—Measures affecting Asbestos and Asbestos-Containing Products,* Communication from the Appellate Body, WTO Doc WT/DS135/9, 8 Nov 2000.

concerns heard in WTO dispute settlement. In this respect, much will depend on the outcome of the Doha Round of negotiations, the agenda of which comprises a review of rules and procedures guiding WTO dispute settlement, aiming *inter alia* at a clarification of the *amicus curiae* issue.

IV.4 Explaining the Findings

We have now outlined the rules and practices of co-operation between the WTO and non-state actors. How can we explain this pattern of co-operation and, in particular, the recent advances in access and transparency? For WTO staff and policy-makers, there should have been relatively few changes in their incentive structure, as outlined in Table 1, since the days of the old GATT. As for *agenda-setting*, the WTO is still a pronouncedly member-driven organisation. Even its Secretariat and staff play a rather subordinate role in the identification of new issues. With regard to *research*, it seems unlikely that WTO staff or delegations from the industrialised world would have a need for NGO expertise in research or policy formulation. In its 'Economic Research and Statistics Division', the WTO definitely has considerable in-house capacity. In theory, the delegates from developing countries at the WTO who lack support staff and technical expertise would have more reason to co-operate with non-state actors. So far, however, this potential for co-operation has not been realised. Many developing country delegates still distrust NGOs because they perceive them as pursuing the political agenda of industrialised societies.[77] In fact, delegates from the major developing countries, such as India, have been particularly opposed to conferring any official status to NGOs at the WTO.[78]

With regard to the *implementation* of an organisation's projects through non-state actors, there is equally little room for co-operation at the WTO. Unlike the World Bank, for example, the WTO is a rule-making organisation and simply does not have any projects to implement. The *monitoring* of member state compliance with WTO rules is carried out by the organisation itself, notably through its trade policy reviews. We should also bear in mind that member states have an economic self-interest to monitor the compliance of their trade partners with WTO rules, at least if they are likely to suffer economic losses because of deviant behaviour. As is well known, states can bring such non-compliance before the dispute settlement body.

In summary, we find very little incentives for the WTO to pull in NGOs. This is true across all the phases of international trade policy-making. Thus,

[77] See E Türk, 'The Role of NGOs in International Governance. NGOs and Developing Country WTO Members: Is there Potential for Alliance?' in S Griller (ed), *International Economic Governance and Non-economic Concerns* (Vienna: Springer, 2003).

[78] BK Zutshi, 'Comment' in Porter, *et al.*, n 57 above, at 390.

the emerging practices of co-operation that we can observe seem to follow largely from the pressure of NGOs pushing into the organisation, which are, in turn, limited by the insistence of the IGO on protecting its intergovernmental core. However, NGOs are not very powerful actors on the international scene with regard to material factors. We therefore need to explain how exactly the NGO 'push' leads to co-operation in the absence of clear-cut incentives on the IGO side. A somewhat diffuse mechanism seems to be at work here—a mechanism that we have not captured in the range of factors identified in Table 1.

In the 1990s, NGOs challenged the legitimacy of the WTO by questioning its secretive and exclusionary policy style. They invoked transparency, stakeholder participation and inclusiveness as general standards of good governance.[79] Like any other institution of global governance that relies on voluntary support, the WTO cannot be indifferent to its perceived legitimacy.[80] If an international organisation violates standards of good governance that are widely viewed as appropriate, support from member state governments may decline, at least if these governments are democratically elected and sensitive to street protests and shifts in public opinion. Moreover, it can be assumed that the often quite internationalist and committed staff at the organisation is sensitive to shaming campaigns. International organisations are populated by people socialised in a certain environment and adherent to a specific set of values and principles. This is why NGOs try to use public de-legitimation as a lever to open the door to international governmental institutions. Neither governmental delegates nor the civil servants in the WTO would be well advised to ignore NGO campaigns against the organisation completely.

V. CONCLUSION

In this chapter, we have investigated why civil society participation at the WTO remains institutionally underdeveloped. To answer the question, we presented an analytical framework which identified the major motivations that IGOs and civil society actors might have for engaging in consultation and co-operation. We illustrated the framework with examples from the UN system, where co-operation is extensive in many fields of political activity. Cases in point were the identification of issues, research and factfinding, as well as the joint implementation of projects and the monitoring of compliance. In the case of the WTO, incentives for co-operation

[79] N Woods and A Narlikar, 'Governance and the Limits of Accountability: the WTO, the IMF and the World Bank' (2001) 53 *International Social Science Journal* 569.

[80] TM Franck, *The Power of Legitimacy among Nations* (Oxford: OUP, 1990); J Steffek, 'The Legitimation of International Governance: A Discourse Approach' (2003) 9 *European Journal of International Relations* 249.

are much weaker on the side of the international organisation, as there is little need for NGO expertise in research, in assistance in the implementation of projects or in the monitoring of compliance. However, in both organisations, we found the tendency to protect an *intergovernmental core* of negotiation, that is, decision-making processes among state delegates. In the UN system, this is evidenced by the absence of a formalised negotiating role for NGOs in any of the main UN bodies and *fora*, or of any institutionalised position at all in the General Assembly and the Security Council—despite some informal developments in the last years. It seems that the intensity of the efforts to protect this core is correlated with the political importance that member state governments attach to the topics under negotiation; hence, we should expect stronger protection when it comes to hard issues such as security, trade and finance, and less protection in other policy fields.

It also emerged from the analysis of the two cases that the factors envisaged in our initial framework might not be sufficient to account for all the dynamics of co-operation between IGOs and NGOs. There seems to be a less concrete or less tangible benefit for IGOs collaborating with NGOs, which does not fit into any of the phases of policy-making. Instead, it seems to be related to the more general public perception of the legitimacy of the organisation. We found two instances of such a tendency. First, the UN Secretariat seeks the assistance of NGOs in mobilising public support for, and a positive perception of, the organisation. Secondly, in the case of the WTO, we found civil society actors seeking to damage the image of the IGO, by pointing to its deficits in both transparency and public access to policy-making. The WTO responded to these arguments, partly by trying to refute them and partly by adjusting its respective rules and policies. We should therefore add to our analytical framework the general interest of IGOs in maintaining the perceived legitimacy of the organisation.

Another factor that we had failed to account for initially and which probably needs more attention in future research is a sociological one; international organisations are 'social environments',[81] populated by people who are socialised in a certain tradition and adhere to a specific set of values and principles. Hence, they develop an institutional culture which might be more or less favourable to co-operation with NGOs. In this sense, the legacy of the 'club culture' of the GATT, which still persists among many delegates and officials in the WTO, might also contribute to the difficulties of NGOs in gaining access to the organisation.

[81] AI Johnston, 'Treating International Institutions as Social Environments' (2001) 45 *International Studies Quarterly* 487.

6

Participatory Transnational Governance

RAINER NICKEL*

> The upshot of the activities of international organisations is that today most citizens greatly underestimate the extent to which most nations' shipping laws are written at the IMO in London, air safety laws at the ICAO in Montreal, food standards at the FAO in Rome, intellectual property laws in Geneva at the WTO/WIPO, banking laws by the G-10 in Basle, chemical regulations by the OECD in Paris, nuclear safety standards by IAEA in Vienna, telecommunications laws by the ITU in Geneva and motor vehicle standards by the ECE in Geneva.[1]

MULTILEVEL TRADE GOVERNANCE and transnational social regulation put democratic self-regulation under stress. A growing number of supra- and transnational norms, rules and regulations on trade, environmental issues or any other field of regulation prove that we are facing another 'great transformation', the transformation of international relations and intergovernmental politics into law-generating *fora*, with government and private networks and court-like institutions as central actors. This process of transnational juridification limits parliamentary room for maneouvre and comprehensively alienates many citizens submitted to transnational regulation by this process.

This contribution attempts to clarify the mechanisms at work (Section I). In a second step it seeks to identify possible concepts that could adequately theorise this transformation, and confronts them again with the problem of self-government. In a bow to the particularities of the transnational

* The research on this contribution was supported by a Marie Curie Intra-European Fellowship under the European Community's Sixth Framework Programme (Contract no MEIF-CT-2003–501237). I am indebted to Christian Joerges, Florian Rödl, Hauke Brunkhorst, Robert Howse, Peer Zumbansen, Regina Kreide, and the participants in the Florence conference for encouraging comments and constructive suggestions.

[1] J Braithwaite and P Drahos, *Global Business Regulation* (Cambridge: CUP, 2000), at 488.

sphere, it tries to resist the methodological 'nation-state trap'. Instead, it supports a constitutionalisation of participative structures in global administrative governance (Section II). The outline, degree and limits of such a concept are not self-explaining. The example of the EU and its attempts to integrate civic participation thus may illustrate patterns of such a project (Section III). This reconstruction allows for concluding observations on global structures and the constitutionalisation of participatory transnational governance on a global scale (Section IV).

I. DEMOCRACY AND TRANSNATIONAL REGULATION

In modern democracies, legal norms are products of parliaments—at least, that is what most citizens think and take for granted. However, this is not an adequate description of today's reality: it is widely acknowledged and well documented that supranational and international entities or arrangements play an increasing role in the shaping of national law. If a significant portion of law is 'written' elsewhere, instead of by the elected national parliaments, as the above-quoted authors of a voluminous study on global business regulation suggest, there is a problem either with the use of the term 'law' or with the concept of democracy that underlies our self-description as citizens of democratic states (and a democratic European Union). The latter problem of democratic rule is the focus of an intense debate about democracy beyond the nation-state, and is fuelled by the perception that the gap between normative models of democratic rule and the findings of many studies about the increasing amount of rule-making outside the nation-states is reaching a critical point. The common description of this development is that there is a crisis of democracy which is caused by the quasi-natural forces of globalisation: namely, that the growing need for transnational regulation is served by governments and private-party networks, and not by parliaments.

An alternative description of these developments could focus on law instead of democracy. The starting point could be that our notion of 'law' is an old European one, an outdated version of an even more outdated Kantian or Rousseauian model of self-rule and self-government: law is not necessarily the product of procedures within parliaments, and of governments enforcing it and courts applying it, but can also be produced within networks of governments and/or private parties, outside the nation-state and in many variations. Proponents of a post-modern theory of law have repeatedly made this point. The novelty of this idea, compared to very early concepts of law outside or independent of the state,[2] is that the dissolution

[2] See Eugen Ehrlich's sociological concept of a 'living law': E Ehrlich, *Gesetz und lebendes Recht* (Berlin: Duncker & Humblot, 1986). This book includes a reprint of the original article from 1915. Ehrlich's idea of living law as a product of society (as opposed to the state-centred

of territorially bound democracy and the production of binding rules outside the institutional design of national parliaments is no longer an exception but is actually becoming the norm.[3] In a similar vein, advocates of societal constitutionalism or a concept of 'private transnationalism' argue that the nation-state itself has only limited capabilities to regulate both the markets and the social sphere within its own borders. Consequently, the emerging system of conflict resolution and market regulation at international level does not need a statal corset, but guiding procedures and norms which structure the norm-generating processes.[4]

However, the terminology used to name and describe the legal system emerging beyond the nation-state clearly suggests that there is uneasiness with this shift in the rule-making process: the production and enforcement of law beyond the nation-state has cautiously been labelled governance,[5] not government, and the binding rules of the EC/EU are still not called 'law', but regulations or directives. One of the most interesting details of the new Draft Constitutional Treaty of the EU is that it replaces the old EC terminology: regulations become European laws, and directives become European framework laws.[6] Thus, it seems as if rules and regulations deserve to be called 'laws' only after a constitutionalisation process has taken place.

The uneasiness with supranational and international rule-making processes found its clearest expression in Europe in the 1990s debates on the democratic legitimacy of the EU/EC. Fuelled by decisions of several constitutional courts, the infamous *Maastricht* decision in Germany,[7] as well

approach of the traditional theory of law and sociology of law) treated non-statal sources of law as equally legitimate sources as state law, or even as the 'original' sources of law, and this idea implied the assertion that norms set by non-state actors are part of the legal order even if these parts are not officially approved of by the state. The Austrian–German legal profession highly contested this view, and Ehrlich's theory of living law subsequently became the centre of a fierce controversy between him and Hans Kelsen: see the reprint of the 1915/17 discussion in: H Kelsen and E Ehrlich, *Rechtssoziologie und Rechtswissenschaft: eine Kontroverse* (Baden-Baden: Nomos, 2003).

[3] Braithwaite and Drahos, n 2 above, provide the most comprehensive overview of global business regulations that come into being mainly as self-regulations. For rule-making processes in global regulatory networks, see A-M Slaughter, *A New World Order* (Princeton, NJ and Oxford: Princeton UP, 2004).

[4] See C Joerges' contribution to this volume; H Schepel, *The Constitution of Private Governance—Product Standards in the Regulation of Integrating Markets* (Oxford: Hart Publishing, 2005).

[5] On the interdisciplinary concept of governance, see G-F Schuppert, 'Governance im Spiegel der Wissenschaftsdisziplinen' in G-F Schuppert (ed), *Governance-Forschung* (Baden-Baden: Nomos, 2005).

[6] See Art I–33 of the Draft Treaty. Art I–6, 'Union law', defines the legal rank of EU laws: '[t]he Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States': Draft Treaty as amended by the IGC, 6 Aug 2004, document no CIG 87/04.

[7] BVerfGE 89, 155. The decision has been criticised as promoting 'Der Staat über alles': see JHH Weiler, 'The State "über Alles": Demos, Telos and the German Maastricht decision' in O Due *et al*. (eds), *Festschrift für Ulrich Everling* (Baden-Baden: Nomos, 1995), ii, at

as the respective decisions of the *Corte Costitutionale* and the *Conseil Constitutionnel* of Italy and France, a wide discussion started about the possibilities and the limits of European integration[8] and its genuine version of social regulation.[9] This discussion has produced some new and interesting insights into the possibilities of a legitimate law-generating process which is not identical to the familiar structure of our nation state model: EU governance is a distinct mode of social regulation that cannot be compared to nation-state government arrangements and should not be measured against nation-state standards.

The starting point here is that the discussion about democratic rule above or beyond the nation-state level is often dominated by a number of misleading clichés. The first stereotype concerns the law-making process *within the nation-state itself*. Democratic rule is portrayed as parliamentary rule, but a closer look at contemporary rule-making processes reveals a different picture. Governments and non-state actors play a significant role in the pre-formation of legal rules. In particular, governments represent highly aggregated entities with an enormous potential of resources, manpower, knowledge assessment and experience. It is they—and not the parliaments—which are the primary source and filtre for legislative proposals. Thus, it is 'governative structures', as von Bogdandy calls them,[10] and not parliamentarians, that widely dominate the law-making process.

Secondly, parliaments do not act in a social vacuum, but within a societal sphere that is influenced, and partially even dominated, by aggregated interests and conflicting positions. A patchwork of unions, employers' associations, political parties, NGOs, religious groups and many other actors do not merely complement the law-generating political process, but basically

1651–88. This characterisation, however, misses the complexity of the FCC's reasoning; for a more relaxed interpretation of the Maastricht decision, see A von Bogdandy, 'Das Leitbild der dualistischen Legitimation für die europäische Verfassungsentwicklung: gängige Missverständnisse des Maastricht-Urteils und deren Gründe (BVerfGE 89, 155 *et seq*.)' (2000) 83 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 284.

[8] See Dieter Grimm's famous intervention against a European constitution: 'Does Europe Need a Constitution' (1995) 1 *ELJ* at 282, and the criticism of Jürgen Habermas, 'Remarks on Dieter Grimm's Does Europe Need a Constitution?' (1995) 1 *ELJ* 303 and in his seminal work *Between Facts and Norms* (Cambridge, Mass: MIT Press, 1996). Giandomenico Majone has taken a different stance: for him, the EU regulatory system has a positive and effective regulatory function, but beyond this function there is no room and no legitimacy for any distributive politics: G Majone, 'Europe's "Democratic Deficit": The Question of Standards' (1998) 4 *ELJ* 5. This view, however, ignores the redistributive effects of every form of regulation: even if a norm appears to be 'purely technical' on the surface, it still affects actors in a different manner.

[9] C Joerges and E Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Oxford & Portland Ore: Hart Publishing, 1999); FW Scharpf, *Governing in Europe—Effective and Democratic?* (Oxford: OUP, 1998); G Majone, *Regulating Europe* (London: Routledge, 1996).

[10] A von Bogdandy, *Gubernative Rechtssetzung* (Tübingen: Mohr, 2000); see, also, R Dehousse, 'Misfits: EU Law and the Transformation of European Governance' in C Joerges and R Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford: OUP, 2002), at 207.

constitute this process by participating in public debates about, amongst others, market regulation and social regulation. Here lies the core of what is widely identified as the democratic problem of supranational and international regulation/governance: at global level, the lack of parliamentarianism is accompanied by the lack of a strong global civil society, global political parties and a global socio-political sphere in which conflict about social regulation can be played out in the open. In other words, it seems that the social *humus* necessary for a democratic process worthy of the name does not exist at global level. Deliberative democracy[11] ends at the national borders.[12]

This does not mean that democracy above or beyond the nation-state is actually impossible or theoretically unthinkable; it is just not in sight. But if we still take the concept of law seriously, and, with it the normative assumption that norms need to be legitimised in order to be called 'law', then it is worth examining the possible functional equivalents to the norm-generating setting of the nation-state: participatory arrangements ensuring the involvement of civil society actors, stakeholders and the public in the arguing, bargaining and reasoning processes of transnational regulation, procedural rights safeguarding these procedural positions and courts or court-like institutions that flank these arrangements. These potential functional equivalents—as elements of a deliberative constitutionalism[13]—do not replace the democratic process necessary for the production of legitimate law, but they may narrow the legitimacy gap between the ongoing process of transnational social regulation and democratic constituencies.

Clearly, it is the EU that represents the most advanced supranational entity that generates binding norms without simultaneously being a state in the classical sense. The regulatory system of the EU is, therefore, a prime candidate for additional value potentials: can the EU thus be taken as 'role model' for a general legal framework of transnational governance (see Section III below)? In order to answer this question, though, criteria for an assessment are needed. A look at legal philosophy and the sociology of law

[11] Here I refer to the notion of deliberative democracy as unfolded by J Habermas in his book *Between Facts and Norms* (Cambridge, Mass: MIT Press, 1996) and in his later work *The Inclusion of the Other* (Cambridge, Mass: MIT Press, 1998), and to G Frankenberg's concept of republicanism: see G Frankenberg, *Die Verfassung der Republik* (Frankfurt aM: Suhrkamp, 1997), and the theory of civil society: see U Rödel, G Frankenberg and H Dubiel, *Die demokratische Frage* (Frankfurt aM, Suhrkamp, 1989). Rödel, Frankenberg and Dubiel correctly stress the idea that social integration is the result of societal *conflicts*; as a consequence, there is a need for elaborate frameworks in which conflicts are staged. This issue cannot be broadened here.

[12] On the challenges of a trans- or supranational constellation for the concept of deliberative democracy, see D Curtin, *Postnational Democracy. The EU in Search of a Political Philosophy* (Amsterdam: Kluwer, 1997).

[13] For the concept of Deliberative Constitutionalism, see P Nanz' contribution, 'Democratic Legitimacy of Transnational Trade Governance: A View from Political Theory', in this volume.

approaches towards the problem of transnational governance without parliament may provide such a perspective.

II. JUSTIFYING GLOBAL 'LAW' WITHOUT CONSTITUENCIES

Global governance generally lacks any *legal* patterns of public or democratic participation. Thus, as stated above, the growing exercise of regulatory authority by international or supranational governmental decision-makers in a wide variety of fields and forms raises serious legitimacy problems. Institutionalised entities, such as the EC Council or more loosely connected networks of government officials, constantly make decisions in a no-man's land between politics and law. Additionally, statements or decisions stemming from global arrangements in which governments are involved convey—especially if compared to actions of non-governmental actors—an additional claim to legitimacy because they are constituted by public authorities.

On the other hand, there is at least some kind of legitimising chain which links supra-national and international actors to constituencies. International treaties, for example, regularly have to be approved in one way or another by the national parliament before they become domestic law, and treaty-derived institutions such as the parliamentary assembly of the European Convention on Human Rights guarantee at least a certain degree of reference to national constituencies. The representatives of national bureaucracies sent out to take part in international governmental networks and *fora* are at least formally linked to the national governments and are, at least theoretically, controlled by national parliaments.

Nevertheless, democracy and the rule of law are at stake if the executive branch of government is released from the chains of *intense* parliamentary/public control and of judicial review. Additionally, empirical research on the patterns of globalisation draws our attention to the enormous number of non-state ('private') regulations that shape and rule transnational business relations and international trade. Private standard-setting bodies, agreements on technical norms and other forms of regulative activities suggest that we are observing a major shift, if not a change of paradigm, from state regulation and international law regulations to private international regulations.[14] At the same time, we are experiencing a major increase in 'hybrid' activities, namely, in co-operative international activities of

[14] Private governance regimes as described and examined, e.g., by C Cutler, J Braithwaite and P Drahos, or H Schepel, play a significant role in the global political economy: see C Cutler, *Private Power and Global Authority* (Oxford: OUP, 2003), J Braithwaite and P Drahos, *Global Business Regulation* (Cambridge, CUP, 2000), H Schepel, *The Constitution of Private Governance—Product Standards in the Regulation of Integrating Markets* (Oxford: Hart Publishing, 2005). It is, however, justified to set the main focus here on global arrangements in which governments are somehow involved: these arrangements convey an additional claim for legitimacy as they are constituted by public authorities.

national governments and private actors.[15] Both the tendencies of extended private governance activities and the hybridisation of international actors can be integrated into the compromise formula that 'the new legal order is working significant transformations in governance arrangements, both locally and globally, suggesting that the distinction between the public and the private realms is becoming increasingly difficult to sustain' (Claire Cutler[16]).

Beyond popular slogans warning us against the end of the nation-state or even welcoming this trend, the factual developments towards international regulatory regimes can be labelled as a trend towards 'legal globalisation'. Although a vague concept, 'globalisation' clearly reflects the loss of control over a growing number of transnational issues, *for example,* environmental protection, regulation of international trade and international financial markets for national parliaments and national administrations.[17] Accordingly, national governments try to regain control over the issues that cannot be dealt with at national level by increasing their efforts at international level. As a consequence, the production of law—or regulations—shifts from nation-state level to international level. In the end, governmental actors create regulations without the direct involvement of constituencies, and without complementary courts that control the exercise of authority.

A number of theoretical attempts have been made in recent years to face the challenges of a transnational legal order that significantly lacks both democratic legitimacy and transparency. Four distinct concepts and models of a more legitimate exercise of international authority can be distinguished: (1) a plea for global democracy and/or a global state (*globalism*); (2) the designation of governmental or private networks as co-ordinating instruments (*networkism*); (3) the identification of separate global societal spheres as already constituted fragments of global society (*societal constitutionalism*); (4) and a normative, process-based conflict of laws concept which is based on transnational comity (*comitas*). On the basis of this reconstruction, I will (5) present the concept of participatory governance as a viable public law alternative to the aforementioned approaches.

II.1 *Globalism*: Global Democracy and World Statism

A first approach towards a more legitimate rule beyond the nation-state (with the potential of generating more legitimate 'global law') can be

[15] As a striking example, the activities of standard-setting bodies such as the International Organisation of Standardisation (ISO) could be mentioned here. ISO standards are often used in national courts as *legal* benchmarks, e.g., in tort cases. Another well-know example is the function of the private organisation ICANN as world administrator of web site addresses.

[16] Cutler, n 14 above, at 2.

[17] 'Globalisation' is an umbrella term, covering a wide variety of linkages between countries that extend beyond economic interdependence: see M Kahler and DA Lake, 'Globalisation and Governance' in M Kahler and DA Lake (eds), *Governance in a Global Economy* (Princeton NJ, and Oxford: Princeton UP, 2003), at 1 and 3.

characterised by support for 'world statism' and by the invocation of global democracy. Proponents such as D Held and O Höffe see the need for an institutional design that safeguards the democratic input at global level. Otfried Höffe, in particular, has argued that we have to adhere to the Kantian premise of self-government by building a world parliament and world government out of the existing raw material, i.e., the UN charter and its institutions.[18] It is, indeed, tempting to use the existing UN institutions as a starting point for the creation of global democracy: the fact that all independent states are members of the General Assembly conveys a certain legitimising moment to this institution. There are, however, serious obstacles to such a project, both from an empirical perspective and from a conceptual viewpoint: the existing 'one-state-one-vote' approach clearly violates the fundamental idea of democratic representation, whereas equal representation could mean that half the members of the parliament would have to be from (non-democratic) China. Of similar importance is the fact that there is no social *humus* for a democratic process on a global scale yet in sight. Finally, the prospect of a world state could pose an even greater threat to the—more or less, but still—functioning democratic systems that are *embedded* in the societies of the UN member states.[19]

Other authors claim that there is already a global statism in the making, with or without democracy. For example, M Albert, a member of the Bielefeld-based Institute for World Society, literally states that the earth is 'on its way to global statehood' ('*die Erde auf dem Weg zur Weltstaatlichkeit*'). He sums up developments towards an ever tighter net of international regulations and arrangements in a most fitting manner:

> The exuberant quantitative growth of legal norms in the world society could be dismissed as a relatively unspectacular and—in the sense of global dynamics of modernization—expectable process of global juridification which, due to the absence of executive power, remains without consequences. But precisely here the new quality these processes of juridification have gained in recent years catches the eye: whether private arbitration panels such as the one at the International Chamber of Commerce (ICC), or state-bound arbitration panels such as the one of the World Trade Organisation (WTO), or the International Criminal Court (ICC): all of them stand for a growing formation of secondary norms

[18] O Höffe, *Demokratie im Zeitalter der Globalisierung* (Munich: Beck, 1999), especially at 267–314.

[19] Immanuel Kant, in his famous work '*Zum Ewigen Frieden*' *('Perpetual Peace')*, introduced the concept of a '*Weltbürgerrecht*', a cosmopolitan citizenship right, but stopped short of proposing a 'world republic'. Instead, he painted a negative picture of such a world republic as a state: '[i]f all is not to be lost, there can be, then, in place of the positive idea of a world republic, only the negative surrogate of an alliance which averts war, endures, spreads, and holds back the stream of those hostile passions which fear the law': I Kant, *Perpetual Peace* (Boston, Mass: American Peace Society, 1897). For a comment and critique of this realist turn in Kant's concept, see J Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?' in J Habermas, *Der gespaltene Westen* (Frankfurt aM: Suhrkamp, 2004), at 113–93, especially at 125–31.

> in the law of world society, i.e., norms that do not only set rules but also constitute procedures in cases of a breach of the rules, or that contain provisions dealing with the handling of conflicting rules ('*Kollisionsnormen*', norms guiding the solution of conflicts of norms). This reveals a sustainable maturing of the law beyond the nation state.'[20]

Albert argues that these additional, procedural patterns of global law represent a new qualitative step in the development of world society. In his definition, 'world statism' does not mean that a sovereign world state emerges, but that global law (without a state) and global politics (without a state) merge into 'world statism without a world state'.[21] This opaque merger, however, represents nothing but an alternative description of exactly the paradox that we are trying to resolve.

If comprehensive concepts of global statism and global democracy are too broad and unrealistic, then an evolutionary model may be an attractive alternative. Such a vision of a dynamic global constitutionalism, with the legal framework of the WTO as a focal point, is supported by Ernst-Ulrich Petersmann in his contribution to this volume[22] as well as in a number of earlier writings.[23] Petersmann holds that the constitutionalisation of the WTO is a positive process that serves to protect 'human rights and democratic governance more effectively'.[24] His vision, however, represents a slenderised and significantly curtailed idea of a constitution: human rights and 'the constitutional functions of open markets and WTO rules for enabling mutually beneficial co-operation among individuals across discriminatory state barriers' stand at the core of his idea of a constitution of the WTO. Open markets and free trade become institutional expressions of individual human rights to 'economic freedom', while public goods such as environmental protection are scaled down to mere soft goals in a

[20] M Albert, 'Die Erde auf dem Weg zur Weltstaatlichkeit' in 31/32 *Aus Politik und Zeitgeschichte* (26 July 2004), available at http://www.das-parlament.de/2004/31–32/Thema/031.html (translation:RN).

[21] Ibid. This observation is widely shared: see M Albrow, *The Global Age* (Stanford, Cal: Stanford UP, 1996), who argues that there is an already existing world state that materialises 'in joint endeavours to control the consequences of technical advance for the environment, in shared interests in human rights and in a common fear of a nuclear catastrophe', at 173. See, also, M Shaw's portrait in his 'Theory of the Global State' of an emerging world statism, albeit with a more critical tendency. Shaw holds that the emergent global state is constituted 'by the complex articulation of the globalised Western state with the global layer of state power'. But he foresees a 'lengthy period of struggle' fought between global democracy and anti-globalist nationalism until what he calls the 'global-democratic revolution' can be completed: M Shaw, *Theory of the Global State* (New York: Cambridge UP, 2001), at 269.

[22] See E-U Petersmann, in this volume, Section IV ('Constitutionalising the WTO? Problems and Perspectives').

[23] See, e.g., E-U Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organisations: Lessons from European Integration' (2002) 13 *European Journal of International Law* 621, and E-U Petersmann 'Constitutional Economics, Human Rights and the Future of the WTO, (2003) *Aussenwirtschaft-Swiss Review of International Economic Relations* 49.

[24] Petersmann, chap. 0 this vol., Part IV.5.a.

constitutional balancing process. Thus, under the supervision of this kind of global minimal state, regulatory preferences, such as strong labour laws, appear to be 'discriminatory practices' rather than the legitimate expression of a certain national economic constitution. Embedded in an intergovernmental framework of international law, and disembedded from national and global civil societies, a reduced WTO constitutionalism may, therefore, only intensify the legitimacy crisis of transnational social regulation or constrain appropriate responses to it.[25]

In his recent work, however, Petersmann has widened his approach towards the 'constitutional' structure of the WTO; he now also underlines that there is a need to integrate issues such as trade and environment, or trade and social rights, into the discourse on WTO law.[26] This reflects the fact that we are facing a *materialisation* process in international trade law, with more and more linkages between trade law and other fields of social regulation. Whether this fact of an ever denser body of international 'trade and …' law deserves the label 'constitution' is subject to continuing controversy in international law.[27] In my perspective, a 'constitutionalisation' of transnational bodies that produce material law is appropriate only if a parallel process of proceduralisation, a process that integrates public discourse and civil society, with all their inherent contradictions and conflicts, into the law-making structures, is part of the project.

What all these 'global' approaches have in common is that they perceive the dwindling of self-rule powers of nation-states in a growing number of regulatory fields as an incentive for the creation of international institutions which somehow fill the gap between constituencies and transnational governance. They often use the classical nation-state model, with its features of democratic representation, constitutional rights, accountable administration and independent courts, all embedded in a constitutional framework, as a blueprint and a normative reference point. What is striking, though, is the fact that many proponents of global democracy and world statism, either explicitly or implicitly, take it for granted that only parliamentarianism can represent the core of the nation-state model of democracy, or they state the need for 'more democracy' without seriously addressing the obvious conceptual and practical questions arising from such an approach: who is the electorate? or what are the foundations and the competences of a global state?

[25] R Howse and K Nicolaidis, 'Legitimacy and Global Governance: Why Constitutionalising the WTO is a Step too Far' in RB Porter *et al*. (eds), *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millenium* (Washington, DC: Brookings Institution Press, 2001), 227, at 230.

[26] Petersmann, n 22 above, Part IV.2–4.

[27] See the detailed discussion about different legal concepts of a WTO constitution by DZ Cass, *The Constitutionalization of the World Trade Organization* (Oxford: OUP, 2005).

II.2 *Networkism:* The Network Metaphor

The failure of positions supporting world statism and global democracy to deliver a convincing answer to the complex problem posed by the lack of a clearly-defined global public sphere or a global electorate has fuelled attempts to describe global authority, not in statal terms, but with the metaphor of a network. The most recent example is A-M Slaughter's book *A New World Order*, in which she emphasises the advantages of decentralised government networks at international level in contrast to the unitary world state vision.[28] Her approach praises the flexibility, problem-solving capacity and efficiency of governmental networks: normative voluntarism is replaced here by a functionalist concept. The stabilising effect on world peace and the actual success of governmental networks in addressing urgent transnational issues such as the weakening of the ozone layer or the spread of nuclear raw material and nuclear technology create an efficient global order that is justified by its own success:

> Global governance through government networks is good public policy for the world and good national foreign policy for the United States, the European Union, APEC members, and all developing countries seeking to participate in global regulatory processes and needing to strengthen their capacity for domestic governance. Even in their current form, government networks promote convergence, compliance with international agreements, and improved co-operation among nations on a wide range of regulatory and judicial issues. A world order self-consciously created out of horizontal and vertical government networks could go much further. It could create a genuine global rule of law without centralised global institutions and could engage, socialise, support, and constrain government officials of every type in every nation. In this future, we could see disaggregated government institutions—the members of government networks—as actual bearers of a measure of sovereignty, strengthening them still further but also subjecting them to specific legal obligations. This would be a genuinely different world, with its own challenges and its own promise.[29]

It is certainly inappropriate to mock this approach as an educational concept which aims at a global reformatory where the bureaucracies of the world learn from the most advanced how to govern the world.[30] On the

[28] Slaughter, n 3 above.

[29] Ibid, at 261–2.

[30] Another reading of Slaughter's approach could be that its tendency to functional realism has to be understood in the present political environment of a more and more unilaterally acting US government (see, e.g., the article 'Washington is Criticised for Growing Reluctance to Sign Treaties', *New York Times*, 4 Apr 2002, on two reports of the Institute for Energy and Environmental Research and the Lawyer's Committee on Nuclear Policy about the US' rejection or disregard of a range of international treaties). In this reading, Slaughter may also try to justify international law and international treaties (and international lawyers) as an important element of the legal order of the US. Her reluctance to support a more institutionalised form of global governance, thus, may be motivated by and directed against US unilateralism. She does not, however, challenge the danger of an instrumental use of international law as a means for an 'imperial' or hegemonic world order, an outspoken tendency within

contrary, there is, indeed, an intrinsic value in advanced forms of bureaucratic co-operative experimentalism that may lead to creative solutions for pressing transnational problems[31] and open *fora* for mutual learning.[32] Problem solving, on the other hand, is not a purely technical or scientific process; it also demands the definition of a problem and the selection of an adequate solution. Output-oriented approaches tend to suppress this aspect of agenda-setting as well as the problem of choices,[33] for example, the critical evaluation of 'technical' solutions in contested areas such as genetically modified organisms (GMOs), hormones in food products or embryonic stem cell research. The fact that transnational policies inevitably have distributive effects[34] additionally underlines the importance of a legal and political embedding of transnational regulatory regimes into societal structures.

While Slaughter rejects any attempts to set up a written global constitutional order, she claims that government networks are bound (or should be bound) to a set of unwritten and 'informal principles'.[35] However, she fails to show why the acting governments should be bound by vaguely defined principles of 'global deliberative equality' or 'checks and balances',[36] instead of being bound by the solid principles of national or economic and political interests. It does not take spectacular incidents like

the Bush administration and academia alike. For a critique of hegemonic tendencies; see, e.g., M Koskenniemi's article 'Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought', typoscript Harvard University 2005, available at http://www.valt.helsinki.fi/blogs/eci/PluralismHarvard.pdf , or N Krisch, 'More Equal Than the Rest? Hierarchy, Equality and U.S. Predominance in International Law' in M Byers and G Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge: CUP, 2003), at 135–75.

[31] See the seminal article by C Joerges and J Neyer on the unique structure of the EU committees system: 'From Intergovernmental Bargaining to Deliberative Political Processes: the Constitutionalisation of Comitology' (1997) 3 *ELJ* 273–99; another practical example of a problem-solving and issue-oriented international regulatory system is the 'Basel Convention on the control of transboundary movements of hazardous wastes and their disposal' of 22 Mar 1989, available at www.basel.int, which introduced an effective system for controlling the exportation, importation and disposal of hazardous wastes, and has so far been ratified by about 160 UN member states (with the notable exception of the US). Finally, the European Union's 'Open Method of Co-ordination' (OMC) could be mentioned here as a new and potentially creative (but also potentially ineffective or counter-productive) political-legal strategy of social regulation; for an extensive overview, see J Zeitlin and P Pochet (eds), *The Open Method of Co-ordination in Action—The European Employment and Social Inclusion Strategies* (Frankfurt aM: Peter Lang, 2005).

[32] See J Cohen and C Sabel, 'Directly-deliberative Polyarchy' (1997) 3 *ELJ* 313.

[33] A prominent example is the clash between the EU's application of the precautionary principle in its own legal order and the US and other members' interpretation of WTO regulations, especially in the context of protective measures under Art 5(1) of the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement): see J Scott, 'European Regulation of GMOs: Thinking about "Judicial Review" in the WTO', *Jean Monnet Working Paper 04/04* www.jeanmonnet.org.

[34] P Nanz, 'Democratic Legitimacy of Transnational Trade Governance: A View from Political Theory', in this volume, Section II.1.

[35] Slaughter, n 3 above, at 245.

[36] Ibid., at 245 and 253.

the recent allegations of a 'torture network' between the US and some Middle Eastern countries to detect that governments need restrictions other than just informal principles of a non-binding character. Everyday practices of negotiation imbalances, for example, in the context of the WTO Treaty rounds, already show that appeals to fairness and equality are futile if they are not supported by some kind of procedural hard law.[37]

Additionally, this kind of functional realism seems to suggest that 'rule of law' merely means that government networks are entitled to create international regulations and to call the result 'law'. However, in the Anglo-American legal tradition as well as in continental legal traditions such as German constitutionalism, 'rule of law' conveys a whole set of normative aspirations and 'quality benchmarks'. By levelling the difference between regulations and law, and by ignoring the difference between a factual creation and the enforcement of international regulations and a legitimate legal order based on principles such as justice and fairness, A-M Slaughter's re-labelling of government network regulations as the 'rule of law' seems to miss the very singularity of the category of law.

II.3 *Societal Constitutionalism:* The Resources of 'the Social' and the Example of the International Organisation of Standardisation (ISO)

If the network metaphor stands for top-down networks of a functional global legal order that is detached from the 'local level' and its citizens, then a change of perspective may reveal new possible ways for a more inclusive order. Gunter Teubner's systems theory approach may provide for such a change of perspective: by emphasising the self-reflexive powers of emerging transnational social spheres, Teubner avoids the top-down perspective of world statism and world constitutionalism. Instead of being inspired by 'governmentality' (M Foucault), his approach supports a perspective in which a process of 'bootstrapping' within social spheres replaces the grand legal framework.

(a) Building Global Law from Below

Gunter Teubner[38] has pushed the insight that we can observe an emerging global legal order without a sovereign world state one step further. He argues that a single (constitutional) fundament or framework for the production of legitimate international law is a myth, and that there cannot be

[37] See the report by W Bello on the first Doha Round, 'Learning from Doha: A Civil Society Perspective from the South' (2002) 8 *Global Governance* 273, especially at 275–8 on factual imbalances and procedural shortcomings during the Doha Round 2001.

[38] G Teubner 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?' in C Joerges, I-J Sand and G Teubner (eds), *Transnational Governance and Constitutionalism*, (Oxford and Portland, Ore: Hart Publishing, 2004), at 3. Teubner refers extensively to D Sciully, *Theory of Societal Constitutionalism* (Cambridge: CUP, 1992).

a constitutional global framework similar to the hierarchical legal order that we know from nation-state level. Based on systems theory, he claims that the internal differentiation of societies produces sub-systems with their own codes and their own rationality, and that this has happened in the process of globalisation on a global scale, too. Precisely as in the traditional nation-state, at international level there is no way back to a unifying rationality guiding the law-making process. Instead of a global constitutionalism 'from above', we observe trends towards a societal constitutionalism 'from below', in which social actors, traditionally not viewed as subjects of international law, are transformed into 'constitutional subjects'. Their actions are based on strategies that use fundamental rights not only on a vertical level, against state power, but also—and more importantly—activate these rights 'against social institutions, in particular *vis-à-vis* centres of economic power'.[39]

Societal actors not only complement the process of governmental governance, they also constitute themselves particular spheres of legality. A constitution of world society, thus, 'does not come about exclusively in the representative institutions of international politics, nor can it take place in a unitary global constitution which overlies all areas of society, but, instead, emerges incrementally in the constitutionalisation of a multiplicity of autonomous sub-systems of world society'.[40] Constitutionalisation processes, he claims, are nowadays much more dynamic within the (private) social sub-systems of society than in the sphere of statal actors. The creeping constitutionalisation of these social sub-systems generates, among others, a juridification that includes a fundamental rights discourse: this discourse supports the binding force of fundamental rights within the global social sub-systems and among societal actors on a horizontal level.

For a constitutional lawyer, as Teubner himself correctly observes, this concept of societal constitutionalism goes way beyond traditional understandings of constitutional law, and if taken as a normative claim it may go several steps too far. One first objection could be based upon the empirical premises of this approach: one may well contest his factual assessments that seem to suggest a linear trend of a similar constitutionalisation processes in all sub-systems of global society. Deep analyses such as the study by Braithwaite and Drahos draw a more complex picture of the enormous diversity within global business regulations, ranging from far-reaching self-organisation to mere factual power relations without any comprehensive or fair structure.[41]

[39] Teubner, n 38 above, at 7; see, also, I-J Sand's contribution in the same volume.

[40] Teubner, n 38 above, at 8. For a pluralist view on constitutionalism, see N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317.

[41] Braithwaite and Drahos, n 2 above.

It is, however, neither this element nor the absence of a single, overarching, binding 'constitutional' document that irritates so much; instead, it is the fact that Teubner relies heavily on the rationality and fairness of self-regulating processes in the societal spheres themselves. In his concept, the global social spheres, or their sub-systems such as the Internet as the symbol for the global communication community, seem, on the one hand, to generate, with almost natural force, a set of second-order rules (secondary norms, a constitution). On the other hand, it is the set of fundamental rights that safeguards the voice and the standing of societal actors, an assumption that points somewhat to courts (national courts?) as the guardians of the private transnational law regimes, with the inherent risk that courts monopolise the open process of interpreting fundamental rights. What the concept of societal constitutionalism seems to underestimate here is the intuition that it is neither courts nor the specific societal spheres but the global community as a whole that is both the author and the addressee of fundamental rights, if understood as fundamentally as the concept of human rights. The judicial discourse in courts and societal sub-spheres takes place in proxy discourse arenas (as *Stellvertreterdiskurse*).[42]

These arenas have their strengths—they may for example, be suitable to foster deliberative processes—but there are also numerous open questions: how can interests of third parties be taken into account in an adequate manner within arenas such as the WTO? How can equal rights to admission and participation be guaranteed? And, finally, who is entitled to define the actual contents of human rights in their given social and political context, if not global society as a whole (including voices of strong dissent)? Within the given structure of fragmented global regulation and unstructured participation, the proxy discourses within the Panels and the

[42] An additional aspect that cannot be discussed in full detail here is that national and international legal *fora* usually follow different rules of standing and procedure: individuals or individual companies have access to the courts in the domestic sphere; once a legal conflict has found its way to international courts or tribunals, however, they may lose standing and become bystanders who can only appeal to their national government to initiate court proceedings. A striking example of this incongruity of the stakeholders and parties of court proceedings is the *Caroline* case: In a landmark decision, the German publisher of a number of articles and photographs about Princess Caroline of Monaco had won its constitutional complaint lodged with the German Federal Constitutional Court (*Bundesverfassungsgericht*) against a partial ban on the publication of certain photographs: see judgment of 15 Dec 1999 in Case 1 BvR 653/96, BVerfGE 101, 361. Against this decision, Caroline lodged a complaint with the European Court of Human Rights. A chamber of the Court declared that the basic assumptions of the *Bundesverfassungsgericht* about the content and range of the freedom of the press violated the European Convention on Human Rights, and reserved a decision to grant her compensation (ECtHR, judgment of 24 June 2004, in *von Hannover v Germany*, App no 59320/00, available at www.echr.coe.int). Although publishers, journalists, photographers and editors pressed the German government to appeal the decision (with the effect that the case would have been transferred to the Grand Chamber of the ECtHR), the government decided not to lodge an appeal, and the judgment of the ECtHR became final.

Appellate Body can neither appropriately reflect or represent this global public discourse *as a whole*, nor replace it.

(b) Global Standardisation and 'the Social': The Example of ISO

One outstanding example of the problematical results of societal constitutionalism may be the recent turn of the International Organisation of Standardisation (ISO)[43] towards social issues. Originally, the ISO seemingly focused on only technical matters: what the measurements of a container were, what and how many sizes of wrenches there should be and what the definition of a wrench was, and so on. Step by step, however, the ISO has moved towards social regulation, with the ISO 9000 family of norms providing a framework for *quality* management throughout the processes of producing and delivering products and services for the customer, and the ISO 14000 family covering a wide-ranging portfolio of standards for sampling and testing methods in order to deal with specific environmental challenges and monitoring standards for the management of environmental issues.[44] Currently the ISO is preparing another wave of norms, the ISO 26000 standards. What is striking here is the fact that the ISO 26000 standards are supposed to integrate something like social policy standards into the norm system: they will deal with the 'social responsibility' of companies *and public bodies alike*.[45] The details of these regulations are still unclear, as the process of establishing the proposals has only just begun. But one can speculate that some of the norms may include ILO standards, with the result that a product bearing the ISO 26001 seal may indicate that it was produced without child labour and under humane work conditions.

The ISO example illustrates that Teubner has a point in his assumption that the actors within sector-specific global legal regimes re-introduce segments of other legal orders. But it also shows that his concept of societal constitutionalism is too narrow, as it places too much emphasis on what he calls 'fundamental rights': by taking up issues such as good corporate

[43] For more information, see www.iso.org. The ISO is a network of the national standards institutes of 146 countries, on the basis of one member per country, with a Central Secretariat in Geneva, Switzerland, which co-ordinates the system. It is a non-governmental organisation; nevertheless, the ISO occupies a special position between the public and private sectors. This is because, on the one hand, many of its member institutes are part of the governmental structure of their countries or are mandated by their government. On the other hand, other members have their roots uniquely in the private sector, having been set up by national partnerships of industry associations.

[44] See the ISO's self-description of the ISO 14000 family at http://www.iso.org/iso/en/prodsservices/otherpubs/iso14000/environment.pdf.

[45] In this respect, ISO pursues an aggressive and overarching strategy: '[t]he need for organisations in both public and private sectors to behave in a socially responsible way is becoming a generalised requirement of society. It is shared by the stakeholder groups that are participating in the WG SR to develop ISO 26000: industry, government, labour, consumers, non-governmental organisations and others, in addition to geographical and gender-based balance.' See www.iso.org/sr.

governance, environmental protection and labour conditions, the ISO has integrated something else, namely, ideas of 'good production', 'good capitalism' or 'social market economy'. The integration of standards that are derived from other global legal regimes also challenges the assumption that each 'global village' acts only according to its own rationality: what we can observe here is more a process of establishing the voluntary links between different social spheres than just the activation of core human rights. If these processes are multiplied in other social spheres/'global villages', the legal web becomes more and more dense, with private or semi-private transnational actors claiming the authority both to set and to interpret global law.

If we cannot rely on democratic processes that guide and control the results of such emerging structures, and if, at global level, we lack a judiciary that may provide for at least a minimum of consistency within the emerging global law structure, then large fields of social regulation fall into the hands of what are innocently called private actors (by means of a creeping privatisation of public law). It is obvious that social stratifications—such as the North–South incline, or multi-nationals *v* locally bound industries—will have an effect on the outcome of regulatory processes in social spheres such as the ISO. That organisation is aware of this problem, and efforts are being made to strengthen the position of developing countries within the organisation, for example, by providing special funds or other technical assistance. In the WTO, we can find similar attempts somehow to deal with obvious imbalances with regard to institutional settings and rule-making processes.[46] These efforts, however, are selective and voluntarily, instead of being systematic and mandatory.

If Teubner took constitutionalism more seriously as a concept, he would have to introduce some 'constitutional' principles and benchmarks that help one to judge whether a constitutionalisation process has failed or whether the processes of rule-making and rule application were fair, legitimate and

[46] The WTO has set up a technical assistance service for developing countries that are members of the WTO: see http://www.wto.org/english/tratop_e/devel_e/teccop_e/tct_e.htm. The Petersmann–Alston debate (see E-U Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organisations: Lessons from European Integration', (2002) 13 *European Journal of International Law* 621; P Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 *European Journal of International Law* 815; and Petersmann responding, 'Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston' (2002) 13 *European Journal of International Law* 845, however, highlights deeper dimensions of the problem: is an 'integration' of human rights law into WTO law possible, or desirable? What is meant by human rights law in this context—rights safeguarding economic performance, or labour rights, or social rights, or …? A widening of the scope of WTO law would have serious consequences, well beyond the already unleashed debate on 'trade and …' questions, as it might entail an elaborated constitutionalisation of the WTO as a world constitution. Mere technical assistance for a number of poorly prepared ('underdeveloped') countries in the framework of an expert dialogue cannot make up for a genuine political debate about the contents and foundation of a world constitution.

balanced. But the place of politics is empty (there is no global constituency, no parliament, and so on), and the judiciary is absent or weak. Who cares, then, about the enforcement of 'fundamental rights', or the structures of processes that really can be labelled as being open, participatory and deliberative? Who shields the infamous 'autonomous sub-systems' from empire or other forms of power corruption?

Additionally, it is litigation which finally leads to some form of judicial scrutiny and legal standards.[47] As Harm Schepel has shown for the field of private standardisation, private transnational governance is linked to the law via national courts: law 'constitutes' private governance through an *ex post* process of measuring the regulatory processes against standards borrowed from concepts of due process of law and *Rechtsstaatlichkeit*. Regulations issued by private parties may deserve recognition as constitutionally legitimate 'law' under much the same conditions 'under which the American Law Institute is prepared to have common law claims to be pre-empted by statute: when the court is confident that the deliberative process by which the safety standard was established was full, fair and thorough and reflected substantial expertise'.[48] When litigation starts, however, the damage has already been done. Seveso and Bhopal may have served as *ex post* reasons for upgrading international standards of chemical production, or for integrating 'critical' expertise into the standard-setting process, but the social costs of such a trial-and-error procedure remain too high.

The real essence of Teubner's systems theory approach lies elsewhere: it shows the virtues and the weaknesses of a rights-based approach to global law that relies heavily on good-will actors (judges, panellists, societal actors, etc). One of the virtues certainly lies in the observation that regulatory processes beyond the nation-state reflect the legal culture(s) they are embedded in, or even confronted with: as in the national sphere, as D Sciully and H Schepel have shown, in the international sphere, too, the participants in regulatory processes expect, both from each other and from the regulatory framework which they create or are confronted with, that these processes will meet minimum standards of fairness.

The blind spot of this approach concerns the value and mechanism of participation within the processes that result in more or less binding global law: mutual observation of possibly conflicting regimes (the WTO and ILO, for example) is only one facet of the multi-dimensional problem that global law without a constituency produces. If WTO norms or Appellate Body decisions override national norms, they have to produce more legitimacy than just the fact that, at one point in the past, a nation-state has entered

[47] For the function of international private law litigation as a tool, see R Wai's contribution to this volume.

[48] H Schepel, *The Constitution of Private Governance—Product Standards in the Regulation of Integrating Markets* (Oxford: Hart Publishing, 2005), 446 ff, with further references.

into an international treaty. A substantive international legal order in the making needs to be connected to the political constituencies that represent the primary source of legitimacy, not necessarily through direct elections, but at least by ways of a re-integration of public policy interests. And if we are facing not only selective interventions but also a very comprehensive global regulatory machine 'in the shadow of the law' (Christian Joerges) and under the control of (semi-)autonomous private regimes, we have to seek more than just a vague form of mutual observation of global law regimes and *ex post* litigation. Procedural safeguards which bring civil society back in—not only as outside protesters, but as legitimate voices—may not be the last word, but may be an essential beginning.

Such a normative concept of transnational procedural law—or global administrative law or constitutional administrative law—may even be compatible with Teubner's approach, if his societal constitutionalism is read as political legal philosophy: the basis of societal constitutionalism lies in the good intention of mobilising the constitutional concept for the institutionalisation of self-enlightening potential within the semi-autonomous global regimes. The ISO example shows that there is even empirical proof of the assumption that global regimes somehow tend to re-integrate public law issues (for example, social topics such as problems of equality and the distribution of wealth and political influence) into their own legal structure. It is, however, not enough to appeal to global regimes for such reintegration of social or political issues—we need a systematic approach in order to make sure that the self-enlightening potential of non-instrumental discourses can be exploited. In essence, the proponents of societal constitutionalism have not realised how they could conceptualise this relationship between societal norm production and public law.

II.4 *Comitas:* International Comity instead of Deliberative Transnationalism?

In his contribution to this volume, Christian Joerges has taken a cautious stance towards transnational legal governance, especially with regard to a further constitutionalisation of the WTO system. His approach[49] favours a *comity* solution that rests on reciprocity of respect for national legal orders that are constitutionally legitimised: the thin democratic foundation of the WTO's Dispute Settlement Panels and Appellate Bodies does not allow for

[49] For a detailed analysis and critique of C Joerges' approach, see the comments of D Chalmers, R Nickel, F Rödl and R Wai on C Joerges' paper, 'Rethinking European Law's Supremacy', EUI Working Paper Law No. 2005/12, available at http://www.iue.it/PUB/law05-12.pdf; see, also—from the perspective of private international law—R. Wai's contribution, 'Conflicts and Comity in Transnational Governance: Private International Law as Mechanism and Metaphor for Transnational Social Regulation through Plural Legal Regimes', in this volume, Section I.4.

a deepening of its inherent regulatory force—the WTO should not cross the borderlines of 'judicialisation'.[50] *Comitas,* a sensitive humility towards constituted legal orders (although, one must add, legal orders that are not necessarily always democratically constituted), could enhance the legitimacy of the rulings of the Panels and Appellate Body. Such sensitivity could—and indeed should—reflect the fact that, in WTO cases, we are confronted not only with a conflict or clash of legal norms, but also with a conflict of the legal and social philosophies underlying these legal orders, with a multitude of models for structuring societies and markets. Thus, mutual respect is a better foundation for conflict solutions.

A recent decision of the US Supreme Court about the interpretation of the Alien Torts Statute (ATS), an interesting relict from revolutionary times, echoes this claim. In his concurring opinion, Justice Brenner relates to the concept of *comitas:* '[s]ince enforcement of an international norm by one nation's courts implies that other nations' courts may do the same, I would ask whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement. In applying those principles, courts help assure that "the potentially conflicting laws of different nations" will "work together in harmony", a matter of increasing importance in an ever more interdependent world'. Justice Breyer adds, 'Such consideration is necessary to ensure that ATS litigation does not undermine the very harmony that it was intended to promote'.[51]

Although not identical, the ATS litigation problem in some respects clearly reflects the paradox of a comity approach: its success rests mainly on a certain process of judicial self-restraint and an openness towards harmonic solutions. It is inevitable, though, that court-like international institutions such as the WTO Panels and Appellate Bodies will be confronted with hard cases that resist harmonic solutions.[52] Additionally, the Panels and Appellate Bodies have the task of protecting the very aims of the WTO agreements and of international *ius cogens* alike, so that national laws may represent only one balancing factor among others. Finally, recent experiences with the—institutionally more advanced—European Court of Human Rights are not encouraging: the Court's judgments tend to become more

[50] C Joerges, 'Juridification Patterns for Social Regulation and the WTO: A Theoretical Framework', Trans State Working Paper No. 017(2005), available at: www.staatlichkeit.uni-bremen.de. See, also, C Joerges' contribution to this volume, Section IV.

[51] Concurring opinion of Breyer J, Cases 03–339 (*Sosa v Alvarez-Mac*hain) and 03–485 (*U.S. v Alvarez-Machain*), 542 US 692 (2004).

[52] See R Wai's analysis of C Joerges' approach in this volume: R Wai, 'Conflicts and Comity in Transnational Governance: Private International Law as Mechanism and Metaphor for Transnational Social Regulation through Plural Legal Regimes', Section I.4.

and more dense, with detailed corrections of rather well-discussed and elaborate national legal solutions.[53] A tendency towards the materialisation of the 'soft law' vested in flexible international treaties into hard international law seems to be inherent in such court-based arrangements.[54] It is precisely this tendency that demands creative solutions for a more inclusive—and less government-based—approach towards transnational law production.[55]

Christian Joerges' concept of comity, thus, can be read as a complementary methodology, a methodology which demands especially from actors in court-like transnational procedures that they use comity as a point of reference *vis-à-vis* conflicting social-economic concepts and models. It does not, however, sufficiently address the problems posed by the continuing *materialisation* of transnational law, especially the quest for a more comprehensive inclusion and participation of conflicting societal interests.

II.5 Participatory Transnational Governance

These demands for a more inclusive approach can now be spelled out in a clearer manner. A critical-constructive theory of legitimate transnational *legal* governance has to take the specific nature of law into account. Transnational law—not in abstract terms, but in its concrete form as a WTO term of trade, as an Appellate Body decision, or as a Security Council black list of terror organisations and affiliated individuals—deserves recognition only if it fulfils criteria that we rightly take for granted when we talk about 'law'. These criteria are related to the concept of law in the nation-state, albeit not identical with them. As it is futile, at least for the time being, to envisage a global democracy in a strong sense, traces of the idea of self-government must be integrated into the specific regulatory processes. This process may be called 'constitutionalisation', as long as this term is not meant to signify a given catalogue of rights and procedures, but a fluid concept, without the underlying bias of an *a priori* existing specific economic constitution, and open for public law constraints and local

[53] In the *Caroline* case, as set out in n 42 above, the ECHR clearly did not follow the principle of comity, but pushed its own agenda; it replaced a cautions and thorough judgment of the German Federal Constitutional Court on the freedom of press with its own vision of a balance between this right and the personality rights of celebrities—by limiting the freedom of the press even further.

[54] This claim is supported by the findings of empirical research by Karen Alter, 'Agents or Trustees? International Courts in their Political Context', TranState working paper no. 008, available at http://www.staatlichkeit.uni-bremen.de. She observes that, even if decisions of international courts are contested, 'it is significant that the legal principles stay on the books because they may well be used in the future as authoritative sources of precedent', at 18. The quotation contains a Freudian misspelling: She writes 'principals' instead of 'principles'.

[55] See the contributon of R Howse to this volume, who draws the conclusion that Art 2(4) of the WTO TBT Agreement 'provides a complete refutation to the "Geneva" orthodoxy that labour and human rights are "outside" the WTO; for these are clearly "international standards", and in as much as these rights are relevant to domestic regulation, they have normative force by virtue of TBT 2.4'.

preferences concerning the common good. Accordingly, it is not appropriate to establish a 'human right to trade' as a foundation of world constitutionalism if, for example, a 'human right to social regulation' does not come into the field of vision.[56] General, universally accepted material concepts of a 'right' balance between conflicting ideas of a good economic and social constitution are not at hand; the existing structure of the WTO system, for example, can represent only preliminary results of continuing social conflicts within world society and its national sub-societies.

The existing, continuing process of a *materialisation* of transnational law, especially in the field of international trade law, with more and more linkages between trade law and other fields of social regulation,[57] embodies another 'great transformation', the transformation of international relations and intergovernmental politics into law-generating *fora*, with government networks and court-like institutions as central actors. As neither the WTO nor other international organisations is 'democratic' in an emphatic sense, and due to the dominance of governments in their creation and policy, it is justified to characterise these transnational structures as being part of the administrative branch, and its actions represent a form of transnational *administrative regulation*. A 'constitutionalisation' of transnational bodies that produce material law is appropriate only if a parallel process of proceduralisation, a process that integrates public discourse and civil society, with all their inherent contradictions and conflicts, into the law-making structures is part of the project.

In a national context, civil society is the central stage for carrying out social conflicts. It plays an important role in the will-formation processes, and serves also as a *forum* for social conflicts, expressing critique and executing control over legislative, executive and judicial decisions. On the supranational level, civil society organisations cannot mimic a strong public sphere, but they can observe—and sometimes participate in—global governance arrangements, and open up rooms for a (weak) global public sphere.[58] They enlarge the range of viewpoints and transmit 'local' viewpoints to the transnational level, and vice versa. In this respect, they act as a transmission belt between local and global public spheres, thus enabling and supporting a higher deliberative quality of global regulatory governance—at least in theory. They might as well, however, be seen in a more sceptical light, where they represent only the loudest, strongest or most influential interests, and they might also just represent powerless protest in the face of global regulatory power.

[56] See the discussion of E-U Petersmann's approach, in the text to nn 22–27 above.

[57] Many contributions to this volume underline this trend; see, especially, those of E-U Petersmann, R Howse, J Pauwelyn, C Godt, and U Ehling, which include numerous examples of an ever denser web of norms.

[58] See H Brunkhorst, *Solidarität—Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft* (Frankfurt aM: Suhrkamp, 2002), especially at 141–217.

As a consequence, it is not civil society integration into global regulatory regimes *as such* that enhances public deliberation on transnational law; it is the procedural fine print of civil society involvement that counts. The focus of attention, therefore, has to turn from existing structures of transnational law to the processes that *generate* transnational law.

III. THE EU AS A POSITIVE MODEL FOR GLOBAL LAW PRODUCTION?

It is not surprising that the European Union, as the most advanced supranational entity, is more and more frequently taken as a reference point for the development of a legitimised framework for transnational social regulation.[59] Indeed, for the sake of argument, it is useful to imagine the EU as a 'normal' international organisation (which it is clearly not), and to scrutinise how the law-generating process is structured in this entity.

III.1 Democracy and Participation in the EU

On paper, the EU is well suited for a democratic process; Article 6 TEU states that the EU is founded on the principle of democracy. The institution of the European Parliament is proof enough that there is a certain degree of legitimacy from below in the law-making process.[60] The EU, however, found itself, for reasons which were well apparent in the late 1990s, in the focus of criticism because of its lack of democratic legitimacy: not only were the lack of full (or half-full) parliamentary sovereignty and the lack of an overarching European public sphere seen as symptoms of a regulatory structure that had reached its limits, but so too were the regulatory structures with their opaqueness and lack of transparency. In particular, the prospect of 10 or more new Member States and the fact that the regulatory activity of the EU had increased not only quantitatively but also qualitatively, with major fields of rule-making shifting into the core Community sphere following the Amsterdam and Nice Treaties, had caused a widely stated sense of unease with the regulatory mechanisms as a whole. Article 257 EC, which foresees a certain form of functional participation of the Economic and Social Committee in some areas, provides only for a

[59] Most recently in Slaughter, n 3 above.

[60] Low voter turnouts and other circumstances additionally weaken the—already limited—legitimising force of EU elections: the outcome of the 2004 elections for the European Parliament—as with the elections before—clearly demonstrated that EU citizens still orientate themselves not only according to their nation-state preferences, but also on domestic issues, instead of on European issues. Election analysts unanimously stated that, throughout the EU, there was a trend to punish the ruling parties and the governments they formed, for domestic policies. This outcome stresses the importance of alternative ways of participation in the European law-making processes.

corporatist top-down approach to civil society, with rather limited potentials for the production of a significant legitimacy surplus.[61]

The European Commission reacted to this crisis with its (in)famous White Paper on European Governance.[62] Instead of taking up the popular slogan of a strengthening of the European Parliament, the Commission mainly focused on its own position within the institutional framework of the EU. It identified five principles of 'good governance', three of which were directly related to the legitimacy issue: (1) *openness*: '[t]he Institutions should work in a more open manner. Together with the Member States, they should actively communicate about what the EU does and the decisions it takes …'; (2) *participation*, with the need to ensure wide participation of interested actors 'throughout the policy chain – from conception to implementation', because 'improved participation is likely [to] create more confidence in the end result and in the Institutions which deliver policies'; and (3) *accountability*: '[r]oles in the legislative and executive processes need to be clearer. Each of the EU Institutions must explain and take responsibility for what it does in Europe.'[63]

By stressing the issues of participation, openness and accountability, the Commission reacted to popular criticism about its own performance as a non-transparent regulatory machine that seemingly runs of its own volition. In this regard, it was an intelligent move to use the concept of 'governance' instead of 'government' as a reference point; this shift in the nomenclature lowers the expectations to a significant degree:

> Governance is not political rule through responsible institutions, such as parliament and democracy—which amounts to government—but innovative practices of networks, or horizontal forms of interaction. It is a method for dealing with political controversies in which actors, political and non-political, arrive at mutually acceptable decisions by deliberating and negotiating with each other.[64]

In order to prove that the commitment to participation, transparency and openness is not merely paying lip service to them, the Commission later published a code of conduct for its interaction with civil society actors. This document contained the promise that civil society would be included in deliberations on legislative acts as soon as possible and

[61] See S Smismans, *Law, Legitimacy and European Governance: Functional Participation in Social Regulation* (Oxford: OUP, 2004).

[62] COM(2001)428, July 2001. For a critical review of the White Paper, see C Joerges, Y Mény and J Weiler (eds), *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, *Jean Monnet Working Paper No.* 6/01, (2001), available at www.jeanmonnetprogram.org/papers/01/010601.html.

[63] COM(2001)428, at 10. The other two principles—effectiveness and coherence—are related to functional aspects of output-oriented legitimacy; for lack of space they cannot be dealt with here in more detail.

[64] EO Eriksen and JE Fossum, 'Europe at crossroads: Government or Transnational Governance?' in Joerges, Sand and Teubner, n 38 above, at 120.

comprehensively as possible.[65] Additionally, in 2001, a new regulation on access to EU documents came into effect, significantly raising the level of effectiveness of transparency rights.[66]

While the White Paper issues of openness and transparency were dealt with in a more thorough way through the introduction of a clearer legal basis for access to documents, its commitment to participation did not bring about any satisfactory results in the following years. The Council (and its Secretariat, which had in the course of five decades evolved into a second major administrative-legislative institution parallel to the Commission) was left completely out of the discussions about enhanced public participation. The abovementioned code of conduct of the Commission, laid out in December 2002 in a 'Communication of the Commission', does not have any legally binding force and cannot be used by third parties in court: the mere self-binding force of an internal Commission regulation does not entitle citizens to gain access to committees or other *fora*, nor does it contain other possible participatory rights, such as the right to be consulted or the duty to take contributions of participants into account when delivering the grounds for a decision. Additionally, the document expressly exempts crucial areas of decision-making processes from the consultation process, especially '[d]ecisions taken in a formal process of consulting Member States ("comitology" procedure)'.[67]

In this respect, the Commission remains firmly within the 'Community method' of practising consultation *according to its preferences and under its conditions*. Under this classical method of decision-making, wide consultation is not a completely new phenomenon; on the contrary, as its Communication on Consultations correctly points out, the Commission has a long tradition of consulting interested parties from outside when formulating its policies. It incorporates external consultation into the development of almost all its policy areas.[68] The underlying philosophy of this consultation policy—that consultation processes are initiated by the institution, participation is limited to non-decision, and only directed towards selected actors—did not change after the publication of the White Paper. Calling the White Paper approach to public participation and the subsequent policy as laid out in the Commission's 'Communication' a substantively new approach would, thus, be a misnomer.[69]

[65] For further details, see the 'Communication from the Commission: towards a reinforced culture of consultation and dialogue—General principles and minimum standards for consultation on interested parties by the Commission' of 11 Dec 2002, COM(2002)704 final.

[66] Reg (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L/145/43.

[67] 'Towards a reinforced culture of consultation and dialogue' n 65 above, at 16.

[68] Ibid, at 3.

[69] For an evaluation of the White Paper approach before the publication of the Communication, see P Magnette, 'European Governance and Civic Participation: Beyond Elitist Citizenship?' (2003) 51 *Political Studies* 144, especially at 148–150.

In summary, in the light of the principle of participatory democracy, notwithstanding the first steps of the Commission towards a more inclusive legal structure, the current level of public participation in the norm-generating processes of the EU is still not satisfying: the basic assumption that all those affected by legal norms should have the chance to participate in the deliberation and decision-making process regarding those norms[70] has clearly not been met by the current institutional and legal design of the EU. The 2001 Laeken Declaration of the IGC also underlined the fact that the legitimacy gap is still a serious issue, and the seemingly failed attempt to establish a formal European Constitution, with the referenda in France and the Netherlands producing a vote against the Draft Constitution, has deepened the legitimacy crisis of the EU even more.

III.2 New Modes of Governance

However, instead of insisting on a clear-cut separation between national democracies and supranational government networks, it may be worth visiting the transition zone between governance and government that was established through the so-called New Modes of European Governance. The most prominent modes of a specific European governance setting are the committee system, also called Comitology, and the Open Method of Co-ordination.

The numerous EU committees, legally anchored in a rather opaque reference in Article 202 TEC and in the 1999 Council decision 'laying down the procedures for the exercise of implementing powers conferred on the Commission',[71] play an outstanding role in the law-making process of the EU. They gather expertise and discuss solutions; for this purpose, hundreds of representatives of the Member States, usually but not necessarily members of national administrations, congregate on a regular basis. Chaired by Commission representatives, the Committees formulate and adopt measures of various kinds.[72] While Comitology is viewed by many with suspicion, mainly due to the character of the system as 'technocratic structures behind closed doors',[73] Joerges and Neyer in their famous 1997 contribution suggested a radical new vision of Comitology as a forum for deliberative supranationalism in which all participants engage in the search for

[70] See the emphatic criticism by A. Menendez, 'No Legitimacy Without Politics—Comments on Jens Steffek' in C Joerges, Sand and Teubner, n 38 above, at 109.

[71] Council Dec 1999/468 of 28 June 1999 [1999] OJ/L/184/23.

[72] For further details, see Joerges and Vos *et al.* (eds), n 9 above; C Joerges and J Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology' (1997) 3 *European Law Journal* 273.

[73] R Dehousse, 'Misfits: EU Law and the Transformation of European Governance' in C Joerges and R Dehousse, *Good Governance in Europe's Integrated Market* (Oxford: OUP, 2002), 207 at 214.

the common good.[74] Viewed from this angle, Comitology is a borderline case[75] that seems to resist a clear characterisation as governance or government. Others have interpreted the Open Method of Co-ordination,[76] a soft approach towards co-ordinated policies in areas where the EU has no regulatory competences, as a desirable and even more advanced instrument of deliberative policy-co-ordination on the supranational level,[77] a clearly contestable view.[78]

With reference to theories dealing with deliberative structures, one can distinguish between the adherents to 'expert deliberation' and those to 'public deliberation'.[79] In its White Paper, the Commission acknowledged the importance of deliberative structures within the EU framework; on the former, the White Paper on Governance points to the role of expert advice in EU policy-making: '[s]cientific and other experts play an increasingly significant role in preparing and monitoring decisions', and in the area of 'social legislation, the Institutions rely on specialist expertise to anticipate and identify the nature of the problems and uncertainties that the Union faces, to take decisions and to ensure that risks can be explained clearly and simply to the public'.[80]

While the Comitology system does represent a mode of deliberative governance, its mechanisms should not be confused with the characteristics of deliberative *democracy*. As pointed out by Cohen and Sabel, '[d]eliberation, understood as reasoning about how to best address [*sic*] a practical problem, is not intrinsically democratic: it can be conducted within cloistered bodies that make fateful choices, but are inattentive to the views or the interests of large numbers of affected parties'.[81] Deliberative democracy fundamentally relies on participatory conditions for policy-making; these conditions are not met by the Comitology procedures: although national administrations are not forced to send only one representative and only

[74] Joerges and Neyer, n 72 above.

[75] C Joerges in C Joerges, Sand and Teubner n 38 above, at 358.

[76] For details, see the report of C de la Porte and P Pochet, 'The OMC Intertwined with the Debates on Governance, Democracy and Social Europe: Research on the Open Method of Co-ordination and European Integration', Report prepared for Frank Vandenbroucke, Belgian Minister for Social Affairs and Pensions, *Observatoire social européen*, Brussels, Apr 2003.

[77] See, especially, J Cohen and C Sabel, 'Directly-Deliberative Polyarchy' (1997) 3 *European Law Journal* 313 and 'Sovereignty and solidarity: EU and US' in J Zeitlin and D Trubek (eds), *Governing Work and Welfare in a New Economy: European and American Experiments* (Oxford: OUP, 2003).

[78] See the criticism of C Joerges in his contribution to this volume.

[79] For an overview of approaches relating to the theory of deliberative democracy, see C de la Porte and P Nanz, 'OMC—A Deliberative-Democratic Mode of Governance? The Cases of Employment and Pensions' (2004) 11 *Journal of European Public Policy* 267, especially at 269–72; de la Porte and Pochet n 76 above.

[80] COM(2001)428, at 19.

[81] J Cohen and C Sabel, 'Sovereignty and Solidarity: EU and US' in J Zeitlin and D Trubek (eds), *Governing Work and Welfare in a New Economy: European and American Experiments* (Oxford: OUP, 2003), at 366–7.

public officials into the committees, a comprehensive representation of national or EU civil society actors is neither mandatory nor the practice.

III.3 Participatory Governance in the EU: An Emerging Concept?

Beyond the rather limited, unstructured and quite unsystematic influences of civil society actors on the Comitology procedures and European agency actions, there are currently no *general* laws or legally binding provisions in effect that could safeguard the participation of interest groups, NGOs or other social actors in the law-generating processes under the supervision of the Commission.

Only in the field of environmental law has a move towards enhanced civic participation been made. This movement towards broad-based participation was fostered by the Aarhus Convention of the UN, which was signed by all EU Member States.[82] It led to Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information[83] which transformed the demands of the Aarhus Convention into binding EU law. However, Directive 2003/4/EC does not constitute a form of general administrative law; the Directive is confined to a clearly defined area of EU environmental law.

There are signs, however, that more broadly defined participative *rights* may find their way, step by step, into the fibre of EU law and regulatory procedures, creating a general framework for participatory governance. The Draft Constitutional Treaty, notwithstanding its unclear political and legal future, provides its own subtitle (Title VI) dealing with 'The Democratic Life of the Union', with separate articles defining the scope of representative democracy (Article 46) and participatory democracy (Article 47). Article 47 reads as follows:

> Article I–47:
> The principle of participatory democracy
>
> 1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
> 2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

[82] The 'Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters', done at Aarhus, Denmark, on 25 June 1998 and available at http://www.unece.org/env/pp/treatytext.htm, results from Principle 10 of the 1992 Rio Declaration on Environment and Development. Principle 10 states that '[e]nvironmental issues are best handled with the participation of all concerned citizens' and demands that at the national level 'each individual shall have appropriate access to information concerning the environment that is held by public authorities … and the opportunity to participate in decision-making processes': see UN Doc A/Conf.151/26 (vol. 1, 1992). The Convention text has recently also been published in the OJ: [2004] OJ L/124/4.

[83] [2003] OJ L/041/26.

3. The Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.
4. Not less [*sic*] than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution. European laws shall determine the provisions for the procedures and conditions required for such a citizens' initiative, including the minimum number of Member States from which such citizens must come.

The scope of these provisions is clearly limited, and the underlying concept of participatory democracy is admittedly rather thin: participation is more than just the opportunity to express an opinion (paragraph 1) or the opportunity to enter into a dialogue whose conditions and consequences are unclear (paragraph 2). In contrast to these provisions, the consultations mentioned in paragraph 3 sound more serious, but only in cases where they take place in a real space with discussants and an auditorium present, and not merely in cyberspace: written statements cannot replace the exchange of ideas and views in real time, in person and before a forum. Unfortunately, paragraph 3 falls short of a clearer definition of consultations. Most importantly, Article 47 completely fails to mention any kind of procedural right to participation, nor does it foresee any legal remedy in the event of conflict over the conditions of a consultation process. In this regard, the Draft Constitutional Treaty does not break away from the thin concept of participation the Commission proposed in its White Paper.

These conceptual shortcomings notwithstanding, Article 47 constitutes the first window of opportunity for a more comprehensive involvement of civil society in the law-making process of the EU. It also underlines that participatory democracy is—or will be—a genuine legal principle of EU law.

III.4 The ECJ: The Guardian of 'Good Governance' in the EU?

One of the major preconditions of substantive participation in a deliberative process—such as the regulatory *fora* of Comitology—is access to comprehensive information about the process itself: who discusses what and when, what the positions of the participants are before they enter the process, and so on. These issues are essential for any active involvement. A landmark case of the European Court of Justice (ECJ) highlights the problems and pitfalls of the existing legal framework for access to information: the *Rothmans* case illustrates the oscillating character of the EC/EU

between intergovernmental governance and a rights-based community of European citizens.

By letter of 23 January 1997, the Rothmans company, a famous cigarette manufacturer, had requested access to a number of documents which included the minutes of the Customs Code Committee from 4 April 1995 onwards.[84] Rothmans had probably heard that the Commission planned to take action against illegal imports into the European Union of cigarettes through third countries such as Romania or Bulgaria. Many indicators pointed to the active involvement of cigarette manufacturers in these illegal activities. The reasons Rothmans had approached the Commission (and not the Customs Code Committee directly) were simple: like all committees assisting and counselling the Commission, this one did not have its own administration, budget, archive or premises, nor an address of its own.

The Commission's Directorate-General for Customs and Indirect Taxation forwarded a number of Commission documents, but refused to hand over the minutes of the Committee on the ground that the Commission was not their author.[85] It pointed out that, while the minutes are drawn up by the Commission in its secretarial capacity, they 'are adopted by the Committee, which is therefore their author'. The Commission also refused to hand over the Committee's internal regulation on the ground that the Commission was not the author of that document, either. Finally, it stated that, under that regulation, the Committee's proceedings were confidential. In June 1997, Rothmans brought an action against the Commission before the Court of First Instance, and requested the annulment of the Commission's decisions denying access to the minutes and the internal regulation of the Committee.

This case was a landmark case in three respects: first, it challenged the practice of the Commission to retreat behind some form of intergovernmental confidentiality; secondly, it brought up the question of what the real mechanisms behind the Commission's regulatory actions are: how does the EU bureaucracy actually work, and what is the role of the Committees?; and, finally, the case demanded a clarification of the openness, transparency and accessibility of the EU bureaucracy: are citizens entitled to control the administrative process, and to what extent?

Rothmans demanded less than participation, but a minimum amount of openness and transparency in the Committee structure. The important role of Comitology in the law-making process of the EU—as briefly outlined above—underlines that the Commission and 'its' committees have left the

[84] The request was based on Dec 94/90 granting access to certain documents of the Commission under certain conditions. This Decision has been replaced by the already mentioned Reg (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents n 66 above. The new reg provides for a much higher degree of transparency and easier access to documents of the Council, the Commission, and the Parliament.

[85] Dec 94/90 provided that applications must be sent 'directly to the author'.

originally intended function of the committees as intergovernmental control mechanism far behind. They have turned into a unique, 'freewheeling transnational structure',[86] with its own merits as deliberative forums, but also without a clear legal structure or form. In particular, the poor transparency of the committee procedures 'makes it difficult to discern the part played by the committees in the formulation and eventual adoption of measures'.[87]

The *Rothmans* case shows that the fact that the committees do not formally possess decision-making powers of their own tends to complicate judicial review of committees' work. Additionally, as R Dehousse describes it, the 'indirect character of the review process, compounded by the more general difficulty experienced by private parties seeking annulment of community decisions, reduces incentives to rely on litigation to ensure the proper functioning of committees'.[88] Indeed, the structure of judicial review, as set out in Articles 220–245 TEC, strongly supports this observation: while the reference procedure of Article 234 TEC represents the 'normal' procedure in which a national court refers a case to the ECJ in the event of doubts about the interpretation and implementation of EU law, individual access to the Court of First Instance is granted only under strict conditions.[89]

Because Rothmans had been denied access to the minutes on the basis of an individual decision about its request, the conditions for individual access had been met. As to the material question concerning Rothmans' right to access the minutes, the position of the Commission amounted to a paradoxical—and embarrassing—situation: committees are supposed to be an emanation of the Council; they inform and control the measures of the Commission. But the Council does not hold copies of committee documents. Thus, the argument of the Commission that it held the pen for the committee but was not the author of the documents amounted to an exclusion of Comitology from the scope of the rules granting access to Community documents.[90]

[86] R Dehousse, 'Misfits: EU Law and the Transformation of European Governance' in Joerges and Dehousse, n 10 above, 207 at 214.

[87] G de Búrca, 'The Institutional Development of the EU: A Constitutional Analysis' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford: OUP, 1999), 55 at 77.

[88] Dehousse, n 10 above, at 215.

[89] See the recent judicial dialogue between the CFI and the ECJ about the interpretation of Art 230(4) TEC: In its judgment of 3 May 2002 in Case T-177101 *Jégo-Quéré et Cie SA v Commission of the European Communities*, the CFI used judicial interpretation in order to loosen the conditions under which individual access to the Community Courts for judicial review of Community acts is granted. The ECJ, however, rejected this attempt, first indirectly in its judgment of 25 July 2002 in Case C–50/00 P, *Unión de Pequeños Agricultores v Council of the European Union,* [2002] ECR I–6677 where it confirmed its strict interpretation of the standing rules, and later by reversing the *Jégo-Quéré* decision of the CFI (judgment of the ECJ of 1 Apr 2004 in Case C-263/02 P, *Commission of the European Communities v Jégo-Quéré & Cie SA* [2004] ECR I–3425).

[90] Dehousse, n 86 above, at 215.

In its judgment, the Court of First Instance (CFI) resolved the case in favour of the right to access and stressed the importance of the principle of transparency. It held that 'for the purposes of the Community rules on access to documents, "Comitology" committees come under the Commission itself, … which is responsible for rulings on the applications for access to documents of those committees'.[91] With its decision, the CFI paid tribute to the new governance amalgam of Commission and committees that is called 'Comitology'.

While the CFI decision can be seen as a major step towards a more transparent Comitology procedure, transparency itself is not sufficient for the effective control of Comitology from outside the governance network. It may grant access to information, but it does not give a more active role to individuals or to the civil society sector in the decision-making process. A starting point for a procedural approach to social regulation in the committee framework can be found in a second decision of the European Court of Justice relating to Comitology procedures. In *Germany v Commission*, the ECJ declared a regulation on construction materials void on the grounds that *procedural rules* had been violated; allegedly, the draft of a decision had not been sent within a certain time-frame to the Member State, and not in the right language.[92] In a number of other decisions, the ECJ has further shaped procedural aspects of European administrative law,[93] albeit without spelling out clear general rules for all fields of EU law with regard to legal consequences of violations of procedural law.

If civil society actors were entitled to the same procedural position as the Member States possess in the Comitology procedures, and the Commission were responsible for the dissemination of draft regulations (and accountable for infringements of those procedural rights), the Comitology system would lose a large part of its secretive character. This may lessen the effectiveness of the European rule-making governmental network to a certain degree, but it may strengthen the system in the long run, and it will certainly enhance the legitimacy of EU law. The emerging concept of participatory governance points in this direction, but it must also be accompanied by an EU administrative law that explicitly defines the scope of civil society participation; it is not the task of the ECJ to invent such a procedural framework.

[91] CFI judgment of 19 July 1999 in Case T–188/97, *Rothmans International BV v Commission* [1999] ECR II–2463, at n. 62.

[92] ECJ decision of 10 Feb 1998 (*Construction Products*) [1998] ECR I–441. Case C–263/95, *Germany v Commission*.

[93] See, e.g., the *Eyckeler & Malt* case, where the CFI held that an affected party has a right to be heard directly by the Commission if the Commission's decision may negatively affect this party even if the party had the opportunity to a prior hearing by the respective Member State: see CFI, judgment of 19 Feb 1998, Case T–42/96, *Eyckeler & Malt AG v Commission* (*Hilton Beet*) [1998] ECR II–401, confirmed in the CFI judgment of 11 July 2002 in Case T–205/99, *Hyper v Commission* [2002] ECR II–3141, both available on the Court's website http://curia.eu.int.

IV. A LOOK FORWARD: CONSTITUTING PARTICIPATORY TRANSNATIONAL GOVERNANCE

Is transnational law possible or, to be more precise, under which conditions does the growing amount of transnational regulation through transnational governance, public or private, deserve recognition? This riddle of transnational law/'law' apparently cannot be solved once and for all in a neat manner by zooming nation-state institutions up to global level. The tentative answer supported here stresses the importance of civic participation: transnational 'law', produced outside a classical constitutional framework and without genuine democratic institutions, needs additional sources of justification with legitimatory force.

Concepts of world statism or of a global minimal state do not provide for these additional sources. On the contrary, these abstract visions disregard not only the factual preconditions for a functioning democratic process of law-production, they also do not sufficiently take into account that only a law-generating process where those subjugated to the regulations (the 'law') can—at least potentially—view themselves at the same time also as their authors may provide the essential element of legitimacy; this separates such regulations from mere power structures. The wide gap between abstract visions and the concrete regulations which affect real people in their everyday lives can hardly be bridged by an abstract constitutionalisation of international law. Even if the project is disconnected from a world-state vision, as Jürgen Habermas has recently proposed,[94] the core problem of a constitutionalisation process remains: how is constitutionalisation without a strong (global) civil society and without the inclusion of local civil societies possible?

In this regard, the evolution of the EU may provide some preliminary answers: its tendencies towards a better and broader inclusion of citizens and civil society, notwithstanding the existing shortcomings, reflect the attempt to bridge the legitimacy gap between transnational law and local constituencies. A similar approach towards transnational law on a global scale would call for some form of juridification of participatory governance, not necessarily as another form of an overarching 'constitution' in a single text, but as a juridification of deliberative structures *within* the regulatory islands of international law and international regulation.

Procedural rules and, in particular, participatory rights in the domain of transnational social regulation decide about agenda-setting and co-decision positions to a much higher degree than within the national constitutional framework, where decision-making procedures in governmental regulatory regimes or in private societal spheres are still controlled by both parliaments and a genuine democratic process, and are embedded in a constitutional setting of administrative rules and judicial control. The less direct

[94] Habermas, *Der gespaltene Westen*, n 19 above, at 113–93.

the democratic input in transnational social regulation is, however, the more direct the participatory influence of the social actors, or even of an emerging global civil society, has to be. A mere superstructural network of governments and powerful private players amounts more to a return to some form of benevolent and enlightened absolutism than to 'good' transnational governance.

This correlation between the loss of democratic power in the national arenas and the growing material regulation in the transnational sphere has to be reflected and confronted within the existing global legal structures. As transnational processes are dominated by public or private administrators, the law of the transnational regulation co-ordinating these processes has to integrate the possible functional equivalents of national legitimatory processes. One element of such juridification of transnational regulation may consist of the procedural right of affected interest groups and civic associations to participate comprehensively in regulatory processes, following the existing concepts of interest representation[95] that already form an integral part of some domestic administrative laws throughout the world, and the deepening participatory patterns which the international community has already agreed upon in the past.[96] Civil society organisations participating in transnational regulatory structures enlarge the range of viewpoints and arguments present in deliberative decision-making processes.[97] This may not solve all the problems of *democratic* legitimacy above the nation-state level, but it will certainly lead to a more inclusive—and possibly more legitimate—global legal community.

IV.1 Transnational Civic Participation

General demands for better participation, for clearer decision-making structures and transparency, and for rules and procedures for accountability have for years been raised in the context of global public governance. Events such as the massive protests at the G7/G8 summits in Seattle

[95] One prominent example is the US Administrative Procedure Act (APA). For a comprehensive overview of its development, see R Stewart, 'Administrative Law in the Twenty-First Century' (2003) 78 *New York University Law Review* 437 especially at 441 ff, on the evolution of the interest representation model within the institutional framework of US administrative agencies. Stewart also discusses whether the APA can be taken as a blueprint for global administrative structures: see R Stewart, 'US Administrative Law: A Model for Global Administrative Law?' (2005) 68 *Law and Contemporary Problems* 7, available at: http://www.iilj.org/papers/documents/2005.7Stewart.pdf. T Ziamou gives an overview of different national concepts of participation in (administrative) rulemaking: *Rulemaking, Participation and the Limits of Public Law in the USA and Europe* (Aldershot: Ashgate, 2001).

[96] See, especially, the Arhus 'Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters', http://www.unece.org/env/pp/treatytext.htm.

[97] See P Nanz' contribution 'Democratic Legitimacy of Transnational Trade Governance: A View from Political Theory' to this volume, Section III.3.

1999 and Genoa 2001 against the present state and development of globalisation[98] have shed light on the opaque character of global governance in general.

Some global institutions and regimes have reacted to this criticism; others have not.[99] The World Bank is a striking example of a radical change: under its president, James Wolfensohn, it has launched several initiatives to counter the secretive character of the Bank's policy-planning and decision-making procedures. By decentralising the Bank, by working more closely with other development partners such as non-governmental organisations (NGOs), and placing greater emphasis on home-grown development planning, the World Bank claims that, under Wolfensohn's presidency, it has tried to move closer to its client governments 'than ever before'.[100] With additional efforts to reach out more to other international organisations, to the private sector and to civil society (the Bank states that NGOs now participate in a significant number of its projects, and that Wolfensohn has also made partnership with the private sector a central part of the activities[101]) the World Bank has tried hard to become the *Musterknabe* of global institutions.

Other institutions, in particular the WTO, have strongly opposed such an opening towards civil society. Even rather limited forms of outside interference such as *amicus curiae* briefs were—and still are—the subject of enduring controversies: the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and the Working Procedures for Appellate Review (WPAR) do not contain clear rules on the admissibility of unsolicited *amicus curiae* statements handed in by outsiders such as NGOs or individuals, nor do they contain an explicit exclusion of such statements.[102] In a pragmatic move, the Appellate Body stated in the *Shrimp–Turtle* case that it has the *authority* to accept *amicus curiae* briefs,[103] a position the AB has since affirmed in subsequent decisions.[104]

This small amount of progress notwithstanding, the WTO is still—and still perceives itself to be—a club with exclusive 'membership privileges' (Robert Howse). A 2004 report by an advisory committee to the

[98] For a sociological account of the new movement against the present form of globalisation, see M Andretta, D della Porta, L Mosca and H Reiter, *No Global—New Global, Identität und Stretegien der Antiglobalisierungsbewegung* (Frankfurt aM: Campus, 2003).

[99] For an overview and further details, see the contribution of J Steffek and C Kissling, 'Why Co-operate? Civil Society Participation at the WTO', to Section I.3 of this volume.

[100] See www.worldbank.org for a self-description of Wolfensohn's 1995–2005 presidency of the World Bank.

[101] Ibid.

[102] R Howse, 'Membership and its Privileges: The WTO, Civil Society, and the Amicus Curiae Brief Controversy' (2003) 9 *European Law Journal* 496.

[103] United States-Import prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, T/DS58/AB/R, 12 Oct 1998 (*Shrimp–Turtle*).

[104] Expressly in the *Carbon Steel* case: *United States–Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Report of the Appellate Body, WT/DS138/AB/R, 7 June 2000, paras 39–42.

Directorate General of the WTO on 'The Future of the WTO' dedicates eight of its 80 pages to 'transparency and dialogue with civil society'. It describes the relationship between global civil society and international institutions such as the WTO as a 'new partnership' with 'tensions', but also as a 'welcome and beneficial experience'.[105] The report justifies this extremely cautious approach towards the inclusion of civil society with the limited capacity of the WTO Secretariat. Additionally, it states that the WTO member governments are themselves the ones that must shoulder most of the responsibility for developing the relationships between civil society and state actors. In the end, the report only acknowledges that 'the WTO needs to keep the options of transparency and dialogue with civil society under regular review'.[106]

The latter characterisation of the inclusion of civil society in decision-making processes as mere 'dialogue' comes very close to the attitude of the European Commission towards civil society participation: in its White Paper, the Commission's bow to civil society did not go much further than the proposal of regular 'consultations'. The much-praised convention method that was first used for the EU Charter of Fundamental Rights, and later for the Draft Treaty on the European Constitution, turned out to be a practical example of the deficiencies of mere consultations. Civil society organisations were given only very limited space and time for the presentation of their viewpoints, and the website that was meant to be a place where citizens' concerns could be voiced did not have any traceable effect: nobody knows if or who ever read the contributions that were posted there. In the end, there was room only for a symbolic role of civil society in the constitution-making process.

IV.2 A Concept of Participation in Supranational Rule-making

The WTO report on its future shape and development deals extensively with the questions how best to engage with non-governmental organisations (NGOs), and how to raise its own transparency and negotiate with non-state actors while, at the same time, dealing with their criticisms. This shows that the authors could not ignore the changes in world society during the decade following the establishment of the WTO: in the post-Seattle and post-Genoa era, civil society[107] 'is here to stay' as one of the global forces

[105] 'The Future of the WTO—Addressing institutional challenges in the new millennium', Report by the Consultative Board to the Director-General Supachai Panitchpakti, Geneva 2004, at 41, paras 177–178, available at http://www.wto.org/english/thewto_e/10anniv_e/10anniv_e.htm#future.

[106] Ibid, 41–2, para 182.

[107] For a working definition, I refer here to J Habermas' concept of civil society as 'non-governmental and non-economic connections and voluntary associations' in his work *Between Facts and Norms* (Cambridge, Mass: MIT Press, 1996), at 366–7: 'civil society is composed of those more or less spontaneously emergent associations, organisations, and movements that,

that have to be taken into account.[108] This 'official' establishment of civil society as a global force, however, also marks the end of an unconditional welcome of civil society into global politics and law: as Neera Chandhoke puts it, 'it has ceased to be a "hurrah"-concept'.[109] The North–South divide, an institutional and financial superiority of NGOs and civil society actors from the most advanced 'Western' countries, and the, sometimes, problematical internal structures of the decision-making and funding of NGOs are some of the factors that demand a closer look at the specific conditions of civil society participation.

A popular argument against a stronger role of civil society in transnational regulatory structures goes much further: The wider and deeper participation of NGOs and other parts of civil society is doomed to foster neo-feudal structures or neo-corporatism. John Bolton, the new US ambassador to the UN, has argued that 'it is precisely the detachment from governments that makes international civil society so troubling, at least for democracies'. He does not even shy away from a comparison with fascism: as 'the civil society idea actually suggests a "corporativist" approach to international decision-making', it is 'dramatically troubling for democratic theory because it posits "interests" (whether NGOs or business) as legitimate actors along with popularly elected governments'. As corporativism, according to Bolton, was at the heart of Italian fascism, 'Mussolini would smile on the Forum of Civil Society. Americanists do not'.[110]

In a less polemic reading, this intervention may, indeed, point towards a strong argument against the establishment of civil society participation *beyond protest and comment*. However, it misses the point in several ways. It first envisages a concept of civil society that reflects a market-place model of competing organised interests, thus rejecting the notion of deliberative decision-making within public spheres; it secondly presupposes that 'international decision-making' is exclusively managed by governments alone and not by joint co-operation with certain business interests and, thirdly, it tries to shield a process of vastly executive decision-making that is only remotely connected to democratic self-government.

The topic of participation and its conflict with (democratic) representation is familiar from the nation-state discussions about concepts of

attuned to how societal problems resonate in private life spheres, distil and transmit such reactions to the public sphere. The core of civil society comprises a network of associations that institutionalises problem-solving discourses of general interest inside the framework of organised public spheres'.

[108] N Chandhoke, 'What the Hell is Civil Society?', contribution on the Open Democracy website, www.openDemocracy.net, dated 17 Mar 2005, at 1.

[109] Ibid, at 1.

[110] J Bolton, 'Should We take Global Governance Seriously?' (2000) 1 *Chicago Journal of International Law* 205, at 206. It is not known whether Bolton thinks that Mussolini would also smile on the US Administrative Procedures Act with its outspoken concept of interest representation in regulation.

democratic rule. As Carol Pateman has shown, 'realist' and functionalist concepts of democracy have dominated the discourse on democracy and representation since the 1940s and 1950s, shaping a view of democracy as a political method (as opposed to a normative concept of self-government) through which the active élites of a society take decisions for the passive and disinterested citizens.[111] Since then, the emergence of an active citizenship outside channelled ways of political will-formation (political parties, unions) has eroded the empirical foundation of such a concept. Modern democracies are characterised by a huge diversity of public interest groups and voluntary associations that voice concerns and debate public-policy issues beyond narrowly defined economic interests.

These concerns, issues and perspectives (such as environmental protection or poverty) voiced by civil society are hardly represented within global regulatory networks—a single government representative per country in such a regulatory network simply cannot be understood as an agent of a whole constituency and its internal diversity. The fact that global governance is widely shielded from dissent and opposition has clearly fuelled the emergence of a global civil society,[112] especially because nationally rooted civil society actors see the need to create global networks in order to increase the chances of getting their voices heard.[113]

In this regard, a wider inclusion of civil society actors in transnational regulation should instead be viewed as an antidote to 'corporativist' influences on regulatory processes, and not as a way of fostering it. This holds true especially in the area of transnational economic regulation: as in the Grimm Brothers' tale of the hare and the hedgehog,[114] certain business interest are always there and present, anyway. Gregory C Shaffer has described this reality in the following words:

> The growing interaction between private enterprises and US and EC public representatives in most trade claims reflects a trend from predominantly intergovernmental decision making toward multi-level private litigation strategies involving direct public-private exchange at the national and supranational levels. Given the trade-liberalising rules of the World Trade Organisation (WTO), this

[111] C Pateman, *Participation and Democratic Theory* (Cambridge: CUP, 1970), especially at 1–8 with a critique of the works of Dahl and Schumpeter.

[112] On the emergence of a global legal community (*globale Rechtsgenosssenschaft*) and a—weak—global public sphere, see H Brunkhorst, *Solidarität. von der Bürgerfrreundschaft zur globalen Rechtsgenossenschaft* (Frankfurt aM: Suhrkamp, 2002), especially at 139–236.

[113] See M Kaldor, *Global Civil Society* (Oxford: Blackwell Publishing, 2003). On the—misguided—reduction of civil society actors on the alternative of being "organised" but privileged or compliant insider or "disorganised" and autonomous but marginalised outsider, see G de Búrca and N Walker, *Law and Transnational Civil Society: Upsetting the Agenda?* (2003) 9 *European Law Journal* 387, at 389.

[114] 'I am already here' is what either the hedgehog or his wife said to the hare when they had their famous race in the field—the hare, who could not tell the difference between the hedgehog and his wife, and did not realise the trick, finally lost not only the race but his life. See http://fairytales/u.com/story2/hare.htm.

> trend has an outward-looking, export-promoting orientation composed of more systematic challenges, in particular by large and well-organized commercial interests, to foreign regulatory barriers to trade. International trade disputes are, in consequence, not purely public or intergovernmental. Nor do they reflect a simple cooptation by businesses, particularly large and well-organised businesses, of government officials. Rather, they invoke the formation of public-private partnerships to pursue varying but complementary goals. The development of these public-private partnerships is seen in the actual handling (the 'law in action') of most commercial trade disputes, as opposed to the law in the books reflected in the relevant provisions of WTO agreements, US statutes, EC regulations, and the EC's founding treaty.[115]

This finding underlines that the problem of representativeness has to be viewed from a different angle: if certain interests are already present in the agenda-setting and decision-making processes, then civic participation means opening up these structures to unrepresented groups and interests, thus broadening the agenda and safeguarding the more inclusive representation of societal interests and viewpoints. The problem of representation certainly remains and cannot be solved in a perfectly consistent manner: participatory governance is not meant to replace *democratic* representation. Increasing research by political and social scientists about interest representation in the EU,[116] however, supports the conclusion that some relevant criteria may be found, criteria which can safeguard a perhaps not perfect, but somehow proper, representation of civil society through organised interests and voluntary associations. These criteria, once spelled out in legal documents with binding force, will open *fora* for contestation and dissent within transnational regulatory institutions and networks.

Situated between co-decision powers and mere consultations, the principle of participatory governance can be filled with context-sensitive contents, reaching from notice and comment provisions and transparency regulations, through rights to a hearing by regulatory institutions and networks, to procedural involvement that stops short of a veto position. As long as visions of a global democracy remain a distant hope, a legal concept of participatory transnational governance is the second-best solution for integrating societal diversity into the 'law of law-production' (R Wiethölter). And it can also tackle the other side of the coin, the nightmare visions of a global super-state: participatory transnational governance is a crucial element for a redirection of 'intergovernmentality' and its regulatory networks towards a more inclusive law/'law'-production.

[115] G C Schaffer, 'The Blurring of the Intergovernmental: Public-Private Partnerships behind US and EC Trade Claims' in MA Pollack and GC Shaffer (eds), *Transatlantic Governance in the Global Economy* (Lanhan, Mid: Rowman & Littlefield, 2001), at 97.

[116] See, e.g., the 2004 Report of the Active Citizens Network, 'Participation in Policy Making: Criteria for the Selection of Civic NGOs', available at http://www.activecitizenship.net/projects/project_assessing.htm.

Section I.4

Legalisation Patterns outside the WTO

7

Non-Traditional Patterns of Global Regulation: Is the WTO 'Missing the Boat'?

JOOST PAUWELYN

I. INTRODUCTION

THIS CHAPTER QUESTIONS whether the toolbox of traditional public international law is equipped to address today's global socio-economic needs. It focuses on two of the main features of the traditional international legal system:

— the dichotomy of international law between legally binding norms ('hard law') and non-binding declarations or statements of principle ('soft law'), where, in principle, only the former (hard law) can be normatively held and enforced against states;[1]
— the focus of international law (other than human rights and international criminal law) on states as the subjects of rights and obligations.

The first feature (the focus on hard law or international law's 'legal positivism') logically derives from the second (the focus on states): since states are the subjects of rights and obligations, and are also considered as sovereign and equal, norms of international law emerge only when states, in one way or an other, have consented to these norms as legally binding (be it in the form of treaties, customs or general principles of law).

The WTO legal regime exemplifies these two features of *hard law* centred on *states*. It is probably at the apex of what traditional international law aspires to: with a quasi-universal membership of close to 150 states, the WTO imposes discipline on state conduct through legally binding obligations that are enforced by a compulsory, state-to-state dispute settlement mechanism (panels and the WTO Appellate Body).

[1] P Hulsroj, 'Three Sources—No River, A Hard Look at the Sources of Public International Law with Particular Emphasis on Custom and General Principles of Law' (1999) 54 *Zeitschrift für öffentliches Recht* 219–77; P Weil, 'Towards Relative Normativity in International Law?' (1983) *American Journal of International Law* 413.

Against this background of hard law centred on states, as operationalised in the WTO, the broader reality of the normative patterns governing today's socio-economic affairs looks, however, quite different: first, if and when states do manage to co-operate (other than at the WTO), it increasingly takes the form of soft law; secondly, non-state actors have emerged both as the creators *and* the potential subjects of global norms.

This chapter begins with an overview of these 'non-traditional' *sources* and *players* on the global legal scene (Section II). They have, however, been described and commented upon earlier.[2] What this chapter tries to add is an assessment of the extent to which these new sources and players are taken into account in the more traditional WTO legal regime. More broadly, it questions, first, whether international law takes sufficient cognizance of these non-traditional sources and players when resolving a specific international legal question or dispute (or whether it limits itself to *hard law* created by states) and, secondly, whether international law is equipped, in turn, to control, legitimise and, as the case may be, regulate these new sources and players (or whether its scope is limited to control and discipline *state* conduct).

This inquiry is approached from two different angles.[3] A first point of view (set out in Section III) examines whether the hard law, state-to-state WTO regime takes sufficient account of the new (softer) normative sources outlined in Section II, including those created by non-state actors. From this angle, questions are raised about a certain WTO supremacy—i.e., a risk of *over-inclusion* of WTO obligations—a fear that the non-traditional sources of non-WTO law would play no role or an insufficient role in the resolution of trade disputes. Is the WTO 'missing the boat' by finding, for example, that a domestic measure is in violation of trade rules whilst that very same measure is justified or even imposed by other, newer forms of social regulation (be it an environmental declaration or a private or semi-private international standard) outside the four corners of traditional WTO law?

The second angle (elaborated in Section IV) examines the impact of the non-traditional sources and players in the WTO, but the WTO itself, and whether the WTO may not be totally realistic in its covering not only state conduct and hard, state-to-state norms, without having control over today's

[2] See, e.g., D Shelton, *Commitment and Compliance, The Role of Non-binding Norms in the international Legal System (New York: OUP, 2000)* and S Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', (2001) 11 *Yale Law Journal* 443.

[3] A third angle, not pursued in this chapter, is whether the WTO itself ought to move away from its hard-law-only approach and start regulating trade also in softer forms, be it by non-binding declarations or obligations not subject to the strict DSU (but monitored, e.g., under a compliance mechanism focused on carrots and plans of action, rather than sticks and trade sanctions). For a suggestion in this respect, see K Abbott, 'International Action on Bribery and Corruption: Why the Dog didn't Bark in the WTO' in D Kennedy and J Southwick (eds), *The Political Economy of International Trade Law: Essays in honour of Robert Hudec* (Cambridge; CUP, 2002), at 177.

new sources and players on the international economic scene (i.e., a risk of *under-inclusion* of WTO obligations). Is the WTO thereby 'missing the boat' and tolerating norms and conduct (such as codes of good practice, NGO boycotts or semi-private standards) that may restrict trade as much as, or even more than, traditional tariffs or state imposed quantitative restrictions?

II. NEW SOURCES AND PLAYERS IN GLOBAL REGULATION

II.1 Hard Law versus Soft Law: A 'Partially Globalised' World?

Where states do co-operate (other than at the WTO) such co-operation increasingly takes the form of soft law declarations, codes of conduct or weakly enforceable treaties. When states decided, for example, to do something about the trade in so-called conflict diamonds (that is, diamonds mined by rebel groups and sold to fund internal wars, possibly even global terrorism), they did so in the form of the Kimberley Process Certification 'scheme', that is, a set of precise rules that were explicitly stated as being *not* legally binding but which states promised to implement domestically.[4] Germany has even made it official foreign policy that if international co-operation can be achieved through soft law, German negotiators should not conclude a legally binding treaty.

In other non-WTO areas, such as the Cartagena Biosafety Protocol or the WHO Framework Convention on Tobacco, states did conclude a legally binding treaty, but, unlike with the WTO Treaty, did not back it up with a credible enforcement mechanism. In other fields, states failed to co-operate at all (as, for example, in the Kyoto Protocol, not ratified by the US), or created regimes that are not seen as sufficiently complied with (such as, for example, ILO labour or UN human rights conventions).

When compared to the strictly enforced trade obligations at the WTO, this lack of international co-operation in fields other than the economic one has led commentators to term today's world as a 'partially globalised world'[5] or to find a 'global governance deficit of considerable magnitude'.[6] In my recent book, I spoke of a 'two class society' of international law norms.[7] It is, indeed, quite a paradox that, in the areas that we would domestically frame as constitutional (such as human rights), *less* (enforceable) international co-operation takes place than in areas that we would

[4] J Pauwelyn, 'WTO Compassion or Superiority Complex: What to Make of the WTO Waiver for "Conflict Diamonds" ' (2003) 24 *Michigan Journal of International Law* 1177.

[5] R Keohane, 'Governance in a Partially Globalized World' in D Held and A McGrew (eds), *Governing Globalisation* (Cambridge, Mass: Polity Press, 2002), at 325.

[6] G Gereffi and F Mayer, 'Making Globalisation Work', Feb 2004 (paper on file with author), at 2.

[7] J Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge: CUP, 2003), at 441.

domestically portray as being of 'mere' commercial value (such as trade rules).

At the same time, plausible reasons can be found for this discrepancy (other than the argument that governments care more about trade than about human rights or the environment). First, trade co-operation is hugely facilitated because it is essentially a win-win situation in which all participants stand to gain by the reciprocal exchange of market openings. In addition, because of the reciprocity inherent in trade deals, WTO rules are relatively easy to enforce as they are based on the threat of reciprocal withdrawals in the event that a country reneges on the deal ('if you unjustifiably close-off your market for my products, I will do the same for yours'). This logic of reciprocity is absent both in the creation and the enforcement of, for example, human rights or environmental rules (it is no credible threat to say that 'if you torture your nationals, I will reciprocate by torturing mine'). Put differently, because of reciprocity, the collective action and free-rider problem that traditionally stalls international co-operation is far less prominent in the area of trade than it is in other fields.

Secondly, hard law backed up by a state-to-state dispute mechanism and trade sanctions is not necessarily the most efficient compliance tool for all regimes. Whilst it may work for trade rules, monitoring and a combination of sticks and carrots may be more efficient to achieve, for example, environmental objectives.[8]

Thirdly, while trade law is essentially about making money and enhancing material welfare, the economic liberties that it ensures have, in and of themselves, a human rights quality (economic freedoms).[9] In addition, through the welfare that they create, trade rules are instrumental in the achievement of non-economic goals (such as environmental or human rights protection, public health or social justice) depending, of course, on how national governments redistribute this wealth. At the same time, these positive features of a liberal market do not obliterate the need for non-economic regulation, be it nationally or globally, to correct so-called negative externalities (for example, environmental harm not sufficiently calculated into the cost of goods or services) or to ensure fair competition (for example, through anti-trust law). Liberalised markets must go hand in hand and can only be maintained and flourish when combined with a minimum of government intervention. In this sense, the world does remain 'partially globalised' and in a 'global governance deficit'.

[8] For reasons why soft law is sometimes the preferred and better approach than hard law, see D Shelton, n 2 above.

[9] For a view taking this point a step further by qualifying basic WTO obligations as human rights, see E-U Petersmann, 'Time for a UN "Global Compact" for Integrating Human Rights into the Law of Worldwide Organisations' [2002] *European Journal of International Law* 621; see, also, his contribution to this volume.

II.2 Non-state Actors as Sources *and* Subjects of Global Regulation

Besides a move away from the traditional international law focus on hard law, legal patterns of global co-operation have also expanded beyond the state: non-state actors—in particular NGOs and multinational corporations (MNCs)—have become crucial players both as norm-creators/enforcers *and* as potential subjects of international legal discipline.

(a) NGOs and MNCs as Sources and Enforcers of Global Regulation

Confronted with what they perceive as insufficient or ineffective state-to-state agreed rules on social policy, NGOs have started to monitor these rules themselves (for example, Human Rights Watch or Oxfam's 'Make Trade Fair' campaign) or have created their own rules or codes of conduct for states (for example, Transparency International) as well as MNCs (for example, Social Accountability International (SAI) or Fair Trade Labelling Organisations International).

MNCs, in turn, faced with increasing pressure from both NGOs and consumers to conduct business in a socially responsible manner wherever they operate (even in the absence of government-imposed disciplines), have embraced the notion of Corporate Social Responsibility (CRS). MNCs adopted their own company-specific codes of conduct (for example, the corporate codes of Wal-Mart, the Gap or BP) or industry-wide norms on human rights, environmental protection, labour standards, etc, (for example, the 'Equator Principles' adopted by financial institutions or the work of the World Business Council for Sustainable Development).

Finally, states, NGOs and MNCs increasingly co-operate to construe and agree on collectively formulated norms (for example, the UN's Global Compact, a partnership between the UN and private companies, or semi-private standardisation bodies such as the International Standardisation Organisation (ISO) or the International Accounting Standards Board). They have also joined forces to monitor compliance with state-agreed norms (for example, the role of NGOs in the implementation of the Kimberley Scheme on conflict diamonds,[10] or the role of SAI in the monitoring of compliance with the 8 core ILO labour codes under the 2002 Belgian Law to Promote Socially Responsible Production[11]).

[10] A Working Group on Monitoring was established to monitor the implementation of the Kimberley scheme. Interestingly, this Working Group consists of 8 countries and the European Community as well as 2 NGOs (the Global Witness and Partnership Africa Canada) and 1 industry organisation (the World Diamond Council). The Working Group makes its recommendation to the Chair of the Kimberley scheme who, in the end, is left with the final decision whether or not to expel a participant from the scheme. On 9 July 2004, the Republic of Congo (Congo-Brazzaville) was removed from the scheme following the Working Group procedures (including a site visit by an expert team). See http://www.kimberleyprocess.com:8080/site/.

[11] Under the Belgian law, SAI is the organisation that selects and accredits audit firms abroad which are entitled to certify compliance with SAI's own SA8000 human workforce

This cross-actor co-operation may enhance coherence in the different standards enacted and bolster the credibility and effectiveness of these standards (in particular through independent, third-party monitoring). The participation of NGOs or private standardisation/monitoring bodies in state-created norms is also thought to increase the legitimacy of these norms and may lighten the burden of financial and human resources on states in the process of norm implementation.

(b) NGOs and MNCs as Subjects Disciplined by Global Regulation

Besides creators, monitors and enforcers of global norms, NGOs and MNCs have also become the subjects of such norms in their own right. Most clearly, MNCs are the subjects of many of the codes of conduct referred to. With the increased power and influence of MNCs on the world scene (which, through globalisation, cannot always be controlled by national governments) should come increased responsibilities, the argument goes.

In some instances (such as the self-imposed company-specific or industry-wide codes of good practice), MNCs are both the law-maker and the subject of the law, or both party and judge (which has raised the question whether companies have genuinely embraced CSR or merely use it as a straw-man to fence off criticism and increase profits). In other cases, the norms are created and monitored by NGOs (such as SAI) or, a novelty in international law, negotiated by states and directly imposed under international law on MNCs (as in the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, not yet in force, but approved in August 2003 by the UN Sub-Commission on the Promotion and Protection of Human Rights).

MNCs have also become the subject of international law enforcement before *national* courts, in particular, US federal courts under the 1789 Alien Tort Statute (for example, the *Unocal* case pitting Burmese nationals against the California oil company Unocal, for Unocal's alleged involvement in forced labour and torture in a Burmese pipeline project). The reach of the Alien Tort Statute was, however, recently restricted by a landmark US Supreme Court opinion in *Alvarez-Machain* (discussed below in Section IV).

Note further that MNCs not only face *obligations* under modern international law; they have also been granted specific *rights* under a long series of regional and bilateral investment treaties. These rights are, in most cases,

standard which, in turn, is regarded as equivalent to the criteria set out in the Belgian law. Note, however, that since the entry into force of the Belgian social label (on 1 Sep 2002), only one single company has requested and obtained the label, namely, the Belgian insurance company Ethias, and this was granted for only one of its services, its 'Home Comfort Plus', a home insurance policy. The link between a social label and inducing compliance with minimum labour standards abroad is, in this case, quite strained.

of a hard-law nature (unlike the obligations of MNCs in codes of conduct) that MNCs can directly enforce at the international level in compulsory investor–state dispute mechanisms (such as Chapter 11 of NAFTA). In other words, while MNCs may increasingly bear rights *and* obligations under international law, MNC rights remain of a more precise and enforceable nature than MNC obligations.

NGOs, in turn, have faced criticism for having a lack of accountability which matches their power and influence in the market place (this influence is readily apparent in successful NGO-instigated consumer boycotts against, for example, Coca Cola, Nestlé or apartheid South Africa; Oxfam's alleged influence on the failure of the WTO meeting in Cancún as well as its role in the fight against the export subsidies of rich countries[12] or Nestlé's backing down in an investment claim against Ethiopia because of NGO triggered consumer outrage). As a result, new mechanisms have recently emerged with a view to checking the operation and financing of NGOs so as to increase their accountability to members, contributors and consumers at large (see, for example, the American Enterprise Institute's ngowatch.org or One World Trust's Global Accountability Project, which rates the transparency and accountability of both states and NGOs).

III. NON-TRADITIONAL PATTERNS OF GLOBAL REGULATION AND THE WTO

III.1 Are WTO Trade Obligations *Over-inclusive*?

Notwithstanding the abovementioned complexities of today's world economy and its regulation, the standard work of a WTO panellist seems remarkably simple and confined. All he or she can and, indeed, must do, it is generally believed, is to decide whether a given WTO member has violated one of the WTO rules agreed upon in the 1994 Final Act. It is, indeed, tempting for international trade lawyers to perceive the world of trade and the legal patterns that govern it as limited to what the WTO covers and regulates. This cosy and comforting perspective, limited to the four corners of the hard law set out in the so-called WTO covered agreements, has, however, one major risk: the marginalisation of the WTO as an appropriate forum for the settlement of complex trade disputes which touch upon a broad range of societal questions (from combating poverty to public health and the environment, from worker protection to the protection of minors).

This risk is one of *over-inclusion* of WTO trade obligations. It is the risk that WTO obligations may be found to be violated in the confined universe

[12] At the time of writing, Oxfam has, e.g. a web page by which it enables supporters to send direct emails to US President Bush urging him (in a pre-set text) to implement the WTO ruling condemning US cotton subsidies. See http://www.maketradefair.com/en/index.htm.

of trade law, even though, in the wider corpus of global legal patterns, the conduct in question may be perfectly legal or justified (because it is permitted, or even called for, in another treaty or norm). If and when this risk materialises, it would hardly be correct to state that disputes are genuinely 'settled' at the WTO; at best, they would be offered *one* outcome limited to trade law; at worst, this outcome would be meaningless since it would be contradicted under another set of global norms, thereby seriously tarnishing the legitimacy and enforceability of WTO rulings. In this sense, it would be more appropriate to talk about 'confined' or 'within-the-box' adjudication, rather than genuine 'dispute settlement' that brings a case to closure.

(a) Non-WTO Norms Legally Binding on the Disputing Parties

Panels and the Appellate Body have realised this first threat of 'missing the boat' and have, unlike the panels which operated under GATT 1947, construed WTO rules in the wider context of international law (with references to rules of public international law on questions such as treaty interpretation, burden of proof, private counsel, *amicus curiae* or the proportionality of countermeasures, as well as other non-WTO treaties, in particular, multilateral environmental agreements (MEAs)).[13]

Although it has now become common practice for panels and the Appellate Body to *interpret* WTO rules with reference to other rules of international law and to apply the *general rules* of treaty law, state responsibility and dispute settlement, what remains to be decided is whether a violation of the WTO Treaty can be justified, independently, by another norm of international law which is binding on the disputing parties. For example, even if a trade restriction violates GATT and cannot be justified under the exceptions of GATT Article XX, can another rule, say, an MEA or an ILO declaration, which is binding on the disputing parties, still offer a valid defence on the basis of which a WTO panel can decline to find a violation of WTO rules?

In my view, this is an extra step that must be taken and one that can be perfectly justified under traditional principles of international law, which distinguishes the limited *jurisdiction* of WTO panels (*in casu*, limited to finding violations of WTO obligations) from the *law* that WTO panels can apply in the exercise of their limited jurisdiction, i.e., in their examination of WTO claims (*in casu*, any valid rule of international law which is binding on the disputing parties but which does not affect the rights of third parties).[14]

[13] See J Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 *American Journal of International Law* 535.

[14] See J Pauwelyn, 'How to Win a WTO Dispute based on Non-WTO Law: Questions of Jurisdiction and Merits' (2003) 6 *Journal of World Trade* 997.

(b) Soft Law Agreed to by the Disputing Parties

While the above 'extra mile' would avoid situations in which a WTO panel finds a violation, even though another (legally binding) treaty explicitly agreed upon between the parties requires or permits the conduct at issue, would the suggested approach also give sufficient deference to the non-traditional, softer law referred to earlier (for example, the Kimberley Scheme, a non-binding declaration in which states commit themselves to ban trade in conflict diamonds)? In my view, it could.

Soft law can, first of all, play a crucial role in the *interpretation* of flexible WTO provisions (as discussed below). When it comes to soft law that genuinely *contradicts* hard WTO law, much will depend on how one construes the definition of conflict between two norms, for example, between a WTO rule and a Kimberley Scheme provision. Should, as was implied by earlier Appellate Body case law, a conflict only be found in the event of two mutually exclusive obligations, i.e., when a state cannot possibly comply with both provisions at the same time?[15] In my view, this definition of conflict is too restrictive. As implied in the more recent Appellate Body ruling on *EC—GSP*, conflict between two norms also includes the situation in which one norm *prohibits* that which another norm explicitly *permits*.[16] In other words, even though both norms in this situation can be complied with at the same time (by not invoking the permissive norm and simply complying with the prohibition), a conflict still arises because the permissive norm cannot be given its effect in the face of the prohibition. Under

[15] Appellate Body report on *Guatemala—Anti-Dumping Investigation Regarding Imports of Portland Cement from Mexico,* complaint by Mexico, (WT/DS60/AB/R, adopted on 25 Nov 1998, at para 65):

> In our view, it is only where the provisions of the DSU and the specific or additional rules and procedures of a covered agreement cannot be read as complementing each other that the special or additional provisions are to prevail. A special or additional provision should only be found to prevail over a provision of the DSU *in a situation where adherence to the one provision will lead to a violation of the other provision*, that is, in the case of a conflict between them.
>
> [emphasis added].

[16] In this case, the potential for conflict was one between GATT Art I (prohibiting discrimination between foreign trade partners member of the WTO) and the Enabling Clause (permitting tariff preferences to be awarded only to developing countries). By finding a potential for conflict between such prohibition (GATT Art I) and permission (Enabling Clause), the AB confirmed that an obligation can, indeed, conflict with a right:'…the text of paragraph 1 of the Enabling Clause ensures that, to the extent that there is a conflict between measures under the Enabling Clause and the MFN obligation in Article I:1, the Enabling Clause, as the more specific rule, prevails over Article I:1. In order to determine whether such a conflict exists, however, a dispute settlement panel should, as a first step, examine the consistency of a challenged measure with Article I:1, as the general rule. If the measure is considered at this stage to be inconsistent with Article I:1, the panel should then examine, as a second step, whether the measure is nevertheless justified by the Enabling Clause. It is only at this latter stage that a final determination of consistency with the Enabling Clause or inconsistency with Article I:1 can be made (*European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (Apr. 7, 2004), para 101).'

this broader definition of conflict, a conflict would arise if GATT were, for example, to prohibit a ban on conflict diamonds (a fact that is far from clear[17]), while the Kimberley Scheme explicitly permits such ban (even though, as a non-binding scheme, it does not legally impose an *obligation* to do so).[18] In this sense, the soft law Kimberley Scheme could provide a valid defence against a claim of WTO violation, albeit only as between two WTO members that had agreed to the scheme.[19]

(c) Legal Patterns not Binding on the Disputing Parties

The abovementioned approach (that is, accepting non-WTO norms *agreed to by both parties* as a possible justification for WTO violation)—although they are still seen by many as revolutionary—may not be enough to placate the concerns of WTO 'marginalisation' described earlier. This approach leaves out norms that were not consented to by the disputing parties (such as the Cartagena Biosafety Protocol in the US–EC dispute over GMOs because the US did not sign the Protocol, or the international Codex Alimentarius standards on hormones not accepted by the EC), as well as norms created by non-state actors (be it NGO or MNC codes of conduct or standards enacted in (semi-)private bodies). This begs the question, of course, whether it is at all appropriate for a WTO panel to refer to such sources, in particular, given the traditional rule of international law that a state cannot be held by law to which it did not consent.

International Standards Referred to in the SPS and TBT Agreements One major avenue of incorporating at least some of these non-traditional sources is now offered in the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter SPS) and the Agreement on Technical Barriers to Trade (hereinafter TBT). These agreements explicitly refer to international standards adopted outside the WTO as a safe haven from WTO discipline. In other words, when a WTO member 'conforms to' (for

[17] See n 4 above.

[18] If, based on the non-binding nature of the Kimberly Scheme, 'rights' under that scheme were also held to be of no normative force, the scheme could, however, have the same effect of justifying the measure pursuant to the principles of good faith and/or estoppel (for a country first to agree to the Kimberley scheme and then to sue another scheme participant for WTO violation is arguably against the principle of good faith; such WTO complaint could also be said to be estopped by means of the complainant's very agreement to the Kimberley scheme).

[19] This line of thinking was confirmed when, in May 2003, all WTO members agreed to grant a waiver for trade restrictions imposed on non-participants in the Kimberley Scheme on condition that such restrictions were consistent with that scheme. In other words, WTO members implied that, as between participants to the scheme, no waiver was needed. There, the Kimberley Scheme itself could justify the trade restriction, even before a WTO panel; only restrictions on non-participants needed a waiver (WTO General Council, Proposed Agenda, WT/GC/W/498 (13 May 2003), Item VI. The text of the waiver can be found in the revised waiver request: WTO Council for Trade in Goods, Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds: Communication, G/C/W/432/Rev.1 (24 Feb 2003).

the purposes of the TBT, when the measure is 'in accordance with') any of those international standards, then it cannot be found to violate the SPS/TBT rules. Crucially, this safe haven applies even though the standard is *not* legally binding in, and of, itself, nor must it be adopted by consensus or be binding on the disputing parties in the WTO dispute.[20]

There are, however, notable differences between the safe haven offered in the SPS, as opposed to that set out in TBT.

In the SPS, the international standards referred to are currently limited to 'standards, guidelines and recommendations' established by the Codex Alimentarius Commission and those developed under the auspices of the International Office of Epizootics or the International Plant Protection Convention.[21] All three organisations are *inter-governmental* bodies (none of them is of the semi-private or private nature discussed earlier, in contrast to the TBT: see below). Moreover, no explicit provision is included that the standards be of a voluntary, non-binding nature (in contrast to the international standards referred to in TBT: see below).

In the TBT, the range of possible standards that can offer a safe haven is much broader. As the panel in *EC—Sardines* found, for TBT purposes, 'international standards are standards that are developed by international bodies'.[22] This, of course, begs the question how to define the terms 'standard' and 'international body'.

First, the word 'standard' is defined in Annex 1(2) of the TBT as '[d]ocument approved by a recognised body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is *not mandatory*' (emphasis added). Hence, the fact that, for example, the Kimberley Scheme requirements are not mandatory could make them 'standards' in the TBT sense and, ironically, somewhat more important for TBT purposes than, for example, legally binding MEAs, since only compliance with international 'standards' offers a presumption of conformity with the TBT.[23]

Secondly, the word 'international body' is defined in Annex 1(4) of the TBT as a '[b]ody or system whose membership is open to the relevant bodies of at least all members'. Crucially, such 'international body' standards could be inter-governmental (such as, arguably, the Kimberley

[20] Art 3(2) SPS; Art 2(5) TBT. The Explanatory note to Annex 1(2) TBT, defining the term 'standard', explicitly states: '[t]his Agreement covers also documents that are not based on consensus'.

[21] Annex A, para 3 to the SPS Agreement.

[22] WTO Panel Report, *European Communities—Trade Description of Sardines*, WT/DS231/R, para 7.63 (29 May 2002).

[23] The fact that non-binding international standards, not even consented to by the disputing parties, can therefore be held against WTO members is another reason why *a fortiori* legally binding rules of international law should be permitted to operate as a defence before a WTO panel.

Scheme[24]) or semi-private (such as the ISO) since the 'relevant bodies' of WTO members referred to can be either governmental or non-governmental. At the same time, 'non-governmental body' is restrictively defined in Annex 1(8) of the TBT as a '[b]ody other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation'. As a result, private standardising bodies or NGOs which set codes of good practice including those open to national NGOs from all WTO members (pursuant to Annex 1(4) of the TBT), are unlikely to be accepted as setting 'international standards' as long as the national NGOs have not been granted the 'legal power to enforce a technical regulation'. This 'legal power' is the link that must exist between an NGO and the WTO member in question before the NGO activity can be relevant for (or, for that matter, be subject to: see below) the TBT agreement.

Importantly, whilst international standards under the SPS Agreement all relate to specifications inherent in the physical characteristics of the product itself (for example, maximum hormone residues in meat), the international standards under the TBT may relate to the product itself (for example, what species of fish can be called sardines) as well as to the *process or production method* by which the product was produced (which, arguably, also includes whether it was produced in conformity with certain labour standards, a point that remains, however, strongly debated[25]).

Note further that the presumption of conformity in the TBT is triggered only for technical regulations, not for standards (see Annex 3 (E) to the TBT), nor for conformity assessment procedures (see Article 5(4) TBT), although in both cases a similar presumption of compliance could be implied from the obligation (in the respective TBT provisions) to base national standards and conformity assessment procedures on international standards. Note also that the presumption of compliance in Article 3(2) SPS applies in respect of *all* SPS provisions *and* those of GATT 1994, whereas the presumption of compliance in Article 2(5) TBT is limited to a presumption that the national measure does not create 'an unnecessary

[24] The inter-governmental Kimberley Scheme, for e.g., explicitly states: 'participation in the Certification Scheme is open on a global, non-discriminatory basis to all Applicants willing and able to fulfill the requirements of that scheme' (s. VI.8 of the Kimberley Scheme). As a result, membership of the Kimberley Process 'is open to the relevant bodies of at least all [WTO] members'. Consequently, Kimberley requirements could well qualify as 'international standards' triggering a presumption of TBT conformity.

[25] Annex 2(2) TBT, defining 'standards', includes a reference to 'products or related processes and production methods' (in contrast to the definition of 'technical regulation' in Annex 2(1) TBT, it does not include the word 'their' before 'related'). Moreover, Annex 2(2) TBT adds: '[the term standard] may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method'. In an explanatory note, Annex 2(2) also specifies that the TBT does not apply to services standards, but 'only' to technical regulations, standards and conformity assessment procedures 'related to products or processes and production methods'.

obstacle to international trade', i.e., meets the obligation set out in Article 2(2) TBT. Finally, the TBT presumption is explicitly defined as 'rebuttable', while the SPS presumption is silent as to whether it can be rebutted or not.

Most relevant for present purposes, the above-summarised SPS and TBT references to international standards imply that a number of non-WTO norms can be taken into account in the settlement of trade disputes, even though:

— they were never consented to by the disputing parties (in particular, the defendant, as was the case in *EC—Hormones* and *EC—Sardines*); and
— they were created by semi-private bodies (such as the ISO) or intergovernmental bodies in which non-state actors (ranging from scientific experts, business associations and, to a lesser extent, NGOs) have a major impact.

Although this may address some of the concerns expressed earlier about the role of non-traditional sources and players in WTO dispute settlement, it does, however, raise two new problems.

First, although the SPS/TBT references thus avoid the strictures of the traditional international law rule of state consent,[26] the question remains, however, whether the collective action problem grounded in the consent rule has not simply migrated from the WTO to the standardising bodies themselves, that is, whether *because of the SPS/TBT references*, standard-making in, for example, the Codex Alimentarius or the ISO will not be chilled or become deadlocked. Countries may, indeed, be wary of issuing new standards in the knowledge that standards are no longer voluntary but, at least partially, enforceable at the WTO. In a recent empirical account of how the Codex Alimentarius Commission has changed since being referred to in the SPS, Veggeland and Borgen found, for example, that the SPS has 'politicised' the Codex Alimentarius in that 'political and economic considerations are more openly stated in the course of Codex negotiations' and 'the negotiation and coalition patterns from WTO meetings are replicated in Codex meetings'.[27] As a result, these authors conclude, some players have been 'less willing to compromise their interests for the sake of agreement'.[28]

Secondly, whilst the SPS reference is clearly circumscribed to three other organisations, one could question whether the open TBT reference to 'standards that are developed by international bodies' is not overly broad.

[26] As Robert Howse terms it in his contribution to this volume, the SPS/TBT references are 'a unique and extraordinary mechanism for the effective creation of new international law'.

[27] F Veggeland and S O Borgen, 'Changing the Codex: The Role of International Institutions', Norwegian Agricultural Economics Research Institute, Working Paper 2002–16, at 25, available at http://www.nilf.no/Publikasjoner/Notater/En/2002/N200216Hele.pdf.

[28] Ibid.

Would it be enough, for example, for 20, 10 or even two WTO members to set up a standardising body, issue trade-restrictive standards on a product that they want to protect (say GMOs) and open this standardising body to all other WTO members (knowing only too well that the countries with which they have a trade dispute over the product concerned will never join), in order for the standard to offer a safe haven from WTO violation, even as against WTO members that decided *not* to join the body? Moreover, what happens in cases where conflicting 'international standards' are developed by different 'international bodies'? Is conformity with either standard sufficient to trigger the presumption of SPS/TBT compliance, or must the WTO decide which of the two is most 'relevant'?

Thirdly, if the international standards referred to are, indeed, partly created both at the demand and under the pressure of non-governmental bodies, including businesses, how can the WTO ensure that these standards are legitimate, unbiased and sufficiently supported by all interested parties, including consumers? So far, panels and the Appellate Body have refused to examine the transparency, due process and other procedural qualities of the international standards invoked. Instead, they have blindly accepted any standard that meets the technical, source-based definitions in the SPS and TBT agreements.[29] Joanne Scott, for example, has recently argued that the Appellate Body ought to examine the procedural appropriateness and legitimacy of international standards before giving deference to them, pleading that international standards (as well as MEAs) should be made contingent or contestable, not absolute.[30] At the same time, once such procedural requirements of transparency, due process, openness, impartiality, etc, have been met, she would advise the Appellate Body to refer to the norm or standard in question even though it does *not* meet the SPS/TBT international standard definition *and* does not constitute a legally binding norm which is consented to by the disputing parties. In this sense, Scott's approach would trump the consent rule even beyond what is currently the case in SPS/TBT, and in respect of other, non-WTO treaties would go far beyond my proposal, outlined earlier, of applying non-WTO rules before a WTO panel as long as they are *binding* on the disputing parties.

[29] At the same time, the AB has considerably reduced the harmonisation pull of the SPS/TBT compliance presumptions by finding that: (i) national regulations must 'conform to' (not simply be 'based on') international standards to benefit from the presumption, and (ii) deviation from an international standard does not shift the burden of proof to the defendant. See, n 31 below. This led Joanne Scott to say that 'the AB has been notably diffident in according authority to such [international] standards, conscious perhaps of the disputed legitimacy of the bodies responsible for them', going as far as to conclude that the 'authority [of international standards] within the WTO would seem, at present, to be modest in the extreme: (J Scott, 'International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO' (2004) 15 *European Journal International Law* 307, at 310 and 330.

[30] Ibid at 311–2.

To close the discussion on SPS/TBT references to international standards, an important question remains whether these standards operate only as a tool to *loosen* national regulations that go beyond international standards (as in *EC—Hormones* or *EC—Sardines*, where EC regulations were found to be too strict) or whether these standards could also be invoked to *tighten* national regulations against countries that fall below the minimum of the international standard. Put differently, do the international standards operate only as a common *ceiling* or maximum (beyond which countries will have to offer specific justifications) or also as a *floor* or minimum below which WTO members cannot go? If the international standards also had the latter (floor) effect, then the SPS and TBT Agreements would have a strong harmonising pull. If not, the incentive to harmonise is limited to the safe haven offered by conforming to the standard.[31]

Article 3(1) SPS provides as follows:

> To harmonise sanitary and phytosanitary measures on as wide a basis as possible, members *shall base* their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, *except as otherwise provided for in this Agreement, and in particular in paragraph 3* [my emphasis].

Now, if an international standard does exist, the only two alternatives to 'basing' measures on it (as required in Article 3(1) SPS[32]) seem to be:

— to 'conform to' the standard (in which case WTO consistency is presumed under Article. 3(2) SPS), or:
— to introduce a measure 'which results in a *higher* level of sanitary or phytosanitary protection than would be achieved by measures *based on*' the standard *and* to offer scientific justification for it.

In other words, no ground (or, at least, no explicit ground) can be found in the SPS agreement for deviating from the Article 3(1) SPS obligation to base measures on international standards by means of a measure that results in *lower* levels of sanitary or phytosanitary protection. Under this reading, the SPS agreement (in particular, Article 3(1) could then, indeed, be used to force a WTO member to *ratchet up* its national measures to the

[31] Note, however, that deviating from the standard by means of a stricter national measure is not punished in AB case law. In *EC—Hormones*, the AB reversed the Panel on the burden of proof under Art 3(3) SPS, finding that even when a member deviates from an international standard, it remains for the complainant to prove that the measure is not scientifically justified (or at least to establish a presumption or *prima facie* case to this effect). Intriguingly, the subsequent Panel on *EC—Sardines*, n 22 above reverted to the panel approach in *EC—Hormones* (shifting the burden of proving TBT consistency to the EC because it had deviated from the Codex standard) but was once again reversed by the AB (which found that it remained for Peru, the complainant, to prove TBT violation even in cases of deviation from an international standard).

[32] The AB in *EC—Hormones* found, however, that compliance with Art 3(1) SPS does not presume SPS conformity. All other SPS requirements remain to be checked even if a measure is 'based on' an international standard.

minimum level of an international standard. The odd result of this is that the WTO would then essentially grant a request to restrict trade *more* (that is, ask the defendant to impose *stricter* SPS measures).[33] It is hard to imagine that this is what the drafters of the SPS agreement (especially developing countries for which it may be hard to reach even the *floor* of international standards) had in mind. Yet, a textual interpretation of SPS Article 3 could lead to such a result.

The obligation in Article 2(4) TBT to 'use' relevant international standards 'as a basis' for national technical regulations can be deviated from under somewhat broader language, namely, in cases where the international standard is 'an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance, because of fundamental climatic or geographical factors or fundamental technological problems'.[34] Although this could be read as granting a right also to go *below* the floor of the international standard, Article 2(4) TBT (much like Article 3(3) SPS) remains focused on deviations that *exceed* the level of fulfilment achieved by the international standard. If the latter is correct, then even the TBT agreement could be used to *ratchet up* (rather than down) domestic technical standards. Given the broad scope of relevant international standards under the TBT agreement, such a reading could transform the WTO from an organisation worried about technical standards that are *too strict* to one that forces countries to comply with the *minima* set out in non-binding standards developed in other *fora*, ranging from the ISO to the Codex Commission, possibly including even MEAs and the Kimberley Scheme on conflict diamonds (recall, in this respect, the problem of conflicting international standards: if the WTO is to enforce a minimum ceiling, which of the two divergent standards should it enforce?). This logical conclusion may well be a strong argument for distinguishing the permitted deviations under the SPS (explicitly stated to include only deviation by *higher* standards) from those under the TBT (including both higher *and* lower standards, as long as the international standard is proven to be 'ineffective or inappropriate'). If, in the alternative, the Appellate Body were to permit only deviations by *higher* standard also under the TBT, Joanne Scott's argument for the Appellate Body to exercise closer scrutiny over the procedural qualities and legitimacy of international standards would gain all the more

[33] Note, indeed, that for the SPS agreement to apply in the first place, the defendant must have some form of measure that 'directly or indirectly, affect international trade' (Art 1(1) SPS) and falls within one of the definitions of an SPS measure (set out in Annex A(1)).

[34] Similar language is provided for domestic 'standards' deviating from international standards pursuant to Annex 3(F) TBT (which permits deviation whenever the international standard 'would be ineffective or inappropriate, for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems'). In respect of conformity assessment procedures, the exception is even broader, namely deviation is tolerated whenever the standard is 'inappropriate for the members concerned' (Art. 5(4) TBT).

force. In any event, the very definition of 'international standards' under the TBT ought then to be more carefully circumscribed than it has been to date.

Legal Patterns that are not Binding on the Disputing Parties, Nor 'International Standards' Under the SPS/TBT This leaves us with non-traditional sources of global regulation that are not binding on the disputing parties, nor incorporated in the SPS or TBT agreement. Is there any scope for WTO panels to take account of such sources, notwithstanding the rule of state consent?

Quite surprisingly, whilst my proposal for panels to apply non-WTO rules that were *agreed on* by the disputing parties has met fierce resistance,[35] the actual practice of the Appellate Body has, in certain respects, gone beyond even what I propose.[36] The Appellate Body has, indeed, referred to other international treaties that were not even agreed to by the disputing parties. In my view, these instances raise more questions of legitimacy and state consent than my, less ambitious, proposal for panels to apply rules that the parties have explicitly agreed to in the first place.

Two Appellate Body cases come to mind. First, in *US—Shrimp*, the Appellate Body read the terms 'exhaustible natural resources' in GATT Article XX in the light of contemporary concerns of the community of nations.

It found expression of these concerns in a series of treaties that were not even binding on the disputing parties (in particular, MEAs and the UN Convention on the Law of the Sea, not binding on the United States).

Similarly, in *EC—GSP*, the Appellate Body interpreted the terms 'development, financial [or] trade need' in the Enabling Clause with reference to:

> broad-based recognition of a particular need … set out in multilateral instrument adopted by international organisations.[37]

Once again, whether or not those non-WTO instruments were binding on the disputing parties was not discussed. In this case, the instruments in question were 'several international conventions and resolutions that have recognised drug production and drug trafficking as entailing particular problems for developing countries'.[38] No question was raised whether

[35] See the Jurisdiction of the WTO, in *Proceedings of the 98th Annual Meeting of the American Society of International Law* (31 Mar–3 Apr 2004), 135 (critique by J Trachtman and D Steger) and J Trachtman, 'Book Review of Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law' (2004) 98 *American Journal of International Law* 855.

[36] For another surprising critique of sovereignty and the consent rule it entails (from one of the original founders of the academic discipline of GATT/WTO law), see J Jackson, 'Sovereignty-Modern: A New Approach to an Outdated Concept' (2004) 97 *American Journal of International Law* 782.

[37] AB report on EC—GSP, para 163.

[38] Ibid., n 335.

India, the complainant, was a party or bound by any or all of these instruments.

How could these references to norms that were not binding on the disputing parties be justified? In my view, it is possible to interpret Article 31(3)(c) of the Vienna Convention sufficiently broadly to call these norms 'rules of international law applicable in the relations between the parties', that is, part of the rules which WTO panels must refer to when interpreting the WTO Treaty pursuant to Article 3(2)of the DSU.

Elsewhere,[39] I have expressed the view that it is not *sufficient* for an Article 31(3)(c) rule to be binding only on the disputing parties ('parties' in the Vienna Convention is defined not as parties to a particular dispute but as the parties *to the treaty*[40]), nor is it, in my view, *necessary* that the rule be *legally binding* on *all* WTO members, in the strict sense that it confers rights or obligations on *all* WTO members (reference is made to rules 'applicable in the relations between the parties', and not to rules '*legally binding* on *all* the parties').[41] In my opinion, it suffices that the rule reflects the common intentions or understanding of WTO members as a whole with regard to the meaning of a particular WTO term.

The process of treaty *interpretation*, at least in the way I understand it, is a fairly limited one. A word or string of words in a WTO provision—be it 'exhaustible natural resources' or 'necessary' in GATT Article XX, or 'development, financial and trade need' in the Enabling Clause—is not entirely clear and must be given meaning. In the process of *defining* these specific terms, must a panel limit itself to outside material that is *legally binding* on all WTO members? I do not think so. Instead, it suffices that these outside sources reflect a definition or provide a meaning that is *commonly understood* by all WTO members. After all, interpreting a WTO term with reference to other sources is *not* adding legally binding rights or obligations to the WTO term, but rather a technical, linguistic exercise of

[39] J Pauwelyn, n 7 above, at 253–72.

[40] Vienna Convention Art 2(1)(g).

[41] In contrast, Art 31.2(a) refers to 'any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty [emphasis added].' In this Art, the word 'all', qualifies the phrase 'between the parties'. This suggests that the absence of the word 'all' to qualify the phrase 'between the parties' in Vienna Convention Art 31(3)(c) means that not all the parties to the WTO need to be parties to the rule of international law. Similarly, Art 31.(3)(b) refers to 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. The commentary to Art 31(3)(b) states as follows:

> The text provisionally adopted in 1964 spoke of a practice which 'establishes the understanding of all the parties'. By omitting the word 'all' the Commission did not intend to change the rule. It considered that the phrase 'the understanding of the parties' necessarily means 'the parties as a whole'. It omitted the word 'all' merely to avoid any possible misconception that every party must individually have engaged in the practice w4here it suffices that it should have accepted the practice' (D Rauschning, 'The Vienna Convention on the Law of Treaties (1978) *Travaux Préparatoires* 254).

defining the very meaning of the WTO term. Indeed, the very first outside source that panels and the Appellate Body consistently refer to is surely one that is *not* legally binding on all WTO members, namely, the *Oxford English Dictionary* in which 'ordinary meaning' is traditionally found. Equally so, in my view, the distinguishing factor for rules under Article 31(3)(c) ought not to be that they are legally binding on all WTO members, but that they instead reflect a common understanding between WTO members.

Crucially, such reading of Article 31(3)(c) could then include:

— rules that are not necessarily binding on *all* WTO members, as well as
— rules or broader legal patterns developed by non-state actors for as long as they can be said to represent a common understanding of a particular term as between the WTO membership as a whole (and this irrespective of the time of enactment of those other rules, be it before or after the conclusion of the WTO Treaty in 1994[42]).

A similar result could be reached, following the same line of argument, under Article 31(1) of the Vienna Convention, which calls for an interpretation of WTO terms 'in good faith in accordance with the ordinary meaning to be given to the terms'.

At the same time, this approach (be it under Article 31(3)(c) or Article 31(1) begs the question of how to decide when and whether a particular norm or legal pattern reflects the common understanding of all WTO members and/or offers a good faith meaning in line with ordinary meaning (and whether this is a task that can be safely put in the hands of the judiciary[43]). The least that the Appellate Body can, however, do is to give some explanation of why the instruments that it referred to in *US—Shrimp* and *EC—GSP* meet its threshold of relevance.

Finally, non-traditional sources of global regulation could also play a role as *factual* references or benchmarks (much like comparative analysis of domestic laws in other WTO members) for panels to decide, for example, whether a country had acted in a non-discriminatory manner (as the Appellate Body did in *US—Shrimp*, referring to the Inter-American Convention on turtle protection), whether a stated concern can be seen as 'legitimate' or whether a measure or standard can be termed as 'necessary' or 'appropriate'. For legal patterns to play such factual role, there is no need for them to be binding on the disputing parties, nor for them necessarily to reflect the common understanding of WTO members as a whole or even

[42] This evolutionary approach to treaty interpretation was explicitly confirmed by the AB in *US—Shrimp*. Note, in addition, that the *Oxford English Dictionary* referred to by the AB is always the most recent version, not the one prevalent in 1994.

[43] Note, in this respect, Joanne Scott's statement that '[a] commitment to textual fidelity will not buy interpretative peace of mind': Scott, n 29 above, 311.

be state-created norms (NGO or MNC codes of good conduct could also be referred to). However, while panels may (and actually must), under the Vienna Convention, refer to interpretative tools on their own initiative, they can, in principle, refer to other rules as facts only when the disputing parties themselves have invoked such facts. Moreover, the weight of rules relied on by panels as legally binding norms or interpretative references will generally be higher and of a more decisive nature than rules simply referred to as facts.

(d) Conclusion

The risk of trade obligations being *over-inclusive*—because WTO panels cannot sufficiently defer to non-traditional patters of global regulation—seems limited. With some creativity, several avenues can be detected for WTO panels to give effect to non-WTO norms, both those that are binding on the disputing parties and those that are not, both hard law and softer norms or 'standards', both inter-state norms and the norms developed by, or with, the input from non-state actors.

However, these multiple forms of reference to outside sources imply different degrees of deference. Whilst, under the rules of the Vienna Convention on treaty interpretation, non-traditional sources not binding on the parties can be of *linguistic/sociological* value (that is, shed light on how a given society gives meaning to a specific term), their role as *factual* references is limited to the process of how to apply pre-defined WTO law to the facts of a specific case. In contrast, when WTO panels apply other treaties that are *binding* on the disputing parties in defence of a claim of WTO violation, such other treaties have independent *legal/normative* value, transcending mere linguistic or factual relevance, and may eventually (depending on the relevant conflict rule) trump or overrule explicit provisions in the WTO Treaty.

It is crucial to bear these different shades of relevance in mind. They make it possible for WTO panels to engage in a delicate balancing act between, on the one hand, taking cognizance of non-traditional sources—and thereby mitigating the risk of 'confined' or 'within-the-box' adjudication limited to the confines of hard WTO law—and, on the other, respecting the rule that no state can be *legally* held by a norm without its consent.[44]

The crucial issue when accepting such roles for non-traditional sources remains, however, their legitimacy, in the sense of both how and by whom these new sources were created (which raises questions of due process, procedural openness, etc) and what they imply in terms of substance (raising questions of impartiality, scientific justification, technical accuracy, etc). As

[44] In contrast, e.g., to Joanne Scott's suggestions (n 29 above) where, by her own admission, her proposals conflict with the rule of state consent.

pointed out earlier, these questions of procedural and substantive legitimacy are particularly acute for the international standards broadly referred to in the TBT Agreement. This brings us to the final section of this chapter (Section III.2). It examines how new patterns of global regulation can be controlled and disciplined, and in particular whether they may, in and of themselves, become trade restrictions that need corrective action at WTO (or national) level.

III.2 Are WTO Trade Obligations *Under-inclusive*?

The previous section (Section III.1) tried to demonstrate that, even under the current regime and using traditional international law tools, the WTO is capable of taking account of non-traditional sources of global regulation in the settlement of trade disputes. If the proposals set out earlier are followed, the WTO could thereby significantly mitigate the risk of *over-inclusion* of trade obligations.

As pointed out in the introduction, however, new sources of global regulation also pose a risk of *under-inclusion* of trade obligations: non-traditional sources and the non-state actors that make or enforce them may constitute unjustifiable trade barriers that escape the state-focused reach of the WTO and traditional international law more generally. Does the WTO, thereby, risk 'missing the boat' by tolerating norms and conduct (such as codes of good practice, NGO boycotts or semi-private standards) that may restrict trade as much as, or even more than, traditional tariffs or state imposed quantitative restrictions?

This concern of *under-inclusion* is a real one. Although the new patterns of global social regulation (ranging from NGO codes of conduct to the UN Norms on the Responsibility of Transnational Corporations) are mainly well intended, there is a real and present danger that they restrict trade in a manner disproportionate to the extent that they achieve social objectives.[45] This trade-distorting effect is particularly felt in developing countries, which may have a harder time complying with social standards (especially if they are set from a rich world perspective) and may find it particularly costly both to keep track of, and adjust to, conflicting and diverging sets of standards developed by a wide range of inter-governmental organisations, countries, MNCs and NGOs.[46]

[45] For a blistering critique of Corporate Social Responsibility, which argues that corporations should stick to their profit-making objective and that it remains for governments to intervene in the market place for non-economic, social ends, see D Henderson, *The Role of Business in the Modern World, Progress, Pressure and Prospects for the Market Economy* (London: The Institute of Economic Affairs, 2004).

[46] The World Bank, e.g., imposes different standards for public as opposed to private lending. Public lending is governed by the World Bank's own so-called 'safeguard policies' on environmental assessments, pollution abatement, indigenous people, etc, whereas private lending is governed by the rules of a separate arm of the World Bank, the International Finance

Moreover, how can one ensure that the standards enacted by non-state actors are legitimate, based on good science, information or technology, and/or represent the democratically supported wishes and concerns of (at least a substantial part of) consumers and citizens? As much as governments are pushed towards protectionism by special interest groups with a lot of political clout (which explains why we need a WTO in the first place), NGOs and MNCs may equally be driven by protectionist purposes: NGOs can be pressured by domestic workers who are adamant about keeping out imports and foreign competition;[47] MNCs, in turn, may be focused on outpacing their foreign competitors by setting standards which only they can meet (or claim to meet) without much extra costs.

One obvious improvement would be to seek the input from all countries and stakeholders when developing standards, thereby adjusting certain standards to the needs of developing countries and reducing the discrepancies between standards emanating from different sources. Government regulation in areas where standards are really needed, as well as appropriate market responses and corrections that guide the content and implementation of codes of good practice (such as consumer feedback and spending patterns in response to bogus standards or false statements by companies or NGOs with regard to compliance with standards) can offer other ways of legitimisation.

Yet, if the WTO is so adamant about eliminating the wasteful and unjustified trade distortions enacted by *governments*, why ought it to tolerate similar trade distortions enacted or brought about by *non-state actors*? Given that traditional government-enacted tariffs and quotas have, in most sectors, been reduced to commercially insignificant levels, are the non-state sources of protectionism not destined to equal or even to surpass the importance of governmental protectionism?

This is not the place to discuss whether the WTO ought to include competition or anti-trust policies and thus tackle distortions created by price-fixing or other agreements between *private* operators. For the present purposes, the question is, instead, whether and how global social regulations and norms themselves ought to be controlled, legitimised or checked in order to prevent them from being translated into new and unnecessary forms of protectionism and thereby decreasing, rather than increasing, global welfare.

Corporation (IFC). See A Balls, 'World Bank "weakening" social safeguards' *Financial Times*, 3 Sept 2004.

[47] For an interesting example see the recent efforts by China's trade union authority (the All China Federation of Trade Unions (ACFTU), classified in China as a 'social group' rather than a government organisation) to ensure that foreign companies established in China, in particular Wal-Mart, comply with the right for workers to establish unions: J Kynge, 'Chinese body to probe companies' failure to establish trade unions', *Financial Times*, 1 Sept 2004.

I first address potential controls at international/WTO level and thereafter address some recent developments on the domestic legal scene, particularly in the United States.

(a) Control at International/WTO level

Unlike the relative openness of the WTO—and traditional international law more generally—to non-traditional sources in the settlement of trade disputes between states, the current legal system is virtually closed to complaints against *non-state* conduct. WTO obligations, in particular, relate only to government conduct (including limited obligations on states to tackle certain anti-competitive private behaviour).

Two notable (though limited) exceptions must be pointed out. Both of these exceptions subject entities which are not, strictly speaking, governmental to WTO discipline on the grounds that they have been granted special privileges by the government. In essence, they are anti-circumvention provisions to prevent WTO members from circumventing their obligations by exercising prohibited conduct through private bodies.

First, Article XVII of GATT bans certain types of discriminatory conduct of both state enterprises and private enterprises that were granted exclusive or special privileges by the state.[48] Other provisions on so-called state-trading or state-controlled enterprises can be found, *inter alia*, in GATT Article II, the *ad* Note to Articles XI, XII, XIII, XIV and XVIII as well as in Article VI of GATT and Article 1 of the Subsidies Agreement.[49] The conduct of MNCs and NGOs at issue here would hardly qualify under these provisions, for lack of a sufficient nexus with the government. Yet, the problem raised by this new type of potentially trade-distorting conduct reminds one of the *rationale* behind the above-referenced GATT provisions negotiated in 1947, namely, to prevent non-state entities from engaging in essentially the self-same conduct that the GATT prohibits states from engaging in.

Secondly, the TBT agreement imposes disciplines on mandatory 'technical regulations' and voluntary 'standards' enacted by *non-governmental* bodies (Articles 3, 4 and 8 TBT). However, as noted earlier, such non-governmental bodies are strictly defined in Annex 1.8 TBT as a:

> [b]ody other than a central government body or a local government body, including a non-governmental body *which has legal power to enforce a technical regulation*.

[48] See the recent AB Report on *Canada—Measures Relating to the Exports of Wheat and Treatment of Imported Grain,* WT/DS276/AB/R, circulated 30 Aug 2004.

[49] Art 1(1)(a)(iv) includes in the definition of a subsidy the situation where a government 'entrusts or directs a private body to carry out one or more of the type of functions' defined as subsidies if engaged in by the government itself.

NGOs which have not been given such power by the state are not subject to the TBT Agreement. Even NGOs which have the power to enforce only voluntary 'standards'—not 'technical regulations' which are defined as mandatory under the TBT—would seem not to fall under the TBT Agreement. This would seem to exclude, for example, Social Accountability International (SAI), which was granted the legal power to monitor compliance with the criteria in the Belgian social label on the ground that the social label is only voluntary, not mandatory. Note, however, that the Belgian government itself remains subject to the TBT Agreement for the enactment of the social label, even if this label is purely voluntary. The label merely qualifies something as a 'standard', and not as a 'technical regulation'.[50]

In essence, it is only international criminal law that makes international legal obligations directly enforceable against non-state actors, in particular, against individuals. Corporations have also been subjected to international law.[51] However, with the possible exception of the (yet to be adopted) UN Norms on the Responsibility of Transnational Corporations (where provision is made for *direct* UN monitoring of corporations, instead of states), these obligations are imposed only *indirectly* on corporations, that is, it is first for states to sign or to agree to the convention or code of practice, and then for the individual state to translate the convention or code into domestic law. In this sense, at international level, the obligation rests on states, not on corporations.

Crucially, so far not a single inter-governmental instrument has disciplined the conduct of NGOs. Notwithstanding the increased influence and power on the global scene of NGOs such as Amnesty International, Oxfam,

[50] This seems to be a fact disregarded by Belgium itself. See the website of the Belgian social label at http://mineco.fgov.be/redir_new.asp?loc=/protection_consumer/social_label/home_nl.htm, where the question is raised whether the social label is consistent with WTO rules. The response given is as follows (translated from Dutch):

> No! This would be the case only if the law were to impose a social label on companies or if it were to prohibit the sale of products without a label in Belgium. This is not the case: everything happens on a completely voluntary basis.
>
> Clearly, anyone familiar with the TBT Agreement knows that even voluntary labels must comply with the Code of Good Practice (Annex 3 TBT) and that voluntary labels may have a trade restrictive effect and hence also fall under GATT Article III. Although I think that the Belgian law could eventually be justified under the TBT Agreement (as a 'necessary obstacle to international trade' in line with Annex 3(E)), it is more doubtful whether it would pass the GATT test (GATT Art XX does not explicitly list labour concerns). Even if such GATT violation were found, however, the TBT prevails over GATT (General Interpretative Note to Annex 1A). In any event, rather than rejecting the application of WTO rules in the first place, regulating countries ought to engage in a discussion of why their initiatives meet specific WTO disciplines (see the TBT Committee meetings held in Geneva, G/TBT/M/23 and 24, where very strong criticism was raised, especially by developing countries, against the Belgian law).

[51] For a discussion, see H Koh, 'Separating Myth from Reality about Corporate Responsibility Litigation' (2004) 7 *Journal of International Economic Law* 263.

Greenpeace or the Sierra Club, NGOs are *not* subject to any *global* regulation other than their own internal rules.

For corporations (and, even more so, NGOs) to be held directly accountable by international law at international level, a true paradigm shift would be needed (recall, however, that MNCs do have *rights* under investor–state mechanisms such as NAFTA). In this context, the crucial question is whether there is a need—and if so when precisely it arises —to leapfrog the level of the state. In other words, when (if at all) should international law impose obligations directly on MNCs, instead of getting a commitment from states that they will ensure corporate compliance under *domestic* law? Although jumping the level of the state may make corporations more directly accountable, it also does away with the main source of legitimisation of international law, namely, state consent and control.

Gate-keeping and the interest-aggregation role of states appears to be one of the core lessons learned under NAFTA Chapter 11, where investors invoked and enforced direct *rights* against states that were far removed from what NAFTA negotiators had in mind when drafting Chapter 11.[52] One view is to regard the direct investor *rights* granted to MNCs under investment treaties as being of a temporary nature only. Indeed, one of the main reasons investor-protection rights were included in treaties was a general mistrust of the domestic legal systems in developing countries (in NAFTA: Mexico) which, it was feared, could not be counted on to protect the rights of foreign investors in an unbiased way. Once these domestic failures are cured, though (and, for example, the host state has a credible and impartial commercial code and court system of its own), the argument could be made that investment treaties should revert to the traditional state-to-state mode and that the MNCs themselves should focus once again on domestic law where, for example, US and Canadian companies can exercise their rights before Mexican courts, and, if they feel mistreated, ought to convince *their government* to lodge a case against Mexico. This line of reasoning is reflected, for example, in the recent free trade agreement (FTA) between the United States and Australia, which, unlike all other FTAs concluded by the United States, does *not* include an investor–state dispute mechanism and is limited to state-to-state investment disputes.[53]

[52] NAFTA members went as far as to issue an authoritative interpretation of crucial Chap 11 provisions to limit their scope.

[53] US–Australia Free Trade Agreement, Chap 11 on Investment, signed 18 May 2004, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html.

(b) Domestic Control

Besides international regulation of non-state actors, non-state actors can be, and are, clearly controlled even under *domestic* law, be it commercial or anti-trust law for MNCs, or general tort and contract law for MNCs *and* NGOs. As pointed out earlier, international regulation ought, in principle, to be necessary only in cases where domestic regulation cannot achieve the objective, for example, when the global reach and the activities of non-state actors can no longer be controlled by mere domestic law, and international co-ordination is needed (or, in the case of trade and investment law, when domestic law cannot be 'trusted' because it is subject to protectionist pressures, governments must tie their hands to the mast of the WTO to prevent 'beggar-thy-neighbour' policies).

However, as was the case for international regulation, *domestic* control over *NGOs* remains extremely limited. An important question for the future will be whether the activities of NGOs will have to be subjected to scrutiny and control (other than that by their own members, contributors and consumers at large in the market place) and, if so, to what extent and by what means.

In respect of domestic control, in particular over MNCs, two recent US cases are instructive: *Nike v Kasky* and *Sosa v Alavarez-Machain*. I deal with them in turn.

Nike v Kasky (Fair Competition Versus Freedom of Speech) The 2003 *Nike v Kasky* case in the United States is an interesting development in respect of domestic control over corporate social responsibility.[54] This case tests the limits of domestic unfair competition and consumer protection laws as a means of controlling corporate social responsibility, in particular, of checking whether MNCs are, indeed, complying with codes of good conduct or international norms when they claim to do so (with inaccurate statements, MNCs could distort competition by falsely claiming to be good corporate citizens and attract consumers to the detriment of competitors who may be spending millions in order to comply with good practice).

The dispute pitted the global sportswear giant Nike against a San Francisco anti-sweatshop activist, Marc Kasky. Besieged with a series of allegations that it was mistreating and underpaying workers at foreign facilities, Nike responded by sending out press releases and letters as well as commissioning a report (by a former US Ambassador to the UN) on labour conditions in Nike production facilities. The report 'commented favourably on working conditions in the factories and found no evidence of widespread abuse or mistreatment of workers'. In response, Kasky sued Nike for unfair and deceptive practices under California's Unfair Competition and False Advertising Law, claiming that, in order to maintain and/

[54] See 539 US Supreme Court (2003) No 02–575.

or increase sales, Nike had made a number of 'false statements and/or material omissions of fact' concerning the working conditions under which Nike products were manufactured. As apparently permitted under California law, Kasky brought the action 'on behalf of the General Public of the State of California' without demonstrating any harm or damage regarding himself as an individual.

The trial court, as confirmed by the California Court of Appeal, dismissed the case, upholding that Nike's statements 'form[ed] part of a public dialogue on a matter of public concern within the core area of expression protected by the First Amendment'. On appeal, however, the California Supreme Court reversed the decision and remanded the case for further proceedings, finding that:

> [b]ecause the messages in question were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products … [the] messages are commercial speech.

The case was subsequently dealt with before the US Supreme Court, but the writ of certiori was ultimately dismissed as improvidently granted on procedural and jurisdictional grounds without entering into the substance of this intriguing conflict between, on the one hand, fair competition and advertising and, on the other, freedom of (corporate) speech. In summary, under US law (First Amendment), commercial speech is less protected than non-commercial (political) speech. If Nike's statements were found to be commercial speech, the case would have tipped in favour of Kasky; if the statements were seen as political speech, however, it would have tipped in favour of Nike. Eventually, the case was settled out of court with Nike paying Kasky $1.5 million, a sum that Kasky donated to the Fair Labour Association, a Washington-based NGO that monitors corporate labour practices abroad.

Whilst MNC social practices (or at least statements about them) may thus be held against domestic fair competition and advertising laws (although a general reluctance to do so can be detected in the US judiciary other than California's Supreme Court), the question remains, however, how the accuracy of NGO statements and reports criticising corporations can, in their turn, be controlled. Although NGOs are not, as such, selling goods like economic competitors (and would thus seem to escape competition laws), NGO statements about certain goods or companies may influence consumers even more than corporate statements (which may lead to a consumer boycott of specific MNCs). MNCs will, indeed, often be inclined to settle any NGO complaint as soon as possible, even if unjustified, if only to avoid the bad publicity.

Sosa v Alvarez-Machain (International Law Under the Alien Tort Statute)
One hybrid form of control over the social conduct of MNCs is to enforce *international* legal obligations directly on non-state actors before *domestic* courts. This is most famously done in the United States under the Alien Tort Statute, by which US federal courts can potentially enforce certain international norms against individuals and companies (and possibly also NGOs). On 29 June 2004, the US Supreme Court issued its very first opinion on this more than 200 year old statute in *Sosa v Alvarez-Machain*.[55]

Sosa had, at the demand of the US Drug Enforcement Administration (DEA), abducted Alvarez-Machain in Mexico to stand trial in the United States for the torture and murder of a DEA agent (both Sosa and Alvarez were Mexican). After his acquittal, Alvarez sued Sosa for violating the law of nations under the Alien Tort Statute (ATS), a 1789 law giving district courts:

> original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

The District Court accepted the claim and awarded Alvarez damages. The Ninth Circuit Court of Appeals affirmed the ruling. However, the US Supreme Court reversed it. It found that 'the ATS is a jurisdictional statute creating no new causes of action'. According to the Supreme Court, the only claims or causes of action that can be brought under the ATS are those originally intended in 1789, namely, 'offences against ambassadors, violation of safe conduct, and piracy'. As to post-1789 types of claims, the Supreme Court held that 'there are good reasons for a restrained conception of the discretion a federal court should exercise in considering such a new cause of action'. The Supreme Court decided, more particularly, that:

> federal courts should not recognize claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the 18th century paradigms familiar when [the ATS] was enacted.

This proved fatal for Alvarez's claim under the ATS, which had invoked the 'prohibition of arbitrary arrest'. The Court implied, however, that the ATS does offer a cause of action for more established international law norms such as the prohibition of torture and slave trade (for torture, there is also the more explicit Torture Victim Protection Act, 28 USC paragraph. 1350a).

IV. CONCLUSION

The risk that the WTO is 'missing the boat' regarding non-traditional patterns of global regulation is real. Softer forms of regulation and norms or

[55] See 539 US Supreme Court (2003) No 03–339.

standards created by, and for, non-state actors (in particular, NGOs, MNCs and semi-private standardising bodies) have gained importance, particularly in the social field (Section II). The WTO, in contrast, operates under a hard law, state-focused paradigm that controls the conduct of only governments.

At the same time, traditional international law does offer avenues for taking account of these non-traditional sources of global regulation, both those that are binding on the disputing parties and those that are not, both hard law and softer law or standards, both inter-state norms and the norms developed by, or with, input from non-state actors. Such incorporation techniques range from a broader definition of the applicable law before WTO panels and explicit references to international standards in the SPS and the TBT Agreements, to novel approaches to treaty interpretation and construing non-traditional sources as factual evidence. If and when they are carefully construed, these avenues—albeit with different shades of relevance and in a way that raises new questions of legitimacy—can mitigate the risk of *over-inclusion* of trade obligations. (Section III).

In contrast, traditional international law at present offers very limited possibilities for disciplining or controlling the conduct of non-state actors when exercising their new norm-creating and norm-enforcing functions. These functions may distort trade as much as government conduct, yet they generally fall outside the scope of WTO discipline. This entails a risk of *under-inclusion* of trade obligations. The fallback of control by domestic law is equally fragile, as illustrated by recent US cases that show a reluctance to subject MNC statements or conduct in the social field to the disciplines of unfair competition laws or the Alien Tort Statute. (Section IV).

8

Conflicts and Comity in Transnational Governance: Private International Law as Mechanism and Metaphor for Transnational Social Regulation Through Plural Legal Regimes

ROBERT WAI*

THIS CHAPTER EXAMINES the potential contribution of private international law to transnational social regulation in our 'partially globalized world'.[1] Social regulation in the contemporary world order depends on complex interaction among different legal and social regimes, a process which is sometimes referred to as emergent transnational governance.[2] The role that private international law plays in co-ordinating the effects of domestic private laws across borders is rarely taken into account in the broader debates on cross-border regulation and governance. Moreover, private international law is not just an instrument of regulation, but can offer concepts and models for the relationship among legal systems that may be of broader use with regard to the relationship among the different normative orders in transnational governance. This chapter will examine the potential contribution of private international law, both as a concrete mechanism of transnational governance and as a source for models for thinking about the relationship among different governance regimes.

* My thanks for research support provided through a Jean Monnet Fellowship at the European University Institute, Florence.

[1] R Keohane, *Power and Governance in a Partially Globalized World* (London: Routledge, 2002).

[2] C Joerges, I-J Sand and G Teubner (eds), *Transnational Governance and Constitutionalism* (Oxford: Hart Publishing, 2004).

Private international law's promise as mechanism and metaphor has numerous affinities with the concept of transnational governance. The concept of transnational governance offers an alternative descriptive and normative perspective on global governance. In one definition, transnational governance is understood as designating 'various and untraditional types of international and regional collaboration among both public and private actors'.[3] As a description, this definition directs our attention to the multiple sources, levels and regimes of contemporary governance. As a normative perspective as well, transnational governance signals a more plural approach than global governance.[4] As a concept, global governance suggests unrealistic and undesirable goals of consolidated top-down control. It has, in this respect, many of the features of the new hegemonic power that has been the subject of concern for anti-globalisation activists and theorists.[5] To the extent that even the transnational governance concept runs the risk of being too co-operative in its orientation, this chapter uses the frame of private law to elaborate a different sense of transnational governance, in which conflict and contestation are an important part of transnational society.

The role of private international law as a concrete mechanism of governance is sometimes obscured. Its role can be understood as a de-centralised form of co-ordination which both accepts and manages the role of conflicts among the municipal systems of private law. In my reading of private international law's role in an era of globalisation, this traditional concern with addressing conflicts among municipal systems is augmented by a concern in addressing the relationship between various forms of private law and private ordering. The first part of this chapter addresses this complex role of private international law in contemporary transnational governance.

Because private international law must, in concrete ways, wrestle with conflicts among multiple systems of rules of both state and private ordering, it is a promising repository of concepts that may offer guidance for the broader concerns related to the relationship among the plural regimes of transnational governance. The second part of this chapter describes some examples of this use of private international law concepts as a model for relationships among the different regulatory orders of transnational governance. In particular, I try to develop a more critical, active conception of transnational comity. Using examples taken from the realm of NAFTA investment law, I illustrate some of the virtues and hazards of the use of private international law concepts in transnational governance.

[3] Ibid at, ix.

[4] See P Mueller and M Lederer, (eds), *Criticizing Global Governance* (New York: Palgrave MacMillan, 2005).

[5] See, e.g., M Hardt and A Negri, *Empire* (Cambridge, Mass: Harvard UP, 1999).

I. PRIVATE INTERNATIONAL LAW AS A MECHANISM OF TRANSNATIONAL SOCIAL REGULATION

I have previously argued for the significance of private international law in cross-border regulation in the contemporary global order.[6] By private international law, also known as conflict of laws in common law jurisdictions, I mean the field of largely domestic rules that is principally concerned with applicable law, jurisdiction of courts, and recognition and enforcement of civil judgments in disputes with cross-jurisdictional aspects.[7]

The governance functions of private international law are elusive. Partly, this is because its primary sources are the varied rules of municipal private international law. Moreover, private international law's social function is obscured by its procedural nature. It does not directly address substantive concerns, but instead deals with co-ordination among systems of rule-making that do address substantive concerns. Therefore, to articulate the social function of private international law requires knowledge of the nature of both the underlying private laws and the broader international context.

I.1 Social Regulation as a Function of Private Law

(a) Regulation and the Substantive Concerns of Private Law

The public purposes and social functions of private law are already and always properly part of any institution of the market and of private law.[8]

The social function of private law is evident in its concern with compensation. Private law claims may be an effective tool for individual or small group claimants seeking compensation for harm that is either restorative or corrective.[9] That these claims are based on considerations of justice does not remove the sense in which these claims, which are made in or settled in the shadow of state institutions, also relate to public considerations of just compensation and the distribution of resources among individuals.[10]

In addition to compensation, the public policy goals of private law include regulation for public goods and market failure concerns. Compensation to particular injured individuals also contributes to social

[6] R Wai, 'Transnational Lift-off and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization' (2002) 40 *Columbia Journal of Transnational Law* 209.

[7] This can be contrasted with international private law or the broader realm of the law of international business transactions.

[8] For an eloquent restatement of the varied social purposes of private law, see Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto' (2004) 10 *European Law Journal* 653.

[9] See, e.g., E Weinrib, *The Idea of Private Law* (Cambridge, Mass: Harvard UP, 1995).

[10] See, e.g., H Collins, *Regulating Contracts* (Oxford: OUP, 1999), Chap 3; D Kennedy, 'Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power' (1982) 41 *Maryland Law Review* 563.

deterrence.[11] This is demonstrated in the US context by the use of civil litigation as a supplement to public regulation in areas such as product safety, securities and anti-trust. Through the pursuit of their own interests, private 'attorneys general' serve larger social purposes of regulation. The role of private litigation in social regulation has, for a long time, been evident in litigation related to product liability and for environmental harms. The use of private law in response to recent corporate scandals in the United States is a further reminder that, for all the rhetoric concerning corporate integrity and responsibility, and for all the changes in public regulatory process (such as SEC prosecutions or incremental reforms to the FASB guidelines), the key threats that seems to disturb corporate actors (if not always productively) are of shareholder actions and other forms of litigation.[12] Such litigation has as much media salience and financial impact as criminal law prosecutions or public fines.

(b) The 'Mode' of Regulation through Private Law: Civil Procedures and Private Ordering

While the substantive goals of private law are shared with many other kinds of legal regimes, it is the procedural characteristics that distinguishes a role for private law in social regulation and, potentially, in transnational governance.

In its procedural aspects, civil litigation exemplifies what Kagan has identified as adversarial legalism as a form of law and politics.[13] Kagan sees adversarial legalism, which he considers to be the predominant and distinctive 'American' way of law and politics,[14] as policy-making and dispute resolution characterised by: (a) contestation in the form of law (legal rights, duties, procedures, enforcement, penalties, litigation and/or judicial review); and (b) litigant activism, in which contestation is dominated by disputing parties or interests, often acting through lawyers.

Often, adversarial legalism does not provide the most effective or efficient form of regulation. However, both in substance and in process, private law can sometimes be more effective and accessible for groups or individuals than either legislative or administrative processes. In particular, civil litigation may provide a better mechanism for private actors to access and make claims against other private actors directly. While claims to regulate corporate actors, including in their foreign conduct, can be made under

[11] G Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (New Haven, Conn: Yale UP, 1970).

[12] See, e.g., 'From investor fury, a legal bandwagon', *New York Times*, 15 Sept 2002, BU 1; M France, 'How to Fix the Tort System', *Business Week*, 14 Mar 2005, at 70.

[13] R A Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, Mass: Harvard UP, 2001).

[14] Related forms of regulation through litigation also occur in non-common law systems: see H-W Micklitz and N Reich (eds), *Public Interest Litigation before European Courts* (Baden-Baden: Nomos, 1996).

domestic public processes such as human rights claims or through appeals to public regulators, practical impediments are often severe. Regulators may not pursue the case because of industry capture, shortage of public resources or restrictive ideological conditions. Moreover, in societies such as the United States, elaborate supporting practices have developed to assist the use of private law as a tool for claims, including practices such as contingency fee agreements, class actions and broad discovery rights. Civil damages awards, including awards of punitive damages, are potentially far larger than the maximum or realistic levels of fines imposed by public officials. All are part of a complex social system of incentives which are related to regulation, but which offer an alternative to public regulation.

I.2 Social Regulation through Transnational Private Law

Private litigation of domestic private law claims in domestic courts could include both foreign-based defendants and plaintiffs. A central concern of private international law has been with providing guidance with respect to such litigation with connections to more than one jurisdiction.

(a) Transnational Private Law as a Regulatory Alternative: Cross-Border Regulatory Challenges

The regulatory function of national private laws takes on transnational dimensions in the context of a global society. For example, private law litigation is a means of making claims against other private actors, such as multi-national corporations, whose actions and locations straddle national boundaries.[15] Typical examples of harm include injury caused by products that cross borders, or harm caused by production processes, or financial losses to foreign stakeholders caused by financial or managerial improprieties.

The cross-border regulatory challenges that private law faces are shared with other regimes, including national public regulation and international law. The current globalisation of economic activity, environmental problems and health threats is only the most recent augmentation of a phenomenon that has been around for some time. But its increased magnitude has highlighted the weakness of traditional public institutions at national and international levels, and the need to attend to further forms of regulation. National regulation retains the principal role in the *de facto* transnational social regulation that occurs, in spite of political controversy and academic debates about extra-territorial effect. As private law is part of

[15] See, e.g., B Stephens, 'Corporate Accountability: International Human Rights Litigation against Corporations in US Courts' in *Liability of Multinational Corporations under International Law*, M. Kamminga and S. Zia-Zarifi, (eds), (The Hague: Kluwer, 2000), at 209.

most national systems of regulation, it, too, must increasingly address transnational regulatory problems.

Although primarily concerned with the compensation of particular plaintiffs affected by transnational business activity, transnational litigation may also serve a broader regulatory function with respect to transnational economic actors. The regulatory function is particularly important because de-centralised international regulatory systems face problems such as regulatory gaps, free-rider problems and regulatory competition.[16]

International regulatory gaps are increased by the weakening of traditional sovereign public regulation in the face of transnational economic activity, and the difficulty of responding collectively because of impeded international treaty processes. Some national responses are also limited by restrictions of international treaty obligations, most notably under international trade treaties. Increasing globalisation augments the power and authority of the transnational private actors that are often the objects of regulation.[17] Indeed, the spread of functional systems across national borders—to which private laws of contract, for example, contribute—generates competing regimes of regulation. Teubner has described the increasing autonomy from state systems of international economic actors following private norms enforced through 'privatised' dispute resolution, such as arbitration by *lex mercatoria* or the internal processes of multinational enterprises.[18]

In this global context, the potential role of national private laws for regulation is more significant. Elsewhere, I have argued that increasingly de-territoralised economic actors still depend on state law foundations as the supporting venue for contract enforcement, property protection and dispute resolution. In this context, the transnational application of private law in domestic courts may act as a lever for the role of such courts to be a necessary 'touchdown' point for international economic transactions into a transnational regulatory role.[19]

(b) Transnational Private Law and the Processes of Transnational Governance

Transnational private litigation should be seen as part of a more general turn in transnational relations to the role of litigation and courts. From the

[16] W Bratton *et al* (eds), *International Regulatory Competition and Co-ordination* (Oxford: OUP, 1996); E Fox, 'Global Markets, National Law, and the Regulation of Business—a View from the Top' in M Likosky (ed), *Transnational Legal Processes* (London: Butterworths, 2003), 135.

[17] C Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge: CUP, 2003).

[18] G Teubner (ed), *Global Law without a State* (Aldershot: Dartmouth, 1997).

[19] Wai, n 6 above.

perspective of private international law, this invites reflection on the social functions of adversarial legalism. What, for Kagan, is a distinctively US tool of governance may be increasingly a tool of transnational governance.

Transnational private litigation is another of the forms of transnational regulation that is occurring even without express international law agreements or dedicated international institutions. Slaughter's description of the transnational governmental networks of public regulators, such as those among national bank regulators, provides one example of this.[20] Keck and Sikkink's account of transnational advocacy networks is another.[21] Teubner's notion of countervailing global normative orders is also consistent with this vision of the new transnational regulatory setting.[22]

Many scholars have noted the turn to courts as an active tool in international relations.[23] For example, the notion of transnational public law litigation was popularised by Harold Koh some years ago. Koh identified an emerging field of transnational litigation that could advance human rights through actions against human rights violators in local courts.[24] Others have broadened the purposes of international private litigation to address both state and private misconduct for human rights violations, such as tort recovery for torture.[25]

In terms of social regulation, I am more interested in the role in the regulation of transnational economic activity that could be played by 'normal' cross-border private litigation such as claims for products liability or for industrial accidents. In litigation such as the claims made in New York courts by Indian victims of the 1984 Bhopal chemical accident, private law claims were pursued as an alterative form of compensation and regulation where other forms of international and municipal regulation were blocked or ineffective.[26] Transnational private litigation against multinational companies in their home jurisdictions for harms caused abroad has been used to target Canadian companies for environmental degradation in their overseas mining operations in Guyana,[27] US manufacturers for their use of

[20] A-M Slaughter, *A New World Order* (Princeton, NJ: Princeton UP, 2004).

[21] M Keck and K Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell UP, 1998).

[22] G Teubner, 'Foreword: Legal Regimes of Global Non-State Actors', n 18 above, at xiii.

[23] See, e.g., A-M Slaughter and D Boscoe, 'Plaintiff's Diplomacy' (2000) 79 *Foreign Affairs* 102.

[24] H Koh, 'Transnational Public Law Litigation' (1991) 100 *Yale Law Journal* 2347.

[25] See, generally, C Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2001).

[26] *In Re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984*, 634 F Supp. 842 (SDNY 1986), aff'd, 809 F2d 195 (2d Cir 1987). More generally, see U Baxi (ed), *Inconvenient Forum and Convenient Catastrophe: The Bhopal Case* (Bombay: NM Tribathi, 1986); J Cassels, *The Uncertain Promise of Law: Lessons from Bhopal* (Toronto: University of Toronto Press, 1993).

[27] *Recherches Internationales Quebec v Cambior Inc* [1998] QJ No 2554 (Quebec Superior Court, 14 Aug 1998).

forced labour during wartime in Europe,[28] and UK parent companies for their subsidiaries' role in exposing South African workers to the danger of asbestos.[29]

In addition to compensation, private law claims may also perform a communicative function in contemporary transnational politics.[30] These include pressure to settle or change practices through anti-'branding' strategies that impact on corporate reputation and good will.[31] But in a transnational order embedded in a lifeworld that 'forms, as a whole, a network composed of communicative actions',[32] these ideational functions can also include drawing public attention to specific examples of wrong-doing, highlighting general gaps in the domain of global governance, and transmitting policy values from one social domain, such as environmental concerns, to other domains, such as systems of corporate actors.

Such private litigation is currently less important in most legal systems, particularly outside the Anglo-American world. But, given its significance for a number of jurisdictions of global economic significance, and given the particular regulatory concerns that such litigation addresses, it may be important for regulators, for example in civil law jurisdictions in Europe, to fit private litigation into their vision of transnational governance.[33] In addition, if a slightly broader conception of private litigation is taken, we can already see that law production through litigation in areas such as labour law, environmental regulation and consumer protection is occurring in civilian jurisdictions.[34]

I.3 Private International Law and the Co-ordination of National Private Laws

De-centralised systems of domestic private law clearly face co-ordination problems. From a regulatory perspective, the problems include waste, gaps

[28] See, e.g., *Princz v BASF Group et al*., Civ No 92–0644 (DDC 18 Sept 1995); *Iwanowa v Ford Motor Co and Ford Werke AG*, 67 F Supp 2d 424 (DNJ 1999); *Burger-Fischer v Degussa AG*, 65 F Supp 2d 248 (DNJ 1999).

[29] *Connelly v RTZ Corp plc* [1997] 4 All ER 335 and *Lubbe v Cape plc* [2000] 4 All ER 268 (action against British corporate parents of South African companies for asbestos-related harm to workers).

[30] I discuss this ideational function of transnational private law at more length in R Wai, 'Transnational Private Law and Private Ordering in a Contested Global Society' (2005) 46 *Harvard International Law Journal* 471.

[31] See, e.g., N Klein, *No Logo: Taking Aim at the Brand Bullies* (Toronto: Vintage Canada, 2000).

[32] J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (trans W Rehg, 1996 Cambridge, Mass: MIT Press), at 354.

[33] This broader view may also emerge out of the search for common private law principles among European jurisdictions: see, e.g., G Bruggemeier, *Common Principles of Tort Law: A Pre-statement of Law* (London: British Institute of International and Comparative Law, 2004).

[34] Micklitz and Reich, n 14 above.

and over-regulation. Thus, private international law can be viewed as being centrally concerned with addressing some of these co-ordination problems.

(a) Economic and Regulatory Concerns

Clearly, private law litigation as a strategy of social regulation has its drawbacks. Private law litigation demonstrates many of the problems that Kagan notes more generally about adversarial legalism. Adversarial legalism may be very slow in achieving final results, and it has high 'friction costs' including 'expenditures on lawyers, studies, litigation liability insurance, legally imposed delays and distractions'.[35] Partly because of the costs, it may also be inaccessible to most of the public. Indeed, litigation may reward repeat players and advance only already advantaged interests.[36]

From a social perspective, civil litigation may be an ineffective form of regulation. It is also only episodic in its enforcement and effects, driven more by contingencies of private litigants rather than by the broader public interest.[37] In a comparison of the regulatory experience in several jurisdictions, Kagan and Axelrad conclude that, together with higher costs, US-style adversarial legalism does not generally lead to higher standards of social regulation.[38]

In the decentralised transnational context, there may also be risks of 'over-regulation' as well as 'under-regulation'.[39] A number of scholars have argued that systematic under-regulation is the more likely danger because of structural problems such as the lack of co-ordinated international regulatory authorities and the lack of representation in national legislatures of all the parties impacted on by transnational business conduct.[40] In addition to collective action and representation problems, there are the standard problems of regulatory gaps, regulatory competition and the asymmetric mobility of business actors, as compared to consumers and workers.[41]

Moreover, there are reasons to expect and tolerate some overlap for reasons of domestic regulatory preferences. Different domestic systems have developed different tools based on their particular preferences and histories in order to deal with social regulation. It is not self-evident that any single system is superior; Kagan and Axelrad also find examples where the regulatory standards under adversarial legalism were higher than under public

[35] R Kagan and L Axelrad (eds), *Regulatory Encounters: Multinational Corporations and American Adversarial Legalism* (Berkeley, Cal: University of California Press, 2000), at 3.

[36] M Galanter, 'Why "the Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law & Society Review* 95.

[37] Kagan, n 13 above.

[38] Kagan and Axelrad, n 35 above, at 23.

[39] WS Dodge, 'Extraterritoriality and Conflict-of-Laws Theory' (1998) 39 *Harvard International Law Journal* 101.

[40] Ibid, at 153.

[41] J Paul, 'Comity in International Law' (1991) 32 *Harvard International Law Journal* 1; Wai, n 6 above.

regulation systems.[42] In addition, the two modes of regulation are not exclusive; many national systems can, and do, have both.

(b) Extraterritoriality and the Oversight Role of Private International Law

Nonetheless, over-regulation can occur. The most prominent and problematical are concerns about extraterritoriality: the intentional or *de facto* reach of one jurisdiction's laws onto foreign parties or interests.

Private international law rules are an important constraint on the extraterritorial application of domestic private laws because the relevant public international law constraints are few. The main international law constraints on national private (and public) laws are largely restricted to the basic rules on jurisdiction.[43] Under such doctrines as the effects doctrine, however, many kinds of cross-border application of domestic laws are permitted, especially in an era of globalisation when contacts to multiple jurisdictions are so common. Assuming that there are at least some contacts of the underlying conduct or parties to multiple national venues, it is hard to see how the use of the relevant multiple domestic private laws and procedures to seek compensation for such behaviour violates any public international law rules concerning extraterritoriality.

The sources of private international law are still mainly domestic. Treaties related to the main topics of private international law are quite limited. European treaties such as the Brussels and Lugano Conventions and the Rome Convention have few international equivalents.[44] The principal example is the New York Convention with respect to arbitral awards, which is a treaty that has significant impact upon the effectiveness of international commercial arbitration.[45] However, there are few other treaties with significant consequence for the use of national courts and the application of national private laws.[46]

[42] Kagan and Axelrad, n 35 above, at 23.

[43] I Brownlie, *Principles of Public International Law* (6th edn, Oxford: OUP, 2003), Chap 15.

[44] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 Sept 1968, 1262 UNTS 1653 (Brussels Convention); Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 16 Sept 1988, 1659 UNTS 13 (Lugano Convention); Rome Convention on the Law Applicable to Contractual Obligations, 19 June 1980, 1605 UNTS 59. The Brussels Reg replaces the Brussels Convention with respect to EU Members; see Council Reg (EC) 44/2001 of 22 Dec 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] OJ L12/1.

[45] Most major trading states have committed themselves to supporting the use of arbitration through the operation of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June, 1958, 330 UNTS 38 (1959) (New York Convention) and/or the UNCITRAL Model Law on International Commercial Arbitration, 21 June 1985 (1985) 24 *ILM* 1302.

[46] The members states of the Hague Conference on Private International Law have approved the Convention on Choice of Court Agreements, concluded on 30 June 2005; see

Even if the public international law approach has not succeeded in private international law,[47] private international law, as a branch of domestic law, has developed various tools for the recognition of international aspects and concerns. For example, with respect to jurisdiction, courts have restricted their reach in actions where the defendant has no contacts to the court's jurisdiction. Even in cases where courts have assumed jurisdiction, various doctrines of private international law lead to choice of law decisions that lead a court to apply foreign law. These rules, while domestic in their source, can be cosmopolitan in their orientation or effect.

The policy bases for such 'cosmopolitan' concern in domestic private international law have been various. In some systems, formalistic analysis, such as vested rights analysis, has focused on the individual characteristics of the transaction or parties, rather than on purely domestic societal policy interests. More recently, these cosmopolitan tendencies have been boosted by liberal policy concerns about consent, co-operation and comity that have also taken hold in regimes such as the international trade regime.[48] This focus has led to doctrinal changes that increasingly emphasise the rationalisation of conflicts among jurisdictions. Examples include doctrines of jurisdictional restraint over foreign matters (such as the *forum non conveniens* doctrine so controversially applied in the *Bhopal* case), doctrines which favour judicial deference to choice of forum and choice of law clauses, and doctrines of judicial support for the use of international commercial arbitration. Related reforms in domestic rules in civil procedure, such as tougher rules with respect to class actions,[49] could similarly discourage the spread of transnational litigation.

(c) Conflict and Regulatory Approaches in Private International Law

The ways in which private international law accommodates transnational goals are varied. There are many different international policy goals, and many different tools to achieve those goals.

www.hcch.net/index_en.php?act=conventions.text&cid=898. The Convention has yet to be signed by any states, and was concluded after difficulties in reaching agreement on a broader convention on matters of jurisdiction and foreign judgments. For background see 'Symposium Enforcing Judgments Abroad: The Global Challenge' (1998) 24 *Brooklyn Journal of International Law*. 1. Relevant international private law provisions are also found under specialised treaties, such as the Convention for the Unification of Certain Rules Relating to International Carriage by Air, 28 Sept 1955, 478 UNTS 371, and the United Nations Convention on Contracts for the International Sale of Goods, 11 Apr 1980, 1490 UNTS 59.

[47] The goal of early continental theorists of private international law such as TMC Asser, one of the founders of the Hague Conference on Private International Law as well as of the journal *Revue de droit international et de legislation comparé*.

[48] I make this argument with respect to Canadian private international law in R Wai, 'In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private International Law' (2001) 39 *Canadian Yearbook of International Law* 117.

[49] For example, the recent US Class Action Fairness Act; see S Labaton, 'Senate approves action to curb big class actions', *New York Times*, 11 Feb 2005, A1.

A concern with co-ordination and international co-operation seems to lead in the direction of increasing the restrictions on the use of domestic private law courts. This is not the only possible response. I have argued that for national private laws to remain a useful venue for transnational governance, national legislators and courts must adopt a policy understanding of private law in a transnational world that avoids a narrow internationalist conception of inter-state co-operation and facilitation of commerce.[50] The spread of a partial and misguided sense of internationalism might lead national courts and legislatures to close off the potential of transnational litigation to contribute to alternative social goals such as distribution, restitution or social regulation.

In substance, process, normative orientation and conceptually, private international law necessarily and usefully focuses on the productive conflict and contestation among legal orders. In dealing with conflicts among municipal systems, private international law has traditionally not been burdened with the fixation on consent or co-operative benefits that marks subjects of public international law, including international trade regulation. Partly, this is because private international law is principally based in municipal sources. The rules have largely been developed and applied in the context where, unlike public international law, there is limited need to negotiate continuously the mutual consent or benefit for all sovereign parties. Moreover, the stakes of private international law conflicts are more diffuse. The concern of most private international law disputes is individual conflicts among private parties; it is very rare that a single case concerns issues of 'war and peace', or even of wide-scale state consequences.[51] Although significant concerns such as effective regulation can develop through a series of cases, the twin nightmare concerns for public international law—of war and of depression—are not at risk in private international law.

Partly because of these more modest sources and stakes, the traditional approach of private international law more openly and honestly accepts the inevitability of conflicts among municipal systems, and does not quixotically push for the elimination of all such conflicts. Like the systems of local private law that it seeks to co-ordinate, private international law can be understood to have varied substantive purposes which include such standard private law functions as compensation, distribution, regulation and contestation.

As these objectives clearly have a broader societal import, there will also be some conflict among the interests of various jurisdictions in a private international law scenario. This is centrally why private international law

[50] Wai, n 48 above.

[51] M Rheinstein, 'How to Review a Festschrift' (1962) 11 *American Journal of Comparative Law* 632 at 664, quoted in F Juenger, *Choice of Law and Multistate Justice* (Boston, Mass: Martinus Nijhoff, 1993) n 997, at 161.

is known as 'conflict of laws'. In the US conflict of laws tradition, the legal realist tradition that began with the deconstruction of formalist vested rights analysis by Walter Wheeler Cook[52] ended in Brainerd Currie's frank analysis of a broader social interest in the conflict of private law systems.[53] Currie's governmental interest analysis is understood to be the main informing tradition of contemporary US conflict of laws. In the most sophisticated understandings of the contemporary US regime, governmental interests are themselves made more complex, indicative of many different kinds of interests—including individual concerns, social concerns and institutional concerns.[54] There can be as many conflicts among different policy objectives as among jurisdictions. In the context of social regulation, for example, different jurisdictions could share in having an interest in effective transnational regulation of injurious conduct.

For the contemporary era, private international law should consider its particular concerns in the light of the contributions that it can make to transnational society. These include the contributions that transnational private litigation can make to transnational social regulation in an era in which such regulation is difficult either in multilateral institutions or through national public regulations. In addition to private litigation, the various national private laws co-ordinated through private international law also play a special role in constituting the terrain of transnational private ordering.

I.4 Private International Law in the Constitution of Private Ordering

The significance of understanding private international law as concerned with framing contestation and conflict among private actors is especially evident if we recall the framing role of private law in constituting and monitoring various forms of private ordering.

(a) Private Ordering in the Shadow of Private Law

Private law can be viewed as a form of indirect, permissive role of the state with respect to order among different private actors. State institutions have a necessary role in this plural order, but it is a role which forgoes a dominant 'command and control' regulation, and instead acts as a kind of indirect 'facilitative' actor.[55] Even in litigation, private law courts do not initiate

[52] WW Cook, 'The Logical and Legal Bases of the Conflict of Laws' (1924) *33 Yale Law Journal* 457; EG Lorenzen, 'Territoriality, Public Policy and the Conflict of Laws' (1924) 33 *Yale Law Journal* 736; D Cavers, 'A Critique of the Choice of Law Problem' (1933) 47 *Harvard Law Review* 173.

[53] B Currie, *Selected Essays on the Conflict of Laws* (Durham, NC: Duke UP, 1963).

[54] J Singer, 'Real Conflicts' (1989) 69 *Boston University Law Review* 1; J Singer, 'A Pragmatic Guide to Conflicts' (1990) 70 *Boston University Law Review* 731.

[55] Collins, n 10 above, at 65.

claims, nor do they frame the arguments. Private law depends on offering a set of background norms and processes that can be used by private parties to make claims against other private actors.

In this respect, the divide between transactions and litigation is not that great. In private litigation, private parties are provided with a procedure and certain incentives to enable them to make claims against other private actors. Through private transactions, private parties are invited to customise the structure of their economic relations through certain forms of consensual procedure with the expectation that the agreed terms and procedures will be complied with due to their conformity with generally recognised social norms, and in the shadow of the resolution of potential complaints in state courts. These customised structures of consensual relations can include both substantive norms and procedures for complaints and disputes. An arbitration clause, in this view, is nothing more than the most formal of the kinds of customised transaction management. Nonetheless, private law helps to guide dispute articulation and resolution even in these co-operative arrangements. Even if private actors rarely have recourse to full civil litigation in state courts, they are aware of and act in accordance with that background authority. This is even more the case with respect to injured parties who have not constituted a private ordering arrangement. Tort law is the best example of private law oriented towards the interests of the many kinds of affected parties who are not governed by negotiated private ordering. In summary, the rules of private law form a set of ground rules under which private claims and complaints can be raised between either related or non-related parties.

(b) Private Ordering and Contestation in the Global Order: Transnational Ordo-Liberalism

The lens of private international law offers a way to understand the spread of transnational private ordering as an alternative form of regulatory strategy in which private actors can contest private power. It simultaneously reminds us of the need for institutional foundations for this private ordering.

First, private law tools are often important to the placement of primary responsibility for regulation as between private parties according to their customised standards and procedures. Even consensual relations and networks involve a form of regulation and contestation among private parties. As systems theorists such as Teubner observe, and as the defenders of the nature of arbitration argue,[56] there is no essential reason that alternative

[56] The observation that at least one party would provide and that arbitrators would be competent to hear arguments based on public policy was important to the US Supreme Court majority opinion in *Mitsubishi* with respect to why consideration of some antitrust allegations could be heard by arbitrators as part of a commercial arbitration: *Mitsubishi Motors Corp v Soler-Chrysler Plymouth Inc*, 473 US 614 (1985), at 636–7.

processes for monitoring, dispute settlement and enforcement need be less disciplinary or regulatory than between the parties. In important ways, they are more effective and efficient in these tasks.[57] Moreover, these contractual relations can also be the vehicle for the regulation of the behaviour of third parties. For example, retailers may advance social regulation if they arrange with their sub-contractors to comply with specified production standards such as labour conditions.[58]

The notion of social regulation through private ordering recalls early theories of 'natural order or equilibrium'; this is the Mandevillean idyll, and also a strand of Hayekian reasoning.[59] But a more sophisticated theoretical connection lies in the 'ordo-liberal' emphasis on the institutional foundations of market order. While ordo-liberal conceptions have sometimes been identified with neo-liberal accounts of minimal state intervention and constraints on public power, sophisticated ordo-liberal conceptions of social order recognise both (a) that the market and civil society should be social mechanisms for constraint of private (and public) power by private power, and (b) that law is critical to the construction of an order in which the market can operate. Competition of interests can—as Smith had shown in the economy—promote social interests. But for this to occur, the market and other forms of private contestation must be supported through an appropriate institutional framework.

Ordo-liberal conceptions of the role of law in private ordering are relevant to various areas of law. The most obvious is in the field of competition law, where the ordo-liberal understanding recognised that the conservation of the benefits of the competitive market requires controls on excessive accumulation or abuse of market power.[60] Ordo-liberal concerns also inform other areas of legal regulation that seek to protect against the abuse of private power. For example, most systems of private law contain provisions with respect to contract negotiation that try to control abuses of information (for example, laws on fraud) or unequal power (for example, certain laws of capacity, but also of duress and undue influence).[61] These legal fields demonstrate how delicate the balance for ordo-liberal conceptions is in providing adequate institutional foundations for private ordering on the one hand, without creating excessive public power that would overwhelm private power or the benefits of private ordering on the other.

[57] Collins, n 10 above, at 56–96.

[58] See, e.g., F Snyder, 'Governing Economic Globalisation: Global Legal Pluralism and European Law' (1999) 5 *European Law Journal* 334.

[59] C Joerges, 'What is Left of the European Economic Constitution?' (2005) 30 *European Law Review* 461.

[60] Ordo-liberalism was of great theoretical significance to the design of German competition law, and, through that influence, to EC competition law. See, e.g., DG Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford: OUP, 1998).

[61] See Collins, n 10 above.

While ordo-liberalism has a strong sense of the need to protect individuals from the abuses of private power as well as of public power, it has often overlooked the need to re-define the existing and emerging forms of private constraints on private power.[62] Early ordo-liberal texts with respect to the global order focus on the potential use of international processes, including the use of the gold standard and international trade agreements, as a vehicle to constrain state public power.[63] Instead, or in addition, it is important to consider ways in which law can enhance the use of private power to constrain agglomeration and the misuse of private power. In contemporary society, we could, for example, view the emergence of new social movements as an important example of governance through private ordering. New social movements—such as the peace and environmental movements—often have an important cross-border aspect, including their influence in the development of international law.[64] In method, new movements often deploy a diversity of direct action which does not directly involve public regulation. The use of anti-branding techniques in the context of protests against corporate behaviour is just one example in which private groups take direct action against other private actors.[65]

In the global context, transnational private law can be viewed as an important and distinctive approach by the state towards the facilitation of these processes of private contestation and regulation of the behaviour of other private actors. In the language of systems theory, private law is part of a society of multiple social systems, in which the special responsibility of the state system is to assist the embedding and inter-weaving of private power within an order of other systems of private power, and to attend to the conditions of their inter-relationship. From a different perspective, Habermas has explored the potential use of private law as a means of avoiding the paternalistic excesses of welfare state managerial governance while facilitating the capacity of individual and civil society to make claims.[66] This more indirect and strategic form of regulation accords with the various pressures, including globalisation, which limit the effectiveness of traditional forms of state regulation. Perhaps surprisingly, this vision may also accord with the hopes of political theorists that economic

[62] For scepticism and a cautionary tale concerning the impact of ordo-liberalism in the European integration project, see Joerges, n 59 above. For the historical specificity of, and broader limits on, social organisation based on the self-regulating market, the classic critique remains K Polanyi, *The Great Transformation*, (London: Rinehart & Co, 1944).

[63] See, e.g., W Roepke, 'Economic Order and International Law' (1954) 86 *Recueil des Cours* 203.

[64] B Rajagopol, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: CUP, 2003).

[65] M Dery, *Culture Jamming: Hacking, Slacking, and Snipping in an Empire of Signs* (Westfield, NJ: Open Magazine Pamphlet, 1993); Klein, n 31 above.

[66] Habermas, n 32 above, Chap 9:2. Habermas specifically refers to the use of private law remedies, including in the liability area (ibid, at 411), but seems to fear that such remedies are too narrow and inaccessible.

globalisation may lead to the growth of non-traditional forms of democratic response and resistance.[67] For example, litigation figures in some of the primary examples of transnational anti-globalisation campaigns.[68]

(c) Private International Law and the Constitution of Transnational Private Ordering: the Case of Arbitration

The importance of private international law in structuring systems of private ordering is most evident with respect to international commercial arbitration. The use of arbitration for dispute resolution in cross-border transactions has been considerably strengthened both by international treaties and through reforms in national laws not required under treaties. The New York Convention supports the broad recognition and enforcement of foreign arbitral awards.[69] Changed attitudes among national legislatures and courts towards the use of international commercial arbitration have also encouraged the use and finality of arbitration.[70]

From a transnational regulation perspective, there are a number of reasons why private law courts should take care in the promotion of arbitration. There may be differences in outcomes and background assumptions between private arbitrators and state court judges when it comes to private disputes with a broader public policy impact, including disputes with an impact on third parties. Moreover, dispute resolution that is relatively free of recourse to state systems is important to the lift-off of business relations from the broader norms of national laws.[71] The autopoietic character of *lex mercatoria* depends significantly on a break in the norm expectations of business parties with respect to state legal systems.[72] Recourse to broader societal norms by business actors may be reduced as their interaction with broader social actors and institutions through state law and state institutions is lessened. There are also procedural losses from the substitution of arbitration for dispute resolution in state courts. For example, the confidentiality of arbitration proceedings eliminates potentially valuable access for the general public to information about business conduct,[73] as well as

[67] See, e.g., M Hardt and A Negri, *Multitude* (New York: Penguin, 2004), at 202–8, for a suggestive, if vague, discussion of law 'beyond private and public' which advances the notion of 'co-operation of multiple singularities'.

[68] See, e.g., the role of litigation as part of civil protest of Shell's Nigerian oil operations: Klein, n 31 above, at 387–93.

[69] New York Convention, n 45 above.

[70] For an excellent account of the construction of this order, and its relation to the interested behaviour of particular actors, see Y Dezalay and B Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago, Ill: University of Chicago Press, 1996).

[71] For an elaboration of these concerns, see Wai, n 6 above, at 258–260.

[72] See, e.g., G Teubner, '"Global Bukowina": Legal Pluralism in the World Society', in Teubner, n 17 above, at 3.

[73] See CA Williams, 'The Securities and Exchange Commission and Corporate Social Transparency' (1999) 112 *Harvard Law Review* 1197.

to the public goods of the development through precedent of state law and information about such matters as accident rates.[74]

The delicate case of arbitration illustrates that private international law already faces difficult issues of co-ordinating not just among state systems of private law, but also in relation to transnational private ordering. In this, private international law shares a conceptual challenge with the other legal regimes that comprise the plural regimes of transnational social regulation. In the next part of this chapter, I will explore this shared challenge through the idea of private international law concepts of conflicts and of comity.

II. PRIVATE INTERNATIONAL LAW ANALOGIES: CONFLICTS AND COMITY

If transnational social regulation is the product of plural regimes, it becomes crucial to understand the relationship among normative orders as diverse as transnational private litigation, international trade regulation and private ordering through contracts and *lex mercatoria*. In this task, private international law may offer some guidance, given that the traditional and continuing concern of private international law is in mediating among multiple national systems as well as private orders.

A number of authors have observed that the relationship among different legal orders of the contemporary system involves potential difficulties. For example, Pauwelyn has elaborated a notion of 'conflict of norms' with respect to the specific relationship of WTO law to other regimes of public international law.[75] Yet, the conflict of norms among regimes of public international law seems almost simple in comparison to the broader conflict of norms in transnational governance. To address these broader relations, particularly to capture the relationship between state and private systems of regulation, it may be that concepts taken from private international law—in particular, the idea of conflicts of normative orders and the concept of comity—may offer important insights.

II.1 Private Law Analogies in International Law

In his 1927 book, Sir Hersch Lauterpacht identified the significant role that private law analogies play in the development of public international law.[76] By this, he meant not simply the direct and uncontroversial use of private law principles with respect to subjects such as loan agreements involving a

[74] D Charny, 'Illusions of Spontaneous Order: 'Norms' in Contractual Relations' (1996) 144 *University of Pennsylvania Law Review* 1841 at 1852.

[75] J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: CUP, 2003).

[76] H Lauterpacht, *Private Law Sources and Analogies of International Law* (London: Longmans, Green & Co., 1927).

state party, but the use of private law analogy at the very core of public international law.[77] For Lauterpacht, the private laws that are common to nations are an important part of 'the general principles of law recognized by civilized nations', the source of public international law identified in Article 38 of the Statute of the Permanent Court of International Justice.[78] These common principles of private law are the instantiation of principles for co-ordinated life that can fill gaps in the development of public international law, especially in its formative periods. It may be that private law sources and analogies could also assist in the current efforts to develop principles to govern the relationships among different levels of tribunals, and among different international tribunals, such as the specialised tribunals for trade, human rights and labour.[79]

In dealing with the broader topic of transnational governance through a multiplicity of regimes, private international law may be a most useful source of analogies. Such a turn is anticipated in a number of works on European law by Christian Joerges.[80] Joerges has demonstrated how a turn to private law can provide insights into the cross-border co-ordination of regulatory concerns in transnational governance. Specifically, Joerges looks to private international law for what he considers to be an overlooked, yet superior, approach to the conflict among regulatory laws, not just of private law but also of public law, in the European context and beyond. In this task, Joerges engages in a complex and unique transatlantic borrowing: he emphasises two characteristics of private international law influenced by a reading of Brainerd Currie's work on US conflict of laws. First, he sees in Currie's work a clear recognition that private law potentially has public policy purposes and therefore involves public interests.[81] This means that resolution of conflict of laws problems often has a political function of attempting to resolve conflict of interests among states; for Joerges, this situation describes many of the contemporary challenges in European and transnational governance. Secondly, he sees in Currie's response to such conflicts the basis for an appropriate response on the part of contemporary courts facing problems of conflicts among jurisdictions. Aware of the greater democratic legitimacy and greater expertise of legislatures, Currie advocates deference on the part of US courts when dealing with 'true conflicts', i.e., in cases where a public policy concern of the forum jurisdiction can be identified. The combination of a broad sense of forum interest and a

[77] Ibid, at 3–5.

[78] Art 38(1)(c) of the Statute of the International Court of Justice.

[79] See, e.g., International Law Commission Study Group on the Fragmentation of International Law (A/CN.4/L.628) adopted Aug 2002 (2741. and 2742); special issue of the (1999) 31 *New York University Journal of International Law and Politics*.

[80] See, e.g., C Joerges, 'The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Discipline' (2004) 14 *Duke Journal International and Comparative Law* 149; C Joerges, 'Rethinking European Law's Supremacy', EUI Working Paper Law No. 2005/12.

[81] See discussion and references, nn 52 and 53 above.

decision rule that applies forum law in cases of true conflicts has the potential to be very parochial. Joerges has more hope for this approach. He notes that Currie later moved to a more moderate and restrained interpretation of forum interests in order to avoid conflicts. He also elaborates an understanding of this restrained approach that combines Currie's recognition that there are real public policy stakes in conflict of laws, with the more traditional willingness of private international law to tolerate foreign law.

Following this approach, Joerges sees the conflict of laws approach as involving a certain deference, which he identifies as *comity*, to the legislative interests of both jurisdictions. In particular, the conflict of laws approach looks away from the substance of the underlying laws and the task of choosing the better rule, but instead takes a more procedural approach. In this, he sees similarities to developments in 'post-interventionist' law more generally, with the switch from government to governance, and attention to various kinds of reflexive regulation and proceduralisation.

II.2 Private International Law and Co-ordination Problems among Parallel Regulatory Regimes

The metaphorical potential of private international law arises because its central challenge involves co-ordinating the interests of two parallel levels of norm-generating authority. In private international law, disputes involve private parties but with the further complication of the elements of the dispute that are connected to more than one legal jurisdiction. Even if it is a municipal court that is faced with the adjudication of such a dispute, the approach has focused mainly on finding an appropriate balance among the interests of the various parties and jurisdictions.

This emphasis in private international law counters a tendency towards hubristic 'supremacy' reasoning on the part of 'higher-level' institutions, be they federal or supranational. For Lauterpacht, this corresponds to the challenge of an international tribunal dealing with disputes between two sovereign states over territorial claims or treaty enforcement and interpretation. For Joerges, this more modest private law approach contrasts with any conception of European-level supremacy. He clearly believes that caution for European-level institutions is appropriate, especially for courts that are limited in their democratic legitimacy and functional expertise. Even for a higher-level institution such as the European Court of Justice, the aim is to think of the challenge as a co-ordination problem between two parallel units. The situation of the European Court of Justice, for example, would be similar to that of federal courts in countries such as the United States that regularly have to deal with delicate problems of federalism.[82]

[82] These areas of constitutional restriction include areas of private international law concern. In this respect, it is interesting to note how the US Supreme Court has tried to balance

Some oversight is clearly needed in an inter-dependent Europe and an inter-dependent world. Increasing economic and social inter-dependence among jurisdictions means that governmental measures in one state almost inevitably have external effects in trading partners, a process exemplified by the expansive role of the federal trade and commerce clause of the US Constitution. A similar dynamic is present in the WTO and explains the increasing focus on trade effects caused by divergent national regulations. Some of the most controversial decisions of the WTO, such as *Beef Hormones*[83] and *Shrimp–Turtle*,[84] are of this character. This external effect is only weakly protected in traditional sovereign structures, and Joerges believes the European law and institutions, for all their faults, legitimately advance concern for the effects of national regulations on out-of-jurisdiction interests.

But Joerges also does not want too much intervention by the courts. He accepts the insights of post-interventionist law about the legislature, but he also fears the limits in legitimacy and in expertise of courts. Instead, what he pushes for is for courts such as the European Court of Justice, and presumably international tribunals such as the WTO Dispute Settlement Body, not to regulate directly in substance and in detail about what a particular state must do in order to comply with international treaty obligations. Instead, such courts should act as 'instigators' for transnational processes of governance to kick in. This could be the initiation of procedures inside a Member State to find a less trade-restrictive alternative form of regulation (as in *Cassis de Dijon*), or direct negotiation between Member States on the resolution of a dispute, but it could also be, for example, the transnational process of governance that he sees surrounding comitology in Europe.

II.3 Comity in Transnational Governance

Joerges cites the use of comity by Currie as describing the deference of the courts towards their own legislatures with respect to conflicts of policy. This is one sense in which comity is used, but it is important to exercise caution in transferring the concept of comity to other fields, including from private to public law, and from the United States to Europe.

constitutional limitations, such as due process requirements of the Fourteenth Amendment to the US Constitution, with a certain deference towards state jurisdictional autonomy. For a good example of this balance, see the 'minimum contacts' requirements articulated in *International Shoe Co. v Washington*, 326 US 310 (1945).

[83] *EC—Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, 6 Jan 1998.

[84] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R, 12 Oct 1998.

Even in the US context, comity is used in a variety of not necessarily consistent ways.[85] Indeed, the sense of comity that Joerges identifies in Currie—of deference of forum courts to the forum legislature—is not the most common use of comity in US conflict of laws. Instead, comity has more often been identified with some level of consideration, not out of legal obligation but out of a kind of diplomatic politesse for the laws and concerns of other countries. This is the sense in which it is invoked, for example, in the key US Supreme Court case, *Hilton v Guyot*.[86] It is also, and not coincidentally, the sense in which Joseph Story imported the principle of comity, from Huber's work, into US conflict of laws theory.[87] In this way, comity is a vehicle in US conflict of laws for exercising some of the cosmopolitan concern for foreign jurisdictions that, in European private international law, seems more directly addressed through a view of the field as apolitical and concerned mainly with private rights.[88] In the US context, in other words, this provides a helpful bulwark against excessive forum parochialism, the hazard of Currie's use of comity by courts towards their own legislatures. In the contemporary order, and especially given the insights about the defects of legislative and administrative process taken from post-interventionist law, it seems particularly important that courts do not simply defer to their own legislatures in matters of cross-jurisdictional conflicts. In this task, a use of this other US concept, of comity with respect to the policies and processes of other states, may be a helpful importation to understand the role of European and other international institutions in trying to adjudicate on disputes between different states. This mechanism also provides a means of not falsifying true conflicts by ignoring or limiting the concerns of one state or the other.[89]

Beyond even these two senses of comity—of the deference of forum court to forum legislature, and of the concern for the interests and processes of foreign jurisdictions—what Joerges is pushing for at European and international tribunals is something like a deference to the complicated array of procedures—both municipal and cross-border processes, but also non-state-based processes—for reaching accommodations that exist in a more mature international society. This is helpful. At EU level, it means giving attention to sometimes overlooked processes, such as comitology. At international level, for example, it means leaving some room for states to figure out how exactly they should comply with the requirements of the WTO regime. In the case of *Beef Hormones*, for example, there should be greater deference to state choices as long as they adhere to procedural requirements such as justification based on scientific evidence, use of representative

[85] See Paul, n 41 above.
[86] 59 US113 (1895).
[87] J Story, *Commentaries on the Conflict of Laws* (Boston, Mass: Little & Brown, 1841).
[88] A tradition associated, above all, with von Savigny.
[89] See, e.g., Singer, n 54 above.

procedure and reference to multilateral standards. And at both EU and international levels, it means attending to emergent forms of self-regulation developed in private or mixed public–private processes of functional systems.

II.4 Cautions on the Path towards Transnational Comity

As with the internationalist reforms to private international law, also sometimes carried out in the name of comity, these broader uses of comity are all sensible encouragement to courts not to assert supremacy too quickly by substituting a specific resolution to a regulatory dispute among different regulatory orders. Instead, courts should attend to the range of other procedures that are at work in reaching accommodation among the interests of different jurisdictions. There is a danger, however, that this kind of caution can push courts to an almost routine deference to other processes of transnational governance.

This seems a dangerous position, given the current state of international society. Sometimes, what is needed from courts is not simple deference, whether to another foreign state's interest, to a legislative branch or to other transnational processes. Instead, national courts must be seen as increasingly central and normal actors in the complex processes of transnational governance. Courts should recognise that sometimes what is needed in a transnational process is precisely a more active role of oversight by a court.

A second caution is that the regulatory processes to which the institutions of any individual regime might want to attend and defer could extend well beyond traditional court deference to other courts. International trade tribunals may want to attend to other international institutions,[90] to national private law processes or to transnational political processes. And national courts may need to reassert some control over processes of international trade regulation, as will be discussed below.

II.5 Between Productive Conflict and Transnational Comity

The greatest danger in using comity as a frame for the relationship among plural orders is the risk of turning the relationship among regimes too easily into one of harmonious mutual benefit. Again, a certain level of conflict and diversity may be what is needed. Recent reforms in private international law oriented towards rationalising cross-border litigation in the name of comity may have too readily ignored the productive value of conflict.[91] This is the case in particular when we are operating in a partially globalised

[90] See, e.g., A Perez, 'Institutional Comity in National Security' (1998) 23 *Yale Journal of International Law* 302.

[91] Paul, n 41 above.

legal order, with some parts of the international order being quite advanced, but with others lagging behind.

In contrast, Craig Scott and I have described a more activist role of private law courts in a process of *transnational comity* with respect to transnational corporate liability for human rights concerns.[92] In describing the process through which the German Foundation 'Remembrance, Responsibility and the Future' was established to provide some forms of compensation to victims of forced labour during World War II, we identify a productive role for the national litigation initiated in US courts against various corporate defendants, principally German companies. The central concept that we explore is the sense in which such private litigation provided a venue for the plaintiffs who found themselves blocked in other political and legal venues, including more traditional human rights complaints. In this, private litigation of foreign claims seemed to exemplify bypass strategies that have been identified in the international human rights area.[93]

Beyond identifying domestic private law courts as a potential venue for complaints and contestation in transnational claims, we also tried to elaborate on the sophisticated stance required of courts faced with such claims. Above all, such courts must sense their participation as one of the plural regimes of transnational governance. A sophisticated court, we argued, aware of the globalisation of society would also be aware of why more and more claims with complex connections to multiple jurisdictions might end up in a municipal court. A sophisticated court should also be aware that there are plural processes of transnational relations at play in addressing such problems. Municipal courts will therefore need to make judgments on the existence and adequacy of other forms of regulatory oversight for the complaints of parties. We were mainly concerned with this dual role of domestic courts in transnational private litigation to provide a venue for complaints, but also to be sensitive to other forms of transnational governance that might be at play.

Sometimes this may involve a form of analysis, not unlike *forum non conveniens* analysis in the conflict of laws, of whether there are alternative and more appropriate processes for addressing complaints. In the context of the German Foundation we argued that some of the US courts might have made such an assessment when they referred favourably to the establishment by the German government and companies of the Foundation,

[92] C Scott and R Wai, 'Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational Private Litigation' in Joerges *et al*. n 2 above, at 309.

[93] This bypass strategy has been described in a 'boomerang' model: see Keck and Sikkink, n 21 above, at 12–13. For a more complex 'spiral' model, see T Risse, S Ropp and K Sikkink (eds), *The Power of Human Rights International Norms and Domestic Change* (Cambridge: CUP, 1999), at 17–35.

through a process of political negotiation which, in turn, may have been partly precipitated by the litigation in US courts.[94]

Others have questioned the adequacy of the actual settlement.[95] We wanted to highlight the role of transnational private litigation in precipitating the political settlement of the underlying complaints. Such private law litigation may be an important mechanism for addressing the regulation of transnational economic activity that crosses national borders, in a partially globalised system where there is incomplete or impeded national regulation and incomplete supranational or international regulation.

II.6 International Investment Law, and the Complexity of Comity in World of Plural Regimes

As a final example of the potential use of private international law concepts of conflicts and comity, this chapter examines *Metalclad v Mexico*, a prominent case from the investment chapter of the NAFTA, Chapter 11. Chapter 11, which provided a model for the failed Multilateral Agreement on Investment (MAI), is similar to many bilateral investment treaties that have proliferated as states seek to encourage foreign investment. In both procedural and substantive ways, the investment law treaties seem to offer something closer to the integrated supranational oversight of domestic regulatory orders, including by linking international trade regulation and private adversarial legalism. The dispute settlement institutions of investment law must regularly face decisions about how to reconcile overlapping and potentially conflicting normative orders.

(a) NAFTA Chapter 11 as a New Regime of Transnational Regulation

Chapter 11 of the NAFTA sits in the vanguard of contemporary international trade law, providing significant substantive protections for foreign investors and with striking procedural reforms. As a matter of substance, Chapter 11 provides potentially expansive protection for foreign investors against state measures. The provisions of Chapter 11 provide foreign investors with non-discrimination consisting of both Most Favoured Nation treatment as compared to the foreign investors of other states and National Treatment as compared to domestic investors.[96] More impressively, the Chapter also guarantees certain positive standards for foreign investors,

[94] *In re Nazi Era Cases Against German Defendants Litigation*, 129 F Supp 2d 370 (DNJ 2001).

[95] For a critical view, see L Adler and P Zumbansen, 'The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich' (2002) 39 *Harvard Journal of Legislation* 1.

[96] NAFTA Arts 1103 and 1102.

regardless of the standards for domestic investors. In particular, Article 1105 guarantees foreign investors 'minimum standards of treatment' under international law, and Article 1110 protects against expropriation or measures 'tantamount to expropriation'. These substantive provisions could potentially include negative effects on foreign investors caused by governmental measures related to social regulation objectives such as environmental protection or health and safety.

The procedural innovations of NAFTA Chapter 11 are particularly relevant to plural regulation of transnational governance. From a pluralist perspective, the Chapter provides what could be considered to be a helpful and democratic opening to private party complainants of processes of international trade regulation that were formerly restricted to states parties. The Chapter provides for international commercial arbitration under either the ICSID or the UNCITRAL framework to hear foreign investor complaints for compensation for violation by NAFTA governments of the substantive provisions of Chapter 11. The Chapter also creates a remedy of monetary damages, again strikingly taken from private law. The Chapter 11 procedure therefore introduces significant private party adversarial legalism into the realm of international trade law oversight of national governmental measures. In comparison with the more traditional state-to-state framework of the WTO, this could be seen as a helpful form of private party contestation to deal with transnational problems.

From the perspective of social regulation, however, there are problems of asymmetric access and oversight. Criticisms of such provisions are connected to the lack of any other private party access, for example, to hear complaints related to social regulation. The dispute provisions under the environmental and labour side-agreements of NAFTA[97] are limited in both substantive and procedural breadth. Moreover, there is no direct set of obligations on private party investors—such as a mandatory and justitiable corporate code of conduct—under NAFTA. Such asymmetries have led critics to characterise the Chapter as a 'human rights treaty for a special-interest group'.[98]

From a social regulation perspective, given this context, the Chapter seemed a threat to effective social regulation. In particular, this was an incomplete form of pluralisation because it opened up new ways to contest national methods of social regulation without providing new means to effect social regulation. This is a terrain in which concepts of comity might seem especially appropriate.

[97] The North American Agreement on Labour Cooperation (NAALC) and the North American Agreement on Environmental Co-operation (NAAEC).

[98] J Alvarez, 'North American Free Trade Agreement's Chapter Eleven' (1996–7) 28 *University of Miami Inter-American Law Review* 303 at 308.

(b) Metalclad Arbitration

The *Metalclad* case was the first successful investor claim under Chapter 11. The Metalclad Corporation, a US corporation, attempted to complete and operate a hazardous waste processing site in Mexico that was opposed by both local and state governments, at least nominally because of environmental and health concerns, and because of the opposition of the local population. The municipal government refused zoning permits and the state governor eventually made a decree creating a natural reserve in the area. Metalclad made a complaint under Chapter 11, and the NAFTA arbitration panel awarded damages against the Mexican government.[99] The award was later reduced, but not completely overridden, on judicial review of the arbitration decision,[100] by a judge of the Supreme Court of British Columbia, the site of the arbitration.

Of particular interest for our purposes are two contrasting studies in the relation of systems. First, we have the attitude of the NAFTA panel with respect to the Mexican domestic regulations. We can say that, in the name of the NAFTA, the panel was very assertive in its review and its judgment about municipal systems. This clearly was not in accordance with notions of 'comity'. Secondly, we have another question of comity in the attitude of the domestic court judge in the judicial review of the arbitral award. Faced with the international movement towards deference to arbitration panels, the judge took a more balanced stance, overturning the panel on some matters, but not on all matters.

(i) Arbitral Award In its decision, the arbitration tribunal found that the refusal by the municipal government of permits to build a hazardous waste facility constituted expropriation under Article 1110 and violated the minimum standard of treatment under Article 1105. The arbitration tribunal also found that the lack of transparency in Mexican laws concerning permits (mainly due to different views between the federal government, including the environment ministry, and state and local officials concerning whether local permits were required) constituted a violation under Articles 1105 and 1110. Finally, it found that a decision by the state governor to declare an ecological decree (a 'cactus preserve') covering the area amounted to a violation of Articles 1105 and 1110.

The arbitral award in *Metalclad* confirmed the concerns of many social activists concerning NAFTA Chapter 11. The context of governmental measures to regulate the construction of a hazardous waste site was attention-grabbing. More troubling was that, in its reasoning, the tribunal

[99] *Metalclad Corp. v Mexico*, Arbitration Award (30 Aug 2000); ICSID Case No. ARB(AF)/97/1.

[100] *Mexico v Metalclad Corp* [2001] BCJ No 950 (British Columbia Supreme Court, 2 May 2001).

interpreted Chapter 11 provisions very broadly against the Mexican government. The decision confirmed that Chapter 11 might extend protection against direct and total expropriations of property, and include the effects on investors of domestic regulatory regimes.

For example, the arbitral panel focused centrally on the lack of transparency in Mexican laws as constituting a violation under Articles 1105 and 1110. In particular, the panel was critical of the conflicting views among federal, state and local officials in Mexico concerning the site and their respective authority with respect to the granting of permits for the landfill. The panel developed a right to transparency from the general provisions of NAFTA Article 102(1) that an underlying objective of the NAFTA Treaty is to promote and increase cross-border investment opportunities.[101] It also pointed to the provisions of Article 1802(1), a general provision that NAFTA states should ensure that their various laws and regulations should be published.[102] From these weak provisions, the panel concluded that, with to respect to Article 1105:

> Prominent in the statement of principles and rules that introduces the Agreement is the reference to 'transparency' (*NAFTA Article 102(1)*). The Tribunal understands this to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party (whose international responsibility in such matters has been identified in the preceding section) become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.[103]

This interpretation was an aggressive expansion of the substantive provisions of Chapter 11. Most regulatory regimes of any complexity would fail the rigorous test set out. Moreover, few businesses, in any context, expect perfect transparency in all relevant regulations; instead, businesses normally expected some uncertainty in regulatory compliance and permits, and either chose to bear that risk or took other measures, such as insurance, to reduce their risk. Finally, critics noted the irony of the requirements of very high standards of 'transparency' for foreign investors, especially given

[101] Ibid, at para 75. Art 102(1) reads in part:
'1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to: …
c) increase substantially investment opportunities in the territories of the Parties.'

[102] Ibid, at para 72. The panel did not note the nature of remedies for violations of the provisions of Chap 18 which do not lead to remedies under Chap 11.

[103] Ibid, at para 76.

treaty provisions that were far from clear and from a NAFTA dispute settlement process that was itself lacking in transparency.

This decision evidenced a troubling and almost total lack of comity on the part of the arbitral tribunal. No attention was devoted to the relative expertise or legitimacy of the domestic authorities as compared to that of the arbitral tribunal itself. The arbitral panel also waded into contested matters of Mexican constitutional law relating to the federal division of powers. All domestic processes were interpreted in the worst light. The social regulation objectives and concerns of local populations were viewed as irrelevant. This was the kind of decision that, at least as much as WTO cases such as *Beef Hormones*, signalled the failure of trade institutions to relate appropriately trade regulation goals to the other existent regimes of transnational governance.

(ii) Metalclad Judicial Review On judicial review by the relevant British Columbia courts of the arbitration,[104] which had occurred in Vancouver, a local judge cut back significantly on the award. The judge found that the tribunal had committed a jurisdictional error 'beyond the scope of the submission to arbitration'[105] by finding that Mexican rules had lacked transparency, and that such transparency was required based on other sections of the NAFTA and based on international law. The judge noted, in particular, that the cited sections of the NAFTA Treaty were preambular and general rather than binding provisions, and that the panel did not provide any further international law support for these broad requirements of transparency.[106] Accordingly, the part of the award based on the failure to provide zoning was reduced.

Deference of reviewing courts to the determinations of international commercial arbitration bodies has been a major concern of international instruments implemented by many jurisdictions such as the New York Convention and the UNCITRAL Model Rules. British Columbia had an arbitration statute which reflected the deferential standards of the UNCITRAL model rules, and its courts had interpreted the statute consistently with this. The judge would interfere with the arbitral award only if he found (a) there had been a finding on a matter beyond the scope of submission to arbitration, or (b) a patently unreasonable error.[107] The judge in *Metalclad*, reflecting this deference, refused to interfere with the determination by the arbitral tribunal that the state governmental measures making the land into an ecological preserve amounted to an expropriation.

[104] *Mexico v Metalclad Corp*, n 100 above.

[105] Ibid, at para 50, referring to Art 34 of the British Columbia International Commercial Arbitration Act, RSBC 1996, c 233.

[106] Ibid, at paras 78–80.

[107] The latter standard was found in the relevant British Columbia case law with respect to review of arbitral awards.

Although he expressed some doubts about the breadth of the panel's definition of expropriation, he viewed this as a question of law with which he was not allowed to interfere.[108]

This quite nuanced review of the arbitral tribunal's award was heavily criticised by some international investment lawyers and academics.[109] The usual critiques point out the benefit of arbitration as a neutral and expert form of dispute resolution, which would warrant the comity of domestic courts open to plural ordering. However, the context of the NAFTA may mean that transnational comity is not warranted, given proper attention to the underlying context. Michael Riesman observed some time ago that 'systems of control' over arbitration are important to its long-term effectiveness and legitimacy.[110] A more vigorous review by national courts of arbitral awards in the NAFTA context might serve some of the 'systems of control' and regulative function, especially in those cases that have broader public import than most commercial disputes. More rigorous review by domestic courts might be appropriate in these cases, such as the NAFTA context, where arbitration is being used in cases with more public significance than typical commercial disputes. In investment disputes that involve review of national social regulations, domestic courts have as much experience, expertise and legitimacy as procedures of commercial arbitration.

Comity on the part of the reviewing judge in *Metalclad* seems especially problematical, given the lack of comity with respect to domestic Mexican public processes that the arbitral tribunal had demonstrated. This case starkly demonstrates that comity is a not a useful concept *per se*, but depends on the context of review, including the comity demonstrated by the other regulatory order.

Successive arbitral tribunals under the NAFTA Chapter 11 have been more deferential to domestic regulations, perhaps reflecting the broader chastening of trade regimes in the wake of anti-globalisation concerns. In the *Methanex* arbitration decision, for example, the panel adopted much narrower readings of the substantive requirements of the Chapter.[111] In particular, the panel rejected claims based on the negative effects of changes

[108] Ibid, at para 99.

[109] See, e.g., 'Questions Remain After B.C. Supreme Court Upholds Metalclad Victory in Mexico Case', *Mexican Forecast*, Volume X, Number 9, 15 May 2001.

[110] WM Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (Durham, NC: Duke UP, 1992).

[111] Methanex Corporation, a Canadian maker of methanol used in the gas additive MTBE, sought compensation for California measures prohibiting the use of MTBE. Methanex claimed that the arbitrary and flawed regulatory process, with poor scientific support, amounted to a violation of either Art 1105 minimum standards of treatment or expropriation under Art 1110; see *Methanex Corporation v United States of America*, Statement of Claim, 3 Dec 1999. After a preliminary ruling by the panel, Methanex focused its claim on the intent to discriminate against foreign methanol producers in favour of domestic ethanol producers: *Methanex Corporation v United States*, Second Amended Statement of Claim, 5 Nov 2002. The complaint failed for both jurisdictional reasons and on the merits: *Methanex Corporation v United States of America*; Final Award of the Tribunal on Jurisdiction and the Merits, 3 Aug 2005.

in California gas additives regulations for a foreign investor. Procedurally as well, the panel introduced significant additions to standard commercial arbitration procedures, for example, by permitting and referring to *amicus curiae* submissions and by holding public hearings.[112]

(c) Comity, Investment Law Oversight and Private Law Regulation: Loewen

An earlier NAFTA decision, *Loewen*, provides an even more striking example of the complexity of deference and comity with respect to plural orders of transnational governance. The domestic measures challenged in *Loewen* involved the domestic private law and civil procedures that were discussed in Section I of this chapter. Although the *Loewen* case is not directly about social regulation, the private litigation procedures involved are central to private adversarial legalism that figures very prominently in the domestic regulation of the United States. In addition, the jury trial was impacted on by background concerns about access to affordable funerals through local service providers, as well as race dimensions to access and ownership concerns.

In the *Loewen* case, a Canadian-based multinational funeral home operator found itself the defendant in a private action brought against it in Mississippi arising out of alleged breach of contract issues related to Loewen's takeover of some local funeral homes in Mississippi. After a charged trial, the jury returned a verdict awarding $100 million compensatory ($75 million of which was for emotional distress) and $400 million punitive damages. This was by several times the largest jury verdict in the history of Mississippi, and more than 100 times the value of the underlying contracts. Loewen attempted to appeal the jury's decision, and the jury award might very well have been reduced by the Mississippi Supreme Court. However, to launch its appeal, Mississippi civil procedure rules required the posting of a 125 per cent bond for the judgment, which would have totalled $625 million. Although the Court rules permitted some discretion, the court refused Loewen's request to waive or reduce the bond. Loewen negotiated a settlement of $175 million; it later claimed that it did so only under 'extreme duress' of the prospective execution of the judgment against its assets. Shortly after this settlement, but also due to broader problems associated with its highly leveraged expansions, Loewen went into corporate re-organisation, and has re-emerged in reduced form as Alderwoods, Inc, a Delaware corporation.

[112] *Methanex Corporation v United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as '*Amici Curiae*', 15 Jan 2001; The *Methanex* tribunal ultimately accepted written submissions from two *amici*; see *Methanex*, Final Award, Part II, Chapter C, n 111 above.

Loewen Inc and Ray Loewen, its principal shareholder, launched a claim for compensation under the investment rules of the NAFTA contained in Chapter 11. Loewen made its claim against the US government, the responsible government under NAFTA Article 105, for state and local governmental violations of the substantive provisions of the treaty. It sought compensation for $725 million, including $175 million for the cost of settlement and $550 million for consequent loss in value in the shares in Loewen held by Ray Loewen, as well as damage to reputation.

Loewen made a variety of claims under NAFTA Articles 1102, 1105 and 1110. The concerns first related to the conduct of the trial in particular the trial judge's permission of pro-US testimony and of repeated references by the plaintiff's counsel to the foreign nationality of the defendant. Secondly, it pointed to the unusual size of the judgment, and the procedural bonds required for an appeal against the decision.

After a long series of preliminary rulings, a final award was made in June 2003.[113] I will not run through the many procedural issues in detail. The United States had argued as a preliminary matter that the scope of Chapter 11 review did not include judicial acts during domestic litigation and the judgments of domestic courts in purely private disputes. Most aspects of this jurisdictional challenge were rejected by the arbitral tribunal.[114]

In its final award, however, the panel ruled against the claimant. The panel confessed significant sympathy for the claimants and noted the significant evidence of serious problems in the Mississippi procedure. However, it refused the claim because of two procedural reasons. First, the panel ruled that, as a jurisdictional matter, the reorganisation of Loewen into a new US corporate entity under the corporate reorganisation laws of the United States meant that there was no longer a proper foreign NAFTA claimant. Second the tribunal ruled that the claimants had not exhausted all of their local remedies because instead of appealing the jury award they negotiated a settlement. Although Loewen claimed that it settled only because of the unrealistic bond, the panel felt that Loewen had not provided adequate evidence to explain its precise reasons for entering into the settlement agreement rather than continuing with its appeals against the jury award.[115]

For this chapter, two points about the decision stand out. First, the result was a failure for the claimant. Secondly, the panel placed extremely onerous

[113] *The Loewen Group, Inc and Raymond L Loewen v United States of America*, Case No ARB(AF)/98/3, Award, 26 June 2003. A final set of arguments related to certain of Ray Loewen's claims was refused: *The Loewen Group, Inc and Ray L Loewen v United States of America*, ICSID Case No. ARB (AF)/98/3, Decision on Respondent's Request for a Supplementary Decision, 13 Sept 2004.

[114] See *The Loewen Group, Inc and Raymond L Loewen v United States of America* (ICSID Case No. ARB (AF)/98/3), Decision of the Arbitral Tribunal on Hearing of Respondent's Objection to Competence and Jurisdiction (5 Jan 2001).

[115] *Loewen*, n 113 above, para 215.

procedural obligations on the claimant in terms of its willingness to hold out for the exhaustion of local remedies and to provide evidence related to its decisions not to do so. The panel seemed to be searching for almost any procedural reason to avoid concluding that the private law process amounted to a violation.

It is hard to believe that these high procedural requirements were the principal reason for the loss by Loewen, given that it had a very strong case. It is tempting to point to many background factors at play, including a growing awareness on the part of the panel of the political controversy of the Chapter (including controversy generated by the *Metalclad* decision), the politics of protest against trade agreements more generally, and a fear of the loss of US support for NAFTA if Loewen had won its case.[116]

In the end, however, it may be that a sense of the role of investment tribunals as only one part of a plural order can be found. In this regard, it is striking to read the comments of the panel with respect to deference at the conclusion of its award.

> A reader following our account of the injustices which were suffered by Loewen and Mr Raymond Loewen in the courts of Mississippi could well be troubled to find that they emerge from the present long and costly proceedings with no remedy at all. What clearer case than the present could there be for the ideals of NAFTA to be given some teeth?
> Subject to explicit international agreement permitting external control or review, these latter responsibilities are for each individual state to regulate according to its own chosen appreciation of the ends of justice …. Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious) will damage both the integrity of the domestic judicial system and the viability of the NAFTA itself. The natural instinct, when someone observes a miscarriage of justice, is to step in and try to put it right, but the interests of the international investing community demand that we must observe the principles which we have been appointed to apply, and stay our hands.[117]

Loewen demonstrates that regulation through private law, even if maligned as economically inefficient or discriminatory against foreigners, may survive quite well under international tribunal review.

II.7 Transnational Comity among Regulatory Orders

The two NAFTA cases signal the kinds of 'conflicts' problems that will increasingly develop among the plural regimes of transnational governance.

[116] The case created a significant stir in US legal circles. See, e.g., A Liptak, 'NAFTA Tribunals Stir U.S. Worries. Obscure Courts Reviewing American Judgments', *New York Times*, 18 Apr 2004, A1.

[117] *Loewen*, n 113 above, at para 242.

Together, the various regimes of transnational governance—including international investment law and national private law regimes—constitute the particular legal pattern of possibilities for transnational social regulation. The different legal regimes can be seen as complementary, provided that the distinctive focus of each can be properly articulated. However, at the level of norms, there may be conflicts, or rather divergences, among the different legal regimes. But the cases also suggest that the different regimes have different *foci*, and this may be an appropriate and productive diversity even among the different regimes. For example, private law regulation co-ordinated through private international law may present a distinctive set of attributes: most generally, in the use and promotion of private contestation of private behaviour, always within the contours of a constructed market and social order.

Given the imperfections of a world of divided jurisdictions in a partially globalised world, the diversity of transnational regimes may need to be tolerated and even encouraged. This will require an outlook, familiar from private international law, that understands the value of both conflict and comity in the relationship among regulatory orders, whether they be public or private, domestic or foreign, or international or transnational.

Section II

Transnational Governance Arrangements for Product Safety

Section II.1

Food Safety Regulation: the SPS Agreement and the Codex Alimentarius

9

Fixing the Codex? Global Food-Safety Governance Under Review

THORSTEN HÜLLER AND MATTHIAS LEONHARD MAIER*

I. INTRODUCTION

TENSIONS BETWEEN THE objectives of free trade, on the one hand, and what we call 'social regulation', on the other, exist in several different policy areas.[1] The earliest cases of open conflict that gained political salience concerned environmental protection, but food safety quickly emerged as an equally important field in which regulation was needed to protect the health and safety of consumers, but might also function as a (intended or unintended) barrier to trade, unless it was harmonised internationally. Unlike in most areas of environmental policy, the international harmonisation of food-safety regulation has had an institutional home since the early 1960s, in the guise of the Codex Alimentarius Commission (CAC) and its specialised subsidiary bodies, jointly established by the UN Food and Agriculture Organisation (FAO) and the World Health Organisation (WHO).[2] During the past three decades, 'the Codex'[3] has actively created a voluminous body of international food-safety regulation—comprising

* We are grateful to Alexia Herwig, Christian Joerges and, in particular, Christiane Gerstetter for helpful comments, as well as to Annedore Leidl for research assistance.

[1] See C Joerges (in this volume) on the notion of 'social regulation' and its origins.

[2] Within the boundaries of this chapter, we cannot give a general introduction to the institutional structure and functions of the Codex. In this regard, see R Merkle, *Der Codex Alimentarius der FAO und WHO: Die Entwicklung von Codex-Standards und deren Auswirkungen auf das Europäische Gemeinschaftsrecht und die nationalen Lebensmittelrechte* (Bayreuth: Verlag PCO, 1994); D Eckert, 'Die neue *Welthandelsordnung* und ihre Bedeutung für den internationalen Verkehr mit Lebensmitteln' (1995) 22 *Zeitschrift für das gesamte Lebensmittelrecht* 363; DG Victor, *Effective Multilateral Regulation of Industrial Activity: Institutions for Policing and Adjusting Binding and Nonbinding Legal Commitments* (Cambridge, Mass: Massachusetts Institute of Technology, 1998), at Chap 6; GG Sander, 'Gesundheitsschutz in der WTO—eine neue Bedeutung des Codex Alimentarius im Lebensmittelrecht?' (2000) 3 *Zeitschrift für europarechtliche Studien* 335; the Codex website at www.codexalimentarius.net also contains useful introductory texts. More specific aspects are highlighted in each part of our problem-oriented analysis.

[3] We use the term 'Codex' to refer to the institutional *ensemble* of the CAC and its subsidiary bodies.

several hundred standards (for particular commodities and food contaminants or toxins), thousands of residue limits (for pesticides and veterinary drugs in foods), and dozens of guidelines and codes of practice (for example, for food hygiene)—with hardly anyone outside the scientific and bureaucratic networks directly involved taking notice.

Since the WTO came to life in 1995 and, in particular, since its Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) entered into force, the hitherto rather quiet life of the Codex has changed significantly.[4] By virtue of being referenced in the SPS Agreement, Codex standards have taken on increased importance in the current world trading system. Accordingly, the Codex has recently received more attention, but the rather critical view of its operation that has traditionally dominated in the scholarly literature does not appear to have changed very much. Thus, arguably, this 'obscure UN agency'[5] suffers from a 'gaping democratic deficit',[6] its mandate is 'contradictory',[7] its decision-making is unduly 'shaped by powerful countries and actors',[8] it is 'unfit to settle politically sensitive issues',[9] and—perhaps most devastatingly—'[p]recisely the types of disasters … and ongoing problems … that Codex was established to prevent are still with us'.[10]

However, if we look more closely at the 'problems that the Codex was established to prevent', it quickly emerges that it faces a formidable set of challenges indeed. Without the awareness of these challenges, any evaluation of Codex's performance is bound to be incomplete at best, and severely biased at worst. To begin with, there is, of course, the eminent goal of protecting the health of food consumers. This goal is immediately joined, however, with that of 'ensuring fair practices in the food trade'.[11] Here, then, we have an international organisation, in the statutes of which the

[4] For an analysis of the changes that the SPS Agreement has brought for the Codex, see Sander, n 2 above; DG Victor, 'The Sanitary and Phytosanitary Agreement of the World Trade Organisation: an Assessment after Five Years' (2000) 32 *New York University Journal of international Law and Politics* 865; F Veggeland and SO Borgen, 'Negotiating International Food Standards: The World Trade Organization's Impact on the Codex Alimentarius Commission' (2005) 18 *Governance* 675; E Boutrif, 'The New Role of Codex Alimentarius in the Context of WTO/SPS Agreement' (2003) 14 *Food Control* 81.

[5] P Bereano and E Peacock, 'To Eat or Not to Eat? An Obscure UN Agency tries to Provide an Answer' (2004) *GRAIN Seedling*, Apr, at 12.

[6] Victor, n 2 above, at 186.

[7] UP Thomas, *The Codex Alimentarius and Environment-related Food Safety: the Functioning of the Global Standards* (Geneva: EcoLomics International, 2004), at 12.

[8] DL Post, 'Standards and Regulatory Capitalism: The Diffusion of Food Safety Standards in Developing Countries' (2005) 598 *Annals of the American Academy of Political and Social Science* 168.

[9] S Poli, 'The European Community and the Adoption of International Food Standards within the Codex Alimentarius Commission' (2004) 10 *European Law Journal* 613 at 630.

[10] L Sklair, 'Democracy and the Transnational Capitalist Class' (2002) 581 *Annals of the American Academy of Political and Social Science* 144 at 150–1.

[11] *Statutes of the Codex Alimentarius Commission*, Art. 1(a) (CAC, *Procedural Manual* (14th edn, Rome: FAO/WHO, 2004), at 3).

task of solving a 'trade and …' issue—trade and consumer health in particular—is explicitly enshrined.[12] And there are further material goals vying for attention, even though they may not be as prominently placed in the official statutes. In particular, Codex members are explicitly entitled to have the implications of standards on their 'economic interests' taken into account.[13] Clearly, this multitude of material objectives also has consequences for the evaluation of the institution's performance. The extent to which international institutions manage to fulfil their original purpose is difficult enough to conceptualise and to measure, even for 'single-issue' institutions such as multilateral environmental regimes or, for that matter, the WTO itself.[14] If several potentially conflicting goals are built into the mandate of an individual organisation, as in the case of Codex, conceptualising problem-solving capacity is an even more daunting task.

In addition to the challenge of reconciling several potentially conflicting material goals, the Codex is also confronted with potentially competing claims for regulatory authority. These claims emanate, on the one hand, from its members, i.e., the nation-states whose preserve the setting of food-safety standards has traditionally been. On the other hand, the point of the FAO/WHO Food Standards Programme, for the implementation of which the Codex was created in the first place, is, of course, the harmonisation of (at least certain kinds of) standards across nations, which, by definition, implies restrictions on their individual room for manoeuvre. This tension is mirrored not least in continuing debates regarding the decision rules to be applied by the Codex.

The allocation of regulatory authority, finally, is contested not only 'vertically', between the levels of governance, but also 'horizontally', between different social groups and the respective types of knowledge which they can claim to represent. Compared to other international organisations, the Codex can, of course, be deemed to represent a 'science-based' model of regulation.[15] At the same time, it is now widely recognised that regulatory

[12] On 'trade … and' issues, see, *inter alia*, JE Alvarez and JP Trachtman, 'Institutional Linkage: Transcending "Trade and …"', (2002) 96 *American Journal of International Law* 77. Clearly, many other international organisations effectively have to deal with similar issues, even if this may remain more implicit.

[13] *Uniform Procedure for the Elaboration of Codex Standards and Related Texts* (hereinafter 'Elaboration Procedures'), Step 3 (Procedural Manual, at 22).

[14] With regard to goal attainment, on environmental regimes, see DG Victor, K Raustiala and EB Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (Laxenburg and Cambridge, Mass: International Institute for Applied Systems Analysis, MIT Press, 1998); EL Miles *et al.*, *Environmental Regime Effectiveness: Confronting Theory with Evidence* (Cambridge, Mass: MIT Press, 2001); on the WTO, see R Blackhurst, 'The Capacity of the WTO to Fulfil Its Mandate' in AO Krueger (ed), *The WTO as an International Organisation* (Chicago, ill: University of Chicaco Press, 1998).

[15] DE Buckingham *et al.*, *The International Co-ordination of Regulatory Approaches to Products of Biotechnology* (Saskatoon: Estey Centre for Law and Economics in International Trade, 1999), at 48.

issues such as food safety tend to be of a 'trans-scientific' nature: scientific knowledge is necessary to address these issues, but, in the end, it is not sufficient to arrive at collectively binding decisions.[16] Consequently, there is not only the possibility of, but also the need for, considerations which are not scientific or which, at least, belong to scientific disciplines other than the hard sciences, to enter regulatory decision-making processes and influence their outcome.

Given this multi-dimensional collection of challenges, an overall assessment of the Codex's performance is not an easy task. And yet such an assessment has recently been performed at the initiative of the Codex and its parent organisations themselves. A wide-ranging 'Evaluation of the Codex Alimentarius and other FAO and WHO food standards work' was completed in December 2002 by an evaluation team of five people—partly internal, partly external to the two organisations—who were supported by a panel of 10 independent experts (hereinafter the 'Codex Evaluation').[17] This Evaluation was conducted on the basis of a broad consultative process, including a survey of stakeholder views through questionnaires and country visits.[18] The findings and recommendations of the Codex Evaluation have since been discussed in, and also partly implemented by, various bodies of the Codex and its parent organisations. The Evaluation thus provides an excellent opportunity to find out which problems are now perceived to exist inside the institutions of global food-safety governance, and whether institutional actors are capable of fixing these self-defined problems.

The issues that are discussed in this chapter largely coincide with, but do not exhaust, those which the Evaluation has addressed, even if the terminology is not always the same.[19] In particular, subsequent sections deal with:

— The *participation* of different groups of actors in Codex decision-making, with regard to differences between various types of member countries (rich and poor, in particular), between governmental and

[16] A Weinberg, 'Science and Trans-Science' (1972) 10 *Minerva* 209.

[17] The Report of the Evaluation (ALINORM 03/25/3) as well as some information on its background is available at http://www.codexalimentarius.net/web/evaluation_en.jsp (all websites referenced in this chapter were last accessed in Sept 2005). The FAO and WHO started a second, related evaluation exercise (a 'consultative process') in 2003 with regard to the *Provision of Scientific Advice to Codex and Member Countries*. Completion of this process was halted, however, until after the end of the Codex evaluation. Its recommendations (contained in the report of a Jan 2004 workshop, available at ftp://ftp.fao.org/docrep/fao/007/y5388e/y5388e00.pdf) are only beginning to be discussed. The consultative process will be concluded in 2006 with an expert or intergovernmental meeting to prepare specific options for consideration by the FAO and WHO: see 28th Meeting of the CAC (hereinafter 'CAC28'—other meetings of the CAC and its subsidiary committees are abbreviated analogously), Report (ALINORM 05/28/41), para 223.

[18] Evaluation Report, n 17 above, Annex 7 ('Methodology of the Evaluation').

[19] Our most significant omissions from the set of issues addressed in the Evaluation are, first, the formal adoption of standards by Codex members and, secondly, capacity building (touched upon briefly below in the text to n 46).

non-governmental actors, and between different sorts of non-governmental organisations (II);
— the types of knowledge that are used in the *justification* of Codex standards, with regard to different kinds of scientific knowledge (physical and economic, in particular) as well as non-scientific normative arguments (expressive and evaluative concerns) (III); and
— the *decision rules* which are applied in the Codex and its subsidiaries (to the extent that they can be inferred from available sources) (IV).

The concluding section summarises our findings and relates them back to more abstract normative criteria of evaluation.

II. PARTICIPATION: GOVERNMENTAL AND NON-GOVERNMENTAL ACTORS

The 2005 plenary session of the Codex Commission was attended by more than 500 people, representing the governments of 120 members and some 30 international governmental and non-governmental organisations which have observer status at the Codex.[20] Figures such as these may seem to suggest a relatively broadly based participation in Codex decision-making, generally speaking. And yet some of the heaviest criticism directed at the Codex concerns alleged biases in representation. Thus, *members* from amongst the poor countries are said to be seriously under-represented in relation to the rich countries, just as among *observers*, public interest groups are allegedly seriously under-represented in relation to representatives of industry.[21] But are these allegations valid?

In trying to answer this question, we have to bear in mind that different subsidiary bodies within the Codex may vary substantially with regard to the representation of a particular group. At the time of writing, the Codex has 23 active subsidiaries dealing with (a) specific types of products ('vertical' or commodity committees), (b) 'horizontal' issues, such as food hygiene or labelling, which are of relevance to all kinds of products (general subject committees), or (c) groups of countries (regional co-ordinating committees).[22] In addition, there are (d) currently three '*ad hoc* intergovernmental task forces'—for example, on food derived from

[20] CAC28, Report, n 17 above. These are the figures which result from the list of participants (App I). The actual Report (para 1) mentions somewhat higher figures for participants, but it remains unclear what may explain this difference.

[21] See below for specific references. Membership of Codex is open to all members and associate members of FAO and WHO: see *Statutes of the Codex Alimentarius Commission* (Procedural Manual, at 3–5), para 2. The only other official category of participation is that of 'Observer Status'.

[22] See http://www.codexalimentarius.net/web/committees.jsp. Committees are generally hosted and supported in financial and administrative terms by individual member governments, with the small Codex Secretariat, based at FAO headquarters in Rome, merely co-ordinating the activities.

bio-technology—with more limited terms of reference and established for a fixed period of time. For our present purposes, we focus mainly on the Codex Alimentarius Commission itself, without whose consent no Codex standard can be adopted, and (with regard to NGO participation) on its Executive Committee, drawing selectively on pertinent analyses of other committees where they exist.

II.1 Rich and Poor States as Members

When it was founded in 1962, the Codex had no more than 38 member countries.[23] At the time of writing (autumn 2005), there are 173 members—172 countries and the EC as a 'member organisation'.[24] Current membership represents 98 per cent of the world's population according to an official estimate.[25] Quite clearly, however, being a member is not the same as actually participating in—much less exerting influence on—Codex decision-making. It is true that the number of delegations attending Codex meetings has risen steadily in line with its expanding membership, especially with regard to developing countries.[26] However, as we have already noted, approximately 30 per cent of all members still do not even send representatives to plenary meetings of the Codex Commission.[27] As one would expect, the proportion of members who are represented at the meetings is highest among the richest members. However, the difference between countries on different income levels is not as big as one might have thought, and it has become smaller in the past 10 years (see Table 1). Thus, at least with regard to physical presence at Codex meetings, denouncing Codex as a 'rich-nations club'[28] is exaggerated.

In itself, the presence of a member at a meeting does not tell us much about its actual influence. Conversely, however, it is certainly very difficult for a member to exert influence *without* being present in the highest decision-making body, so that the issue of CAC attendance, as such, is not without importance. Still, more interesting than mere attendance rates is the question who actually shapes the substance of Codex decisions. Actual influence is also much more difficult to measure, though. In many instances that have been investigated to date, the making of Codex standards and

[23] Consumer International, *Codex Alimentarius for Consumers*, (London: Consumers International, 2000), at 19.

[24] See http://www.codexalimentarius.net/web/members.jsp. For the sake of simplicity, we will use the terms 'member states' and 'governments' to include the EC as well.

[25] FAO/WHO, *Understanding the Codex Alimentarius* (Rome: FAO/WHO, 2005), at 14, available at: http://www.fao.org/documents/show_cdr.asp?url_file=/docrep/008/y7867e/y7867e00.htm.

[26] Rising attendance is documented in FAO/WHO, n 25 above, at Sect. IV ('The Codex System').

[27] See text at n 20 above. Ten years ago, this figure was close to 40%: see Victor, n 2 above, at 183, referring to the 21st session of the CAC in 1995.

[28] CI n 23 above, at 72, citing an anonymous observer.

Table 1: Participation of rich and poor member states in the Codex, 1995 and 2005

Income (GNP per capita)	Members (1995)	Represented at CAC (1995)	Members (2005)	Represented at CAC (2005)
High	29	83%	36	86%
Upper middle	27	59%	37	59%
Lower middle	41	59%	47	72%
Low	43	53%	53	58%
Total	147[29]	64%	173[30]	69%

Source: CAC meeting reports; World Bank country classification (gross national income *per capita*, 2004 and 1995 data).

guidelines has been dominated by the United States on the one hand, and the EU and its Member States on the other, with countries from other regions of the world playing only a secondary role as allies to one or the other camp.[31] But it is not at all clear to what extent the cases analysed in these studies are representative of the Codex process at large.

If rich countries do, indeed, dominate Codex decision-making under certain conditions, this may even also help the protection of consumer health in developing countries.[32] From a democratic point of view, however, such an imbalance would be problematical, quite independently of its net health effects. And indeed, in recent discussions of Codex reform, the issue of how to improve the participation of the poorer member countries is clearly among the most salient ones. It is one of the four 'main areas for improvement' identified in the 2002 Evaluation.[33]

How could such an improvement be achieved? Money clearly matters. According to the developing countries which participated in the evaluation survey, lack of the financial resources necessary to attend meetings is the

[29] The total number is higher than the sum of those in the four income categories because it includes 7 member states for which income data are not available.

[30] The EC as the sole member organisation is included in the total number of members but not in the breakdown by income level.

[31] A König, 'Negotiating the Precautionary Principle: Regulatory and Institutional Roots of Divergent US and EU Positions' (2002) 4 *International Journal of Biotechnology* 61, on the precautionary principle; Poli, n 9 above, on principles for risk analysis; Post, n 8 above, on food-additive standards; Thomas, n 7 above, on labelling of transgenic foods.

[32] It may help in so far as in highly developed countries the average level of health protection is generally higher too, and these countries will often strive to 'upload' their own stringent standards to the international level. However, consumers in developing countries will benefit from the international diffusion of high standards only if these countries still succeed in exporting their food products—and impeding such exports will of course in many cases be a welcome side-effect, if not part of the purpose, of imposing high standards on all Codex members.

[33] A second area, 'capacity building for development of national food control systems' indirectly also relates to the inclusion of developing countries (see below). The remaining areas concern the speed and the relevance of Codex standards and of the expert advice on which they are based (Evaluation Report—Executive Summary, n 17 above, para. 7).

main barrier to their fuller participation.[34] The Evaluation contains several proposals on how to alleviate the financial burden, such as informal co-ordination and the joint presentation of the positions of groups of countries with common interests, the co-chairing of meetings by a developed and a developing country, and stronger reliance on written procedures or working groups between actual committee meetings.[35] In the meantime, guidelines on both physical and electronic working groups have been adopted.[36] Co-chairmanship of meetings is currently being tested in some committees and the CAC has encouraged other committees to consider this practice as well.[37] By contrast, the Evaluation's cautious attempt to enable the semi-official formation of country groupings was rejected.[38]

In parallel to the Codex Evaluation, financial constraints were addressed more directly by the FAO and the WHO, when they jointly established a so-called Trust Fund, with the objective of 'help[ing] developing countries and those with economies in transition to enhance their level of effective participation in the development of global food safety and quality standards by the Codex Alimentarius Commission'.[39] Over a 12-year period, US$ 40 million are supposed to be contributed from high-income member countries for this purpose. Codex members that belong to one of the lower three World Bank categories of *per capita* national income are generally eligible to seek financial support from the Trust Fund[40]—a total of 137 countries in 2005 (see Table 1 above). In order to qualify for actual funding, however, applicants need to fulfil a set of additional criteria regarding their national food-safety and trade policies and relevant administrative infrastructure.[41] Some delegations have expressed concern that these criteria will exclude precisely the countries which are most in need of support.[42] While eligibility criteria currently continue to be under critical scrutiny,[43]

[34] Evaluation Report n 17 above, para 139.

[35] Ibid., paras 121–125, 141–143. The recommendation to increase work between sessions is mainly aimed at increasing the speed of Codex decision-making but can perhaps help to facilitate developing-country participation, too, to the extent that access to appropriate means of communication is guaranteed.

[36] CAC28, Report, n 17 above, para. 41 and App IV.

[37] Ibid., para 124. As a case in point, the 27th session of the Codex Committee on Nutrition and Food for Special Dietary Purposes (CCNFSDU), held in Bonn, Germany, in Nov 2005, was co-chaired by Thailand, and the 28th session in 2006 will be held in Thailand under the same arrangement.

[38] Ibid., para 126. Reasons for the rejection of this proposal are not given in the meeting report.

[39] *FAO/WHO Project and Fund for Enhanced Participation in Codex—Progress Report* (ALINORM 03/25/4), para 2. The Codex Trust Fund was officially launched at the CAC's 25th session in 2003 (see ALINORM 03/25/5, para 49); see, generally: http://www.who.int/foodsafety/codex/trustfund/en/index.html.

[40] *FAO/WHO*, n 39 above, para 17 and Annex 2.

[41] Ibid., para 18.

[42] CAC25, Report, n 39 above, para 42.

[43] CAC28, Report, n 17 above, para 216.

by the end of 2005, about 250 participants from 90 countries will actually have received support for attending Codex meetings.[44]

As the debate over administrative preconditions for benefiting from Trust Fund support indicates, effective member participation in Codex decision-making ultimately depends on domestic policy-making capacities: a country will not gain much from attending a meeting if it lacks the capacity to formulate a meaningful position of its own. Relevant capacity-building activities are carried out mainly by the FAO and the WHO, rather than by the Codex itself.[45] Both parent organisations are also involved in the establishment of an inter-agency programme for capacity-building and technical assistance specifically with regard to sanitary and phytosanitary measures, called the Standards and Trade Development Facility (STDF), which is initially funded by the World Bank and administered by the WTO in connection with the Doha Development Agenda.[46] We may conclude that the extent to which developing countries are disadvantaged in Codex decision-making is difficult to gauge, but members perceive a problem in this regard, and several efforts are now underway to tackle this issue, even if it is too early to tell with any degree of confidence to what extent these efforts are likely to succeed.

II.2 Private and Public Interest Groups as Observers

Important as it may be, more equal representation of rich and poor countries in itself will hardly suffice to placate concerns about the Codex's lack of democratic credentials. An additional source of legitimacy, which it is worthwhile for the Codex to tap into, is the participation of non-governmental organisations (NGOs).[47] Over the years, several analysts have criticised the Codex for not granting adequate access to different stakeholders, especially with regard to 'public interest' groups.[48] The 2002 Evaluation

[44] *FAO/WHO Project and Fund for Enhanced Participation in Codex—Sixth Progress Report, July–December 2005* (CC/EXEC 05/57/6). The actual amount of contributions received (roughly US$ 3 million over the first three years) indicates that the Trust Fund will have difficulties reaching its $40 million target. Nevertheless, the report of a July 2005 information meeting mentions 'an overall high level of satisfaction with its current operations': http://www.who.int/foodsafety/codex/meeting_july2005.pdf.

[45] Evaluation Report, n 17 above, paras 221–238.

[46] See, generally, http://www.standardsfacility.org.

[47] On potential advantages of NGO participation in international governance see, more generally, J Steffek and C Kissling as well as P Nanz (in this volume). In addition to non-governmental organisations, other international *governmental* organisations (IGOs) can also obtain observer status in Codex. More than 60 IGOs, including other UN subsidiaries as well as many regional associations, are currently registered in this capacity. Although their interaction with Codex is obviously an important issue, not least with regard to the overall coherence of global food-safety governance, we neglect IGOs here for reasons of space.

[48] N Avery, M Drake and T Lang, *Cracking the Codex: An Analysis of Who Sets World Food Standards* (London: National Food Alliance, 1993); Sklair, n 10 above; M Powell, *Science in Sanitary and Phytosanitary Dispute Resolution* (Washington, DC: Resources for the

Report is much more positive in this respect, heralding the Codex as 'an example of good practice in terms of its relations with NGOs and its willingness to accept their input into its work'.[49] As in the case of participation by member governments, for a balanced assessment, we have to be clear about the criteria of evaluation: are we concerned with formal opportunities for participation, with the extent to which these opportunities are actually used, or with the effects of their use in terms of substantive outcomes?[50] In what follows, we focus in particular on the first aspect.

Apart from the special case of the Executive Committee (see below), formal barriers to interest group participation can be considered to be relatively low in the Codex—especially when compared to the WTO.[51] Not least, the complex procedure for elaborating Codex standards has always provided opportunities for the consultation not only of member governments, but also of non-governmental stakeholders. Only relatively recently, however, has the Codex adopted a set of formal *Principles Concerning the Participation of International Non-governmental Organizations in the Work of the Codex Alimentarius Commission*.[52] According to these Principles, all international NGOs that have official status at either the FAO or the WHO are eligible for Observer Status at the Codex; all others have to fulfil a number of (relatively general) criteria to obtain this status, including an 'international … structure and scope of activity' and the possibility for members of the organisation to vote on its policies or otherwise 'express their views'.[53] Organisations with Observer Status are entitled to send a representative without voting rights to Codex meetings (including CAC and its various subsidiaries), to submit their views in writing to these bodies, and to participate in discussions at the invitation of the chair.[54] Compared to other international organisations, this can be considered to be a relatively high level of accessibility.[55]

Future, 1997); L Rosman, 'Public Participation in International Pesticide Regulation: When the Codex Commission Decides, Who Will Listen?' (1993) 12 *Virginia Environmental Law Journal* 329; A Herwig, 'Transnational Governance Regimes for Foods Derived from Biotechnology and their Legitimacy' in G Teubner (ed), *Transnational Governance and Constitutionalism* (Oxford: Hart Publishing, 2004); S Suppan, 'Governance in the Codex Alimentarius Commission' in Consumers International (ed), *Decision Making in the Global Market: Trade, Standards and the Consumer* (London: Consumers International, 2005).

[49] Evaluation Report, n 17 above, para 146.

[50] See P Nanz and J Steffek, 'Assessing the Democratic Quality of Deliberation in International Governance: Criteria and Research Strategies' (2005) 40 *Acta Politica* 368 for a similar set of criteria against which NGO participation in international governance can be assessed.

[51] On the WTO, see J Steffek and C Kissling (in this volume).

[52] Hereafter, 'NGO Principles'; adopted at the 23rd session of the CAC (1999); now included in the *Procedural Manual*, n 11 above, at 62–66. Prior to the adoption of the NGO Principles, relevant provisions of the FAO and WHO statutes were to be applied: see *Rules of Procedure of the Codex Alimentarius Commission,* Rule VIII.4–5 (*Procedural Manual*, at 13).

[53] NGO Principles, n 52 above, sect 3.

[54] Ibid., sect 5(1).

[55] Measured on the scale proposed by Nanz and Steffek, n 50 above, at 375.

When the Principles were adopted in 1999, some 120 NGOs were registered as having Observer Status with the Commission.[56] By 2005, this number had risen to 156.[57] More important than their formal status as observers is, of course, the actual participation in Codex meetings, and it is in this respect that many members are increasingly concerned, expressing fears that 'the time could come when [observers] outnumber official delegations' in particular meetings.[58] At present, this concern still appears exaggerated, even if the number of observers participating in CAC meetings has indeed risen more strongly (from 20 to 30, i.e., by 50 per cent) than that of members (from 94 to 120, i.e., by less than 30 per cent) in the last 10 years.[59] Nevertheless, the issue of meetings being overwhelmed by observers is now on the table. When the NGO Principles were negotiated, a proposal to admit only one (umbrella) organisation from each field was already discussed, but was ultimately rejected by the majority of members.[60] The Evaluation now focuses on another way of tightening criteria for NGO participation, by demanding that observers be 'genuinely international'.[61] In the most recent revision of the Principles, this recommendation is implemented to the effect that NGOs must have members and be active in at least three different countries if they want to obtain Observer Status.[62]

It may thus become somewhat harder in the future, especially for regional NGOs, to obtain the right to participate in Codex meetings.[63] On another front, however, the Codex Evaluation recommended increasing the opportunities for NGO participation, namely, with regard to the Codex Commission Executive Committee (CCEXEC), which acts on behalf of the CAC between its now annual (formerly biannual) meetings. Traditionally, the Executive Committee has been composed of the CAC Chairperson and three Vice-Chairpersons together with seven further members, elected from among Codex members and representing different geographic regions. The Committee's tasks are to 'make proposals to the Commission regarding the general orientation and programme of work of the Commission, study special problems and help implement the programme as approved by the

[56] *Report by the Secretariat on Relations between the Codex Alimentarius Commission and International Non-Governmental Organizations* (ALINORM 01/8, Part II), para 2. We follow the Codex terminology in including not only 'public interest' groups (e.g., consumer organisations) but also industry organisations under the heading of 'NGOs'. For differences between their respective roles in Codex see below.

[57] *International Non-governmental Organisations in Observer Status with the Codex Alimentarius Commission*, Report by the Secretariat (CAC/28 INF/1), Annex I.

[58] Evaluation Report, n 17 above, para 147.

[59] Our own calculation, based on the official reports from the 1995 and 2005 sessions of the CAC (ALINORM 95/37 and ALINORM 05/28/41).

[60] Codex Committee on General Principles (CCGP)14, Report (ALINORM 99/33A), para 87.

[61] Evaluation Report, n 17 above, Recommendation 27.

[62] CAC28, n 17 above, Report (ALINORM 05/28/41), App IV.

[63] See, also, Suppan, n 48 above, at 89.

Commission'.[64] Since 1993, the CCEXEC has also been charged with deciding on new areas of work, and advancing drafts from step 5 to step 6 of the eight-step standards-development procedure (i.e., deciding that the draft standard is ready to be finalised).[65] The Executive Committee thus exercises a number of important 'substantive' functions, especially in the process of standard elaboration.[66]

Based on an allegedly widespread perception among Codex members, according to which the Executive Committee is 'too large to be a strategic management board yet not sufficiently transparent (no observers) and not sufficiently representative to be allowed to consider standards',[67] the Evaluation recommends replacing the CCEXEC with an Executive Board, which, instead of considering standards, would focus exclusively on strategic planning and budgeting, and delegating the management of standards development to another separate body.[68] Unlike in the present Executive Committee, in any future Executive Board, observers were supposed to be represented, too.[69] The members, however, could not agree on the creation of the new bodies recommended by the Evaluation, and the option of active observer participation in the existing Executive Committee was also rejected as compromising the efficiency of its proceedings.[70] Current discussions focus on potential ways of increasing CCEXEC transparency instead of participation.[71] In particular, the feasibility of webcasting the Committee proceedings is currently being explored.[72]

The discussion so far has considered NGOs regardless of their specific tasks and membership. It is probably fair to say, however, that most of the Codex's critics are concerned less with the overall participation of civil-society organisations than with alleged imbalances in the relative weight of

[64] Rules of Procedure, Rule IV.2 (*Procedural Manual*, at 9).

[65] ALINORM 03/26/11, Addendum 2: *Review of the functions of the Executive Committee*, para 2. On more recent additions to CCEXEC's tasks, see, text at n 98 below.

[66] *Considerations of the status of observers in the Executive Committee* (CX/GP 04/21/6), para 25.

[67] Evaluation Report, n 17 above, para 93.

[68] Ibid., paras 94–99. Even before the Evaluation, the composition and working procedures of CCEXEC had been the subject of discussions among Codex members over several years, without agreement being reached. See, in particular, the Report of the 16th session of the Committee on General Principles (CCGP) in 2001 (ALINORM 01/33A, paras 103–113).

[69] Evaluation Report, n 17 above, para 148.

[70] CCGP19, Report (ALINORM 04/27/33), para 45.

[71] Transparency can be considered a precondition of participation but is obviously not the same. Apart from CCEXEC, the meetings of Codex subsidiaries are generally open to the public, unless a committee explicitly decides otherwise: see *Guidelines on the Conduct of Meetings of Codex Committees and Ad hoc Intergovernmental Task Forces*, (*Procedural Manual*, at 55). In practice, however, 'the public' mainly consists of 'occasional members of the food trade press or academics investigating standards issues': see Suppan, n 48 above, at 90.

[72] CAC28, Report, n 17 above, para 122. Audio recordings of the 2005 meeting of the Codex Commission itself have already been made available on an experimental basis on the Codex website.

industry and trade organisations on the one hand, and what is often called 'public interest' groups (in particular consumer organisations) on the other.[73] And, indeed, among the 156 NGOs currently in observer status at the Codex, more than 100 can clearly be categorised as representing the interests of food producers (agriculture and industry) or traders.[74] The remainder mainly comprise scientific and professional organisations, while only 10 organisations represent consumer, health or environmental interests.[75] If we look more specifically at the NGOs which actually attend CAC meetings, the pattern is very similar.[76] The bias is, in fact, even stronger if we take into account the size of delegations. Only one consumer organisation sent more than one person to the 2005 session of the CAC, while the same was true of about half the industry organisations, seven of which had three or more people on their teams and thus more than most national delegations.[77]

For social scientists, it is almost a truism that the 'diffuse' interests of consumers (just like those of women, say, or of the environment) are more difficult to organise and represent politically than commercial interests. Meanwhile, more specific reasons for the dominance of commercial interests among Codex observers can also be found. For one thing, close links with industry have deep roots in Codex history; in early years, the practice was even for member delegations to be directly sponsored by industry.[78] For another, consumer organisations themselves acknowledge that 'the food industry employs the best scientists',[79] which is clearly an important asset in the science-centred Codex process—notwithstanding the emphasis that

[73] See n 48 above. We use the expression 'public interest' simply as a shorthand for non-commercial interests, without prejudice as to the worthiness of different groups' goals.

[74] Also with regard to NGOs' origins in different parts of the world, it is doubtful that Codex member countries and regions are more or less proportionally represented. Many of the NGOs in observer status are of a merely regional origin, and are mainly from the developed parts of the world—about one third, for example, is of purely European origin (own calculations, based on information provided on the Codex website at http://www.codexalimentarius.net/web/organizations.jsp and on additional research).

[75] Ibid.

[76] Our focus on the Commission itself probably leads us to underestimate the overall bias in favour of industry. Thus the global umbrella organisation of consumer interest groups, Consumers International, covers only about half of all Codex bodies in its work; see Suppan, n 48 above, at 83. Rosman, n 48, above, at 346, citing an unpublished paper by Tim Lang, reports that only two of 73 NGO participants attending the 1991 meeting of the Codex Committee on Pesticide Residues (CCPR) represented consumer interests.

[77] The median national delegation consisted of 2 persons among those member countries who attended the meeting. See CAC28, Report, n 17 above.

[78] See Victor, n 2 above. Also, for historical reasons, in the exceptional case of dairy products an industry association (the International Dairy Federation—IDF) still enjoys the right to make specific recommendations for maximum limits of relevant veterinary drugs, by analogy to the recommendations made for other products by the joint FAO/WHO expert meetings. See *Procedures for the Elaboration of Codex Standards and Related Texts*, P 3, para 2 (*Procedural Manual*, at 22). The elaboration procedure is discussed at more detail below: see Section III.1.

[79] CI, n 23 above, at 71.

is constantly put upon the distinction between (scientific) risk assessment and (political) risk management.[80] Last but not least, there are also close personal ties between the food industry and public officials in this field, so that, in some cases, industry organisations with observer status at the Codex also employ former government officials and even former delegates to Codex meetings.[81]

For whatever reason, a large majority of Codex members does not perceive blatant biases in the representation of different social groups to be a problem as such.[82] However, if the criteria for NGO participation are tightened in the direction of greater representativeness, as discussed in the Evaluation Report, this may indirectly help to alleviate the existing industry bias.[83] More demanding, but potentially very effective, would be some kind of reason-giving requirement for Codex committees with respect to NGOs claims, especially at the level of agenda-setting and strategic planning, but also in risk management in the strict sense. So far associations have a right to participate and to speak, but nobody has a corresponding formal duty to respond to the claims of NGOs within Codex meetings.[84]

For a complete picture of how different interest groups influence Codex decisions, we would have to take into account not only multilateral negotiating bodies (i.e., the CAC and its subsidiaries), but also individual member state governments as the potential targets of NGO participation. At the discretion of member country governments, NGO representatives can attend Codex meetings as part of a member's official delegation. More commonly, NGO participation at the domestic level will take indirect forms of either lobbying the government agency in charge of external food-safety policy or trying to influence national public opinion via the news media. A separate study would be needed, however, to analyse the widely varying opportunity structures for these forms of participation as they prevail in the different Codex members, especially if we are interested not only in

[80] See Sect III.1.below. At the same time, given the extent to which the respective roles of science and of 'other legitimate factors' are indeed contested within Codex (Sect III.3. below), it would be too simple to attribute the relatively low level of consumer group participation mainly to an anticipated lack of influence due to missing scientific expertise, as Victor, n 2 above, at 201 suggests.

[81] CI, n 23 above, at 23.

[82] More than 80% express medium or high overall satisfaction with Codex's inclusiveness (scoring 4 or higher on a seven-point scale from 'low' to 'high'; see Evaluation Report, Annex IV, Table 11)—although it does not become quite clear what 'inclusiveness' means in this context.

[83] On the tightening of criteria, see, text to nn 61 and 63 above.

[84] A reason-giving requirement would 'neutralise' quantitative inequalities in the representation of different views, as long as a certain view were expressed by anyone at all. On this point see the discussion of equality in deliberative processes in T Christiano, 'Deliberative Equality and Democratic Order' in I Shapiro and R Hardin, *Political Order. Nomos XXXVII* (New York & London: New York UP, 1996), at 258–261.

formal consultation mechanisms, but also in which groups manage to have their views reflected in substantive policy positions.[85]

III. JUSTIFICATION: SCIENCE AND POLITICS

In the perception of many people, the operation of the Codex is closely associated with an outstanding role for science—in the sense of the hard physical sciences—in international governance.[86] On the one hand, this seems almost obvious, given the nature of the issues with which the Codex is concerned. It is hard to imagine how food-safety standards could possibly be set without a basis in the expert knowledge of chemists, physicians, toxicologists, veterinary surgeons, food-technology engineers, etc. On the other hand, the actual standard-setting in the CAC and its subsidiaries is done by member state delegates, many of whom may be trained in one of the sciences, but all of whom are first and foremost the representatives of their respective governments. Both points of view are correct, of course: science is an indispensable and often predominant ingredient in Codex policy-making, which nonetheless remains a political enterprise in crucial ways. The interesting (and highly contested) question is how scientific and other sorts of justification are (or should be) related to each other in the process. A common way to address this question both conceptually and institutionally is in terms of the general distinction between 'risk assessment' (RA) and 'risk management' (RM). We begin below by reviewing the application of this distinction to the Codex process (Section III.1). Subsequently, from among the various kinds of criticism which have been directed at the RA–RM distinction, we take up two which appear be particularly relevant for the Codex, namely, the way scientific uncertainty is dealt with (Section III.2) and the possibilities for openly non-scientific considerations to enter the standard-setting process (Section III.3).

III.1 Risk Assessment and Risk Management

The relationship between science and politics in risk regulation is now commonly conceived of in terms of the conceptual distinction between risk

[85] To some extent, the opportunities for participation in individual countries' *external* food-safety policy (i.e., their Codex activities) can probably be inferred from corresponding opportunities in the *domestic* policy process. The latter have been identified as important sources of EC–US differences, e.g., in the regulation of transgenic foods: see G. Skogstad, 'The WTO and Food Safety Regulatory Policy Innovation in the European Union' (2001) 39 *Journal of Common Market Studies,* 485; T Bernauer, *Genes, Trade, and Regulation: The Seeds of Conflict in Food Biotechnology* (Princeton, NJ: Princeton UP, 2003); AR Young, 'Political Transfer and 'Trading Up'? Transatlantic Trade in Genetically Modified Food and U.S. Politics' (2003) 55 *World Politics* 457.

[86] The self-perception of the Codex is no different in this regard: '[f]rom the very beginning, the Codex Alimentarius has been a science-based activity': see *Understanding the Codex Alimentarius*, n 26 above, at 21.

assessment (RA) and risk management (RM).[87] At first sight at least, the Codex process appears as a particularly faithful image of the RA–RM distinction, given that the standard-setting work of Codex committees (RM) has always been separated from the provision of scientific advice to the Codex by the various expert committees and consultations (RA). The expert bodies carrying out risk assessments are institutionally independent of the Codex and operate directly under the aegis of the FAO and the WHO. At present, there are three permanent bodies producing scientific advice for the Codex (and for its members), namely, the Joint Expert Committee on Food Additives (JECFA), the Joint Meetings on Pesticide Residues (JMPR), and the Joint Expert Meetings on Microbiological Risk Assessment (JEMRA).[88] This arrangement may once have been a rare case of independence in the provision of scientific advice, but it is a model which has also recently been adopted or strengthened in many nation-states as well as in the EC.[89]

In its *Working Principles for Risk Analysis*, adopted after five years of negotiation in 2003, the Codex has explicitly recognised and refined the application of the RA–RM distinction to its operations.[90] The Principles do recognise, however, that in the process of elaborating Codex standards the FAO/WHO expert committees and the CAC or its subsidiary committees interact in several ways; and the 2002 Evaluation also addresses some of the issues that emerge in the context of these interactions. In what

[87] Risk assessment, risk management and—as the third element—'risk communication' jointly constitute the process of 'risk analysis' in this terminology.

[88] JECFA and JMPR have been in operation for several decades (JECFA actually longer than the Codex itself), whereas JEMRA began as a series of consultations only in 2000. We refer to these three as 'the expert committees' in what follows. In addition to these committees, *ad hoc* expert consultations are organised, usually once a year, to cover a variety of issues on a non-permanent basis, e.g., risk analysis, risk management and risk communication in food safety (1995, 1997, 1998), various safety aspects of genetically modified foods (2000, 2001 and 2003) or—more rarely—specific newly emerging hazards such as acrylamide (2002).

[89] For relevant institutional developments on the national and European level, see, in a comparative perspective, J Falke with K Plett, *Institutionen zur Risikobewertung und zum Risikomanagement im In- und Ausland: Analyse der vorhandenen Konzepte, Umsetzung und Erfahrungen über den Aufbau solcher Institutionen sowie daraus zu ziehende Schlussfolgerungen* (Bremen: Zentrum für Europäische Rechtspolitik an der Universität Bremen, 2002); E Millstone and P van Zwanenberg, 'The Evolution of Food Safety Policy-making Institutions in the UK, EU and Codex Alimentarius' (2002) 36 *Social Policy & Administration* 593.

[90] *Working Principles for Risk Analysis for Application in the Framework of the Codex Alimentarius* (hereinafter 'Risk Analysis Principles', *Procedural Manual*, at 101–7), para 3 and *passim*. On the negotiating history of the Principles see C Gerstetter and ML Maier, *Risk Regulation, Trade and Internationa Law: Debating the Precautionary Principle in and around the WTO* (Bremen: Sfb 'Staatlichkeit im Wandel', 2005). According to Thomas, n 7 above, at 13, the Principles are 'the most detailed presentation of the risk analysis process that a multilateral organization has ever produced'. A second set of risk analysis principles for application by *member* governments is currently still in the process of being negotiatied (see CCGP 22, Report (ALINORM 05/28/33A), paras 31–54). An earlier, but much less elaborate, recognition of the RA–RM distinction for the purposes of the Codex is contained in the four brief *Statements of Principle Relating to the Role of Food Safety Risk Assessment*, adopted in 1997 (*Procedural Manual*, at 190, esp. Statement no. 3).

follows, we attempt to situate these issues in a broad outline of the process in which the Codex and the the FAO/WHO expert committees prepare and elaborate standards.

(1) Expert committees receive requests to investigate the health risks of particular substances from Codex committees.[91] In general, these requests are guided by the overall aims of the FAO/WHO food-safety standard-setting programme and by the Strategic Framework[92] of the Codex, but, in practice, the lack of clear priorities at this step has emerged as problematical.[93] It creates difficulties not least in so far as the temporal and financial resources of experts committees tend to be overstrained.[94] Apart from increasing the overall number of resources available for risk assessment, the Evaluation recommends a certain degree of centralisation in managing the provision of scientific advice.[95] The implementation of these recommendations was adjourned until after the completion of the FAO/WHO Consultative Process dealing specifically with the provision of scientific advice.[96] The recommendations formulated so far in this process, however, aim in a direction similar to that of the Evaluation.[97] No matter what kind of institutional solution is chosen in the end, the interaction between risk managers and risk assessors is likely to increase as a consequence. In the meantime, the Codex has supplemented its Elaboration Procedures with a section on 'Critical Review', entrusting the Executive Committee *inter alia* with the

[91] In the field of pesticide residues, there is a one-to-one relation between a specialised (horizontal) Codex committee and JMPR. JECFA receives requests for scientific advice from the Codex Committees on both Food Additives and Contaminants and Residues of Veterinary Drugs in Food. JEMRA provides expertise to the Codex Committee on Food Hygiene but also to commodity committees such as the one on fish (see Evaluation Report, n 17 above, paras 163–5). Generally speaking, the Codex's general subject committees are more strongly dependent on independent scientific advice than its commodity committees (on the distinction, see text at n 22 above); the latter rely largely on industry for expertise; see Victor, n 2 above, at 180.

[92] The current version of the Strategic Framework was adopted by the CAC in 2001 and covers the period from 2003 to 2007. Its implementation was supposed to be the subject of a medium-term plan of a action covering the same period, but the elaboration of this plan was first suspended until after completion of the Evaluation (CAC26, Report (ALINORM 03/41), para 8) and then discontinued altogether, with the understanding that existing elements would be incorporated in a new Strategic Plan covering the years 2008–2013 (CAC27, Report (ALINORM 04/27/41), para. 121).

[93] Evaluation Report, n 17 above, paras 172–181.

[94] According to a discussion paper produced for the Codex Committee on Pesticide Residues (cited in the Evaluation Report, n 17 above para 178), in JMPR, it takes between 4 and 8 years from the nomination of a pesticide for assessment to a proposal for maximum residue levels. The problem is exacerbated by the need regularly to re-evaluate existing standards for those ca. 250 pesticides which have been assessed in the past (see para 177).

[95] Evaluation Report, n 17 above, paras. 197–199.

[96] On the Consultative Process, see n 17 above.

[97] See the FAO/WHO workshop report, n 17 above, at 9–14. The restructuring of Codex committees and their mandates, which is currently being discussed as another result of the Evaluation and a subsequent consultancy study, will also have an impact on the kind of scientific advice which Codex needs (see Evaluation Report, n 17, above, paras 108–115).

'identification of any requirement for and availability of expert scientific advice'.[98]

(2) In addition to identifying potential hazards for which an RA is to be performed, risk managers—i.e., the CAC and the specialised Codex committees—are also supposed to formulate a 'risk assessment *policy*', so as to ensure 'that the risk assessment is systematic, complete, unbiased and transparent'.[99] Apart from generally providing risk assessors with a clear mandate (paragraph 15), this may involve asking them 'to evaluate the potential changes in risk resulting from different risk management options' (paragraph 16). Although the Risk Analysis Principles remain relatively vague in this respect, the explicit recognition of the need for an RA policy in the Codex is remarkable. Several analysts have noted that RA is necessarily guided by assumptions that cannot be justified on purely scientific grounds, and that it is preferable for these assumptions to be part of an explicit policy—sometimes also referred to as 'science policy'—made by politically accountable risk managers, rather than being implicitly made by risk assessors.[100] To the extent that different (implicit) RA policies underlie international conflicts over appropriate risk regulation, agreement within the Codex on a common RA policy should, indirectly, also help to defuse regulatory trade disputes.[101] The question remains, however, what extent such harmonisation of RA policies can actually be achieved.

(3) The Codex has adopted the frequently used definition of an ideal risk assessment as consisting of four separate steps (paragraph 19): (i) hazard identification (can exposure to the substance cause a health condition?), (ii) hazard characterisation (which dose of the substance leads to which response?), (iii) exposure assessment (how much of it is typically consumed?) and (iv) risk characterisation (combining the results of (ii) and (iii)).[102] The FAO/WHO experts' committees perform these tasks by reviewing the evidence contained in existing studies, mainly conducted by the food manufacturers' scientists, rather than by conducting first-hand empirical studies of their own. The advice to the Codex which results from RA

[98] Elaboration Procedures, p 2, para 1, 7th indent.

[99] Risk Analysis Principles, n 90 above, paras 13–16, at para 14. All references to paragraph numbers in the remainder of this sect refer to these Principles, unless otherwise stated.

[100] DA Wirth, 'The Role of Science in the Uruguay Round and NAFTA Trade Disciplines' (1994) 27 *Cornell International Law Journal* 817 at 834; Powell, n 48 above, VR Walker, 'Keeping the WTO from Becoming the "World Trans-science Organization": Scientifc Uncertainty, Science Policy, and Factfinding in the Growth Hormones Dispute' (1998) 31 *Cornell Journal of International Law* 251. Examples of assumptions which are the subject of RA policies include the conditions under which inferences can be drawn from animal testing to effects in humans, and the safety factors that are to be applied in drawing such inferences: see Powell, n 48 above, at 14.

[101] E Millstone *et al*., *Science in Trade Disputes Related to Potential Rrisks: Comparative Case Studies* (Seville: Institute for Prospective Technological Studies, 2004) provide several examples for the role of RA policy in international trade disputes.

[102] See National Research Council, *Risk Assessment in the Federal Government: Managing the Process* (Washington, DC: National Academy Press, 1983), at 19–20.

frequently comes in the form of specific maximum residue levels (MRLs)—i.e., values for the amount of a given substance that can safely be consumed with the food in which it is contained. Alternatively, the conclusion that such values need not be specified because the substance in question is safe (if used according to standard agricultural or industrial practice) can also be a result of the risk assessment.[103] In addition, current risk analysis policy (as determined in the Working Principles) explicitly requires the experts to communicate 'constraints, uncertainties and assumptions' that have an impact on the RA (paragraphs 23 and 25). We consider the way in which uncertainties are dealt with in greater detail below: see Section III.2.

(4) The actual standard-setting (risk management) is done by the CAC and its subsidiaries, following an elaborate eight-step procedure, at various stages of which members and other stakeholders are consulted.[104] With regard to the role of science at this stage, the Risk Analysis Principles take up the famous formulation in the SPS Agreement (Article 5(1)), according to which the RM decision should be 'based on' RA (paragraph 28), but do not elaborate on what this means. Although not explicitly foreseen in the Elaboration Procedures or the Risk Analysis Principles, experts' committees may be consulted again at this stage, for example, with regard to the respective health risks of specific competing proposals for a certain standard.[105] It is at this stage (i.e., as part of RM) that, in addition to scientific evidence, 'other legitimate factors' may enter the process (paragraph 28).[106] We return to the manner in which this happens in Section III.3.

(5) The final step in the standard-setting process is the adoption of the draft text by the full Codex Alimentarius Commission. The CAC quite regularly makes additional amendments to the text at this stage, and sometimes the committee in charge deliberately refers the most controversial questions to the CAC—i.e., the relevant provisions are put in square brackets and the Commission decides whether to remove the brackets or drop the provision in question. The rules which are applied in order to arrive at final Codex decisions are considered in Section IV below.

[103] This was the conclusion which JECFA reached in the famous case of the controversial growth hormones in cattle: see JW Bridges and O Bridges, 'Hormones as Growth Promoters: the Precautionary Principle or a Political Risk Assessment?' in EEA (ed), *Late lessons from Early Warnings: the Precautionary Principle 1896–2000* (Copenhagen: European Environment Agency, 2002), at 150.

[104] *Procedures for the Elaboration of Codex Standards and Related Texts* ('Elaboration Procedures'), Part 3 (*Procedural Manual*, at 22–24).

[105] A case in point is the Codex standard on maximum levels for aflatoxin M_1 in milk, where JECFA was asked to undertake a quantitative risk assessment comparing two different maximum levels that had been debated without result in the Codex Committee on Food Additives and Contaminants for 10 years (Evaluation Report, n 17 above, Box 3). On the basis of JECFA's assessment that the difference between the two levels was negligible in terms of expected health risks (liver cancer in this case), Codex adopted the more lenient standard, albeit against some members' continued opposition.

[106] See, also, the *Statements of Principle Concerning the Role of Science in the Codex Decision-making Process and the Extent to which Other Factors are Taken into Account* (*Procedural Manual*, at 188–9).

Before turning to alleged weaknesses of this procedure, it may be worth briefly recalling, from a more abstract point of view, the reasons for going to the time and effort of institutionally separating empirical and normative questions, in accordance with the RA–RM distinction. First, scientific and political questions themselves are not only of different natures, namely, empirical and evaluative, respectively—they are also in a kind of logical order.[107] To decide on an appropriate level of protection and on measures of risk regulation for certain products and substances, their actual effects as well as the expected impact of alternative standards have to be known. These are empirical questions, which are independent of—and cannot be compromised by—any evaluative claims or interests. How could we reasonably argue for a certain standard, without any expectations about its empirical impact? Secondly, the general idea of insulating political processes from scientific processes and *vice versa* is a way of breaking down the complex task of standard-setting into several pieces, which helps to clarify both the problems and the conflicting claims related to the process. This, in turn, is a precondition for the rational resolution of conflict and the accommodation of competing claims. Thirdly, the adequate separation of these types of questions makes the resolution of political conflicts and the acceptance of outcomes more likely. It serves rationalisation by minimising unnecessary points of conflict[108] and demonstrates that even a winning majority is guided by the argumentative force of their reasons.[109] In summary, against the background of the complexity of political aims and scientific questions, the practice of going back and forth, of addressing and re-addressing certain questions, should not be viewed as exceptional but as the appropriate rule.[110]

III.2 Dealing with Uncertainty

Yet, even if the logical foundations of the RA–RM distinction may be impeccable, its practical applicability rests on additional preconditions. An important element of these preconditions is the quality of the knowledge that is produced in the risk assessment. As the Codex Risk Analysis Principles explicitly recognise, it can hardly be expected that, as a rule, scientific RA produces unambiguous results. Risk assessors are hence required to include an '[e]xpression of uncertainty or variability in risk estimates' (paragraph 23).

[107] See J Habermas, *Faktizität und Geltung* (Frankfurt aM: Suhrkamp, 1992), at 187 ff.

[108] R Fisher and W Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (London: Arrow, 1981).

[109] A Gutmann and D Thompson, *Democracy and Disagreement* (Cambridge, Mass: Belknap Press of Harvard UP, 1996).

[110] See, e.g., O Gerstenberg and C Sabel, 'Directly-Deliberative Polyarchy. An Institutional Ideal for Europe?' in C Joerges and R. Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford: OUP, 2002, 289) esp. at 292.

But how should risk managers deal with such expressions of uncertainty or variability? In the process of negotiating the Principles, this question—and, in particular, the 'precautionary principle' as a potential answer—was particularly controversial.[111] The text which was finally adopted recognises precaution as 'an inherent element of risk analysis' in general (paragraph 11), but does not assign it a particular role in risk management. Instead, with regard to risk management, the Principles provide that '[w]hen there is evidence that a risk to human health exists but scientific data are insufficient or incomplete, the [Codex] Commission should not proceed to elaborate a standard but should consider elaborating *a related text*, such as a code of practice, provided that such a text would be supported by the available scientific evidence' (paragraph 10, emphasis added). This may sound like a reasonable compromise between the more 'precautionary' approach favoured by the EC, according to which a standard—with an appropriate safety margin—should be adopted even in the case of uncertainty, and the more 'science-based' US position, which would have preferred the Codex to refrain from doing anything at all in this case.[112] But there is at least one problem with the compromise formulation: for the purposes of WTO law, codes of practice are essentially the same as standards, unless there is a definite statement in the text to the contrary.[113] This would seem to imply that, where the Codex has adopted an alternative instrument in reaction to scientific uncertainty, members are under the same obligation to justify deviations from this instrument as if an ordinary standard had been adopted.[114]

The Evaluation points this problem out, but does not recommend any alternative solution, although it correctly takes note of—albeit somewhat helplessly—the remaining disagreement among Codex members.[115] How much of a practical problem the (non-) distinction between standards and related texts actually constitutes is hard to tell.[116] In principle, if the third way of dealing with uncertainty suggested in the Principles, between 'strong' precaution at one extreme and non-decision at the other, is to be pursued further, two options for elaborating upon the difference between

[111] Gerstetter and Maier, n 90 above, at 21–25; Veggeland and Borgen, n 4 above, at 693–4; Poli, n 9 above, at 619–22.

[112] On the EC position, see, e.g., CAC24, Report (ALINORM 01/41), para 83; the US position is reflected in *Government Comments in Reply to CL 1999/16-GP: Comments of the United States* (CX/GP 00/3-Add 5).

[113] Thus, the SPS Agreement repeatedly refers to 'international standards, guidelines or recommendations' when it talks about harmonisation (Art 3(1),(2)).

[114] If the text in question referred to insufficient scientific evidence, Art 5(7) SPS according to which WTO Members can provisionally adopt precautionary measures, might become relevant, 'on the basis of available pertinent information, including that from the relevant international organizations'. Counting as such 'pertinent information', the Codex text would entitle—but, unlike ordinary standards, not oblige—countries to adopt its provisions.

[115] Evaluation Report, n 17 above, para 53.

[116] Poli, n 9 above, at 629, generally questions the practical impact of the compromise formulation contained in the Principles.

a standard and a 'related text' may deserve closer consideration—following the spirit, if not necessarily the letter, of the existing formulation. Specifically, the difference could be in content, duration or both. In the first case, scientific uncertainties are directly introduced into the related text (based on their explicit recognition in the risk assessment—see above), thereby opening up a corridor of options for different legitimate national measures. Such a corridor solution would leave room for legitimate differences in national measures in accordance with the precise scientific uncertainties, without opening the door widely to additional trade barriers, as a non-decision would do. In the second case, the text in question could be endowed with a 'sunset clause', limiting its validity for a certain period of time and automatically leading to a reassessment of the scientific uncertainties after that period.[117] Compare this to the present situation, where the review of existing standards basically follows the same procedure as the development of new ones, and scientific disagreement is regularly carried over into the risk-management arena, where it tends to lead to deadlock (sometimes for many years). Limiting the validity of a contested standard *a priori*, in contrast, might make it easier to agree on a text in full view of scientific uncertainties, the resolution or reduction of which would be part and parcel of the agreement.

III.3 Health and 'Other Legitimate Factors'

The scope of risk assessments performed by the independent experts' committees working with the Codex is restricted to human-health risks emanating from specific substances and products. 'Other legitimate factors' may enter the standard-setting process at the risk-management stage, in so far as they are 'relevant for the health protection of consumers and for the promotion of fair practices in food trade'.[118] Precisely what kinds of things belong to this category of 'other legitimate factors' has been the subject of much controversy.[119] There is wide agreement, however, on the general importance of 'concerns related to economic interests and trade issues'.[120] Thus, with regard to economic interests, the issue is not *whether* but *how* they are supposed to enter the standard-setting process. In this context, we want to draw attention to the fact that relevant economic evidence is not scientifically evaluated by any official Codex or FAO/WHO body, but has

[117] Already, Codex standards are sometimes agreed only on the premise that they will be reviewed after a certain period of time, but this premise is not normally part of the text itself.

[118] Working Principles, n 90 above para 28; Statements of Principle, no 2.

[119] See, in particular, the CCGP negotiations resulting in a set of *Criteria for the Consideration of the Other Factors Referred to in the Second Statement of Principle* (adopted in 2001, now contained in the *Procedural Manual*, at 188–9), which are meant to specify the *Statements of Principle* (n 106 above). An explicit list of nine (groups of) factors was contained in an early background paper (CX/GP 99/9, para 30) but does not appear in the final version of the *Criteria*.

[120] *Criteria for the Consideration of the Other Factors*, n 119 above, 7th indent.

to be introduced into the risk management process by the member states themselves, albeit in a quasi-scientific form, namely, as 'substantiated by quantitative data'.[121]

Leaving the creation and presentation of economic evidence only to the member states softens the separation of the scientific and political questions along different institutions within the Codex process, because there is no separate 'scientific' entity to assess the quality of the member states' input at international level. Instead, these issues have to be fully discussed in the political processes of the Codex committees. At this point, the science-based process is opened to the interest politics of particular states, in so far as 'their' economic data are not independently evaluated. Thus, it is not the differentiation between empirical assessment and political evaluation as such which leads to interest politics rather than deliberation,[122] but rather the questionable classification of economic evidence under the political part of the Codex process. In addition, decentralising the process in which economic data are generated may also have distributive consequences. For countries with a smaller budget—developing countries in particular—it is relatively more expensive to gather the same data, and thus more difficult to create legitimate claims in the standard-setting process.

But perhaps the most serious is a third problem, namely, the fact that the health risks that result from a certain standard are not systematically related to prospective socio-economic costs and benefits of the same standard once it is applied in the different member states. Such costs and benefits occur as a consequence of changing volumes of international trade in agricultural products. All things being equal, trade volumes can, of course, be expected to increase if standards are harmonised internationally—this is one of Codex's basic *raisons d'être*. However, depending on the level at which standards are set, a particular country's exports may also decline in the wake of harmonisation, if it has difficulties complying with the international standard.[123]

With regard to the regulation of aflatoxins (a group of naturally occurring mycotoxins that can cause liver cancer) especially in cereals and nuts, a group of World Bank economists has estimated the monetary effect which different maximum levels would have on international trade flows.[124] According to this econometric model, if the Codex standard that was valid at the time had been adopted universally, the value of exports in these

[121] Ibid. On the role of members in bringing economic criteria to bear on the standard-setting process, see, in particular, Steps 3, 5 and 6 of the *Elaboration Procedure* (*Procedural Manual*, at 22); see, also, the *Guide to the Consideration of Standards at Step 8 of the Procedure for the Elaboration of Codex Standards including Consideration of any Statements relating to Economic Impact* (*Procedural Manual*, at 26–7), para 6.

[122] As Herwig, n 48 above, maintains.

[123] See, also, n 32 above.

[124] JS Wilson and T Otsuki, *Global Trade and Food Safety: Winners and Losers in a Fragmented System* (Washington, DC: World Bank, 2001).

goods would have increased by roughly 50 per cent. At the same time, if a substantially more stringent standard—which the EC had promoted—had been adopted worldwide, overall exports would allegedly have declined by about 50 per cent.[125] In monetary terms, the difference between the two scenarios was seen to be some US$ 12 billion. This figure was then linked by the World Bank authors, as well as by others, to the results of a risk assessment by the Joint Expert Committee on Food Additives (JECFA), according to which the difference between two hypothetical aflatoxin standards was two cancers per year per billion people.[126] The link between the econometric estimate and the JECFA risk assessment remains tenuous in several respects, and we would be very cautious in drawing any substantive conclusions from this particular case.[127] Nevertheless, in view of figures such as these, one can hardly escape the more general point that relatively small gains in direct health effects, obtained by harmonising standards internationally at a high level, may, under certain circumstances, be accompanied by relatively big losses in income from trade, and, more importantly, by the negative indirect health effects which such income losses may have. Any comparison of direct and indirect health effects is bound to be technically difficult, but perhaps not much more so than the type of scientific assessment that is currently underlying Codex standards. In any event, it would be preferable for the Codex and its expert advisors to analyse both kinds of effects systematically, and to consider ways of limiting or compensating negative indirect effects.

Thus, the current arrangement for the consideration of economic interests is likely to influence the mode of interaction in the Codex as well as the members' resources, and, at least in some cases, also the outcome in terms of public health. For all these reasons, it would make sense if health risks connected to alternative standards *and* other related socio-economic costs were analysed scientifically and possibly integrated in a comprehensive study, and afterwards evaluated politically against the background of both kinds of evidence. As long as this does not happen, the political risk management is based on insufficient, narrowly conceived, scientific expertise. In this sense, and contrary to a widespread criticism, the problem with

[125] Ibid., Table 3.

[126] Report of the 49th meeting of JECFA (WHO Technical Report Series No 884), 1999, as summarised by JL Herrman, 'Aflatoxins' (paper presented at the Risk analysis workshop, Geneva, 19–20 June 2000), available at http://www.wto.org/english/tratop_e/sps_e/risk00_e/risk00_e.htm).

[127] Different specific standards and somewhat different categories of goods were considered in each case. Note, also, that JECFA estimated much bigger effects of the same difference in standards with regard to a high-risk group composed of people carrying the hepatitis B virus (which increases the carcinogenic potency of aflatoxins): see Herrman, n 126 above at 19. Ignoring these complications, G Majone, 'What Price Safety? The Precautionary Principle and its Policy Implications' (2002) 40 *Journal of Common Marketing Studies* 89 takes these figures to indicate that the EC in general too strongly relies on the precautionary principle in its food-safety policy.

expertise in Codex standard-setting is not too much, but too little and too specialised or constrained expertise.

Things become even more difficult if we turn from second-order (i.e., economically mediated) health consequences of given Codex standards to *non*-economic 'other' factors—such as environmental concerns or animal welfare and 'consumer interests', on whose legitimate role in risk management Codex members have not reached agreement to date. But it is not only the legitimacy of their inclusion in the standard-setting process which is more controversial.[128] Even if we assume, for the sake of the argument, that at least *some* of these cultural or ethical concerns should be allowed to matter *some* of the time, their consideration is hampered by the fact that relevant evidence is not systematically produced or collected *anywhere* within the Codex process. With respect to socio-economic issues, this imperfection might be remedied by additional scientific expertise, as suggested above. A similar solution is harder to imagine for issues which are commonly referred to as 'cultural', more precisely for collective expressive and evaluative preferences of particular societies which collide with the expected consequences of a given draft standard.[129]

The 'classic' beef-hormones controversy, among others, contains elements of such a clash between scientific and cultural considerations.[130] After all, when the EC decided to ban these hormones, it was unable to base its ban on the risk assessment provided by either the FAO/WHO experts' committee (JECFA) or its own experts (the so-called Lamming Committee, comprising members of two different permanent scientific committees serving the European Commission), who had likewise concluded that the hormones were safe. Clearly, efforts were made to produce scientific evidence from other sources which might justify the ban, and these efforts have since been intensified in the light of the unfavourable WTO ruling.[131] It is hard to deny, however, that consumer preferences for (or against) certain agricultural practices also play a role in the European ban.[132] The current trade dispute over genetically modified food, too, is heavily charged with

[128] Most of this controversy was played out in the Codex Committee on General Principles; see, e.g., CCGP16, Report (ALINORM 01/33A), n 68 above, para. 92–93.

[129] See Habermas, n 107 above: expressive and evaluative judgments (or in his terminology 'ethical' judgments) do not refer to the objective world but to individual and collective self-understandings. Therefore these kinds of claims cannot in the same way be analysed and introduced into Codex risk management as empirical questions of prospective economic consequences or hazards.

[130] On the hormones case, see E Fisher (in this volume), with further references.

[131] A new risk assessment, and revised legislation based on it (Dir 2003/74/EC [2003] OJ L262/17), are the grounds on which the EC is now in its turn challenging the US and Canada before the WTO for what it deems to be an unjustified continuation of retaliatory measures: see WT/DS320 and WT/DS321.

[132] See, *inter alia*, S Pardo Quintillán, 'Free Trade, Public Health Protection and Consumer Information in the European and WTO Context: Hormone-treated Beef and Genetically Modified Organisms' (1999) 33 *Journal of World Trade* 147.

scientific and economic issues, but 'other factors' such as scientifically questionable consumer concerns loom even larger here than in the Hormones case.[133]

As the protracted discussions in various Codex bodies over 'other legitimate factors' and the relatively meagre results of these discussions indicate, a principled answer is hard to find to the question of how such concerns should be dealt with in global food-safety policy. Whether cost-benefit analysis could help in this respect is also rather questionable, although the existing proposals to this effect do perhaps deserve more attention than they have hitherto received.[134] Monetarising culturally motivated concerns may not be impossible in theory, but definitely poses enormous practical difficulties and should probably not be envisaged within the Codex, as long as not even more strictly economic concerns are systematically integrated into its standard-setting procedures. If neither principled nor technical fixes will produce a satisfactory substantive solution, it seems natural to turn to the procedural dimension.

IV. DECISION: RULES FOR RECONCILING AUTONOMY AND EFFICIENCY?

Having considered the actors that participate in the process of setting Codex standards and the criteria that are recognised as valid justifications in this process, we now focus on the rules that are applied in the Codex for eventually arriving at binding decisions. There is a certain tension here between the formally valid decision rule and the prevailing social norm. The latter aims to reach consensus in every relevant question, as was recently confirmed in a pertinent decision by the Commission, according to which 'every effort should be made to reach agreement on the adoption or amendment of standards by consensus'.[135] In more formal terms,

[133] N Perdikis, 'A Conflict of Legitimate Concerns or Pandering to Vested Interests? Conflicting Attitudes Towards the Regulation of Trade in Genetically Modified Goods—The EU and the US' (2000) 1 *Estey Centre Journal of International Law and Trade Policy* 51; GE Isaac, 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 5 *Estey Centre Journal of International Law and Trade Policy* 43. See, also, the *Ad Hoc* Intergovernmental Task Force on Food Derived from Biotechnology and its discussion of factors to be considered in the risk analysis of biotech foods; e.g., 2nd session of the Task Force, Report (ALINORM 01/34A), para. 30. The text that was eventually agreed by the Task Force and adopted by the CAC—*Principles for the Risk Analysis of Foods derived from Modern Biotechnology*—evades the issue and merely refers to the general Codex Risk Analysis Principles with regard to other legitimate factors (CAC/GL 44–2003, para 16).

[134] See, for e.g., J-C Bureau and S Marette, 'Accounting for Consumers' Preferences in International Trade Rules' (paper presented at the National Research Council Conference on Incorporating Science, Economics, Politics and Culture in Sanitary-Phytosanitary and International Trade, Irvine, Cal, 25–27 Jan 1999).

[135] This proclamation introduces a set of *Measures to Facilitate Consensus*, adopted by the CAC in 2003 (*Procedural Manual*, at 191).

however, the decision rule in the Codex is 'state majoritarianism'.[136] Based on the common UN rule of 'one country, one vote', the simple majority of the attending and voting member states can set standards and make changes to the procedural framework.[137] Unfortunately, as far as we can tell, no one has systematically analysed the actual Codex process with regard to the decision rule applied, in the same way that this issue has not received sustained *theoretical* attention in the literature. It is clear, nonetheless, that even if almost all Codex standards to date have been adopted unanimously, some prominent standards were adopted by a vote and supported only by a simple majority of the member states present.[138] Voting was also used to adopt a few important procedural decisions, such as that on how to deal with insufficient scientific knowledge and the role of the precautionary principle,[139] and the one on the EC's membership of the Codex.[140]

Against this background, the Codex Evaluation attempts to specify the conditions under which consensus and voting should apply. Before addressing the details of these recommendations, let us briefly recall the larger context of this debate, so as to clarify the importance of the issue. After all, one may wonder what difference it makes whether Codex standards are adopted by consensus or otherwise, when they have no generally binding force and member states are free to adopt stricter standards. This freedom, it is now widely recognised, is highly constrained by the need to base divergent national standards on a scientific risk assessment—i.e., precisely on the kind of evidence which is the main justification for Codex standards. This implies that national measures cannot be primarily based on 'other legitimate factors', such as collective democratic preferences, traditions or cultural beliefs, no matter how 'thick' and enlightened these national preferences are. And as the history of relevant WTO dispute-settlement cases shows, founding stricter standards on risk assessment is a difficult

[136] A Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford & New York: OUP, 2004), at 314.

[137] *Rules of Procedure*, Rule VII.2 (*Procedural Manual*, at 12). Amendments to the Rules of Procedure themselves require a two-thirds majority (see Rule XIV.1, *Procedural Manual*, at 17).

[138] See Evaluation Report, n 17 above, para 132. Standards adopted by voting include the Codex decision not to set residue levels for growth hormones in beef (n 103 above) as well as maximum residue levels for aflatoxin M_1 in milk (n 105 above).

[139] Risk Analysis Principles, n 90 above, para 10. This was not a vote in the strict, formal sense, but rather a case where 'consensus' was proclaimed to have been reached even in the face of 'reservations' expressed by 17 (mainly EC) member countries—a way of handling disagreement against which the UK protested explicitly but in vain: see CAC24, Report (ALINORM 01/41, paras 83–84).

[140] The decision in question is concerned with the membership of 'regional economic integration organisations' more generally, but in practice applies exclusively to the EC for the time being. It was adopted at the 2003 session of the CAC despite the votes against of the US and 11 other Codex members; see CAC26, Report (ALINORM 03/41), para. 22. Since it concerned the CAC's Rules of Procedure, a two-thirds majority was required for this amendment to be adopted: see n 137 above.

task—stricter national measures have not survived the risk-assessment requirement in any of these cases.[141]

If this interpretation is right, we are facing a dilemma between international standard-setting and national democratic autonomy. On the one hand, in any democratic decision, expressive and evaluative assertions and judgments, as well as given traditions, have their legitimate place. These kinds of judgments and collective preferences are effectively excluded if a Codex standard already exists for the issue in question. On the other hand, general permission to base national measures on expressive and evaluative judgments would undermine the central aim of the international trade regime, namely, the realisation of collective benefits from lowered barriers to trade. There is no ideal solution which completely serves national autonomy and economic efficiency alike. What is asked for is an appropriate accommodation of both values, and the question is whether state majoritarianism adequately serves this purpose.

The Evaluation Report contains a small but rather sophisticated set of recommendations on the issue of decision rules, including a formal definition of 'consensus', the systematic use of facilitators working between committee meetings to help reach consensus, and reliance on a postal balloting system to mitigate the problem of the uneven attendance of members (on the latter, see Section II above). In addition, the Report introduces the concept of 'near-consensus': if committee meetings are close to consensus, the proposed standard should be passed on to the Commission, which, if it reaches no better than 'near-consensus', would be entitled to vote—requiring, however, at least a two-thirds majority for the standard to be adopted.[142] The idea, apparently, is that no decision should be taken against the common will of a whole region or against certain minority states, as long as they do not pursue purely particular interests. Assuming that state interests are sufficiently heterogeneous across the globe, it is indeed reasonable to assume that a blocking minority of one third can be assembled only on grounds which are not entirely selfish. So far, these recommendations have come to nothing, though. The Commission has not made any effort to change the formal decision rule, given the apparently widespread opposition among members to the concept of 'near consensus'.[143]

[141] For useful reviews of relevant WTO dispute-settlement cases, see, *inter alia*, J Pauwelyn, 'The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the first Three Disputes: EC—Hormones, Australia—Salmon, and Japan—Varietals' (1999) 2 *Journal of International Economic Law* 641; Victor, n 4 above; J Peel, *Risk Regulation Under the WTO SPS Agreement: Science as an International Normative Yardstick?* (New York: NYU School of Law, 2004).

[142] Evaluation Report, n 17 above, Recommendation 24.

[143] As reported by the Codex Secretariat in its survey of member states' opinions on those recommendations which survived the first round of debate in the CAC (ALINORM 03/26/11, Add 4, para 40). It is not quite clear from this report whether opposition also extends to the rule of qualified (two-thirds) majorty voting in the Commission or refers only to 'near consensus' as the precondition for its application. The EC, at least, has stated that it 'can

Yet, qualified majority voting has undeniable normative force as a decision rule, compared to both the *status quo* and other alternatives. At international level, we find every kind of decision rule, from majority rule to unanimity rules and veto rights, as in the UN Security Council. However, organisations whose tasks are similar to those of the Codex have frequently adopted some kind of qualified-majority rule.[144] If the goal was to maximise national autonomy, unanimity would—under certain conditions[145]—be the superior rule. But this solution would come only at the expense of both economic efficiency and problem-solving capacity more generally.[146] In almost any standard-setting process, there would probably be at least one country which gained from non-decision. Thus, in general, there would be many fewer international standards and, as a consequence, there would be much more national regulation at the expense of the potential gains from trade. This negative assessment of the unanimity rule is valid, we would argue, regardless of the fact that most current standards are effectively adopted by consensus. This is because consensus in these cases is reached 'in the shadow' of the majority rule and its compromising force.[147]

The remaining question is whether simple or qualified state majoritarianism would be more appropriate to accommodate efficiency and autonomy. Where the unanimity rule would lead to a kind of myopic autonomy at the expense of economic benefits, a global *simple* majority rule tends to render impossible even well-founded and 'enlightened' autonomous decisions by nation-states. In contrast, *qualified* state majoritarianism—with the support of at least two thirds of the attending and voting member states—would not undermine the aggregative economic benefits, because a small number of opposing countries is, for the most part, insufficient to veto collectively binding standards and pursue particularistic economic interests, instead. At the same time, economic interests pursued by more than one third of the member states might very well amount to legitimate

support the adoption of a standard or related text with a majority of two thirds when, in exceptional cases, the consensus cannot be found and a formal vote has been resorted to'. See *European Community Comments on the Joint FAO/WHO Evaluation of Codex and other FAO and WHO Work on Food Standards* (Brussels: European Commission, Mar 2003), available at http://europa.eu.int/comm/food/fs/ifsi/eupositions/cac/archives/cac_ec-comments_cl 2003–8_en.pdf.

[144] Evaluation Report, n 17 above, para 55. Reference is made in particular to other international standard-setting bodies such as the International Plant Protection Convention (IPPC), the International Organisation for Standardisation (ISO), and the World Organisation for Animal Health (*Office international des épizooties*—OIE).

[145] It would have to be unanimity combined with either some kind of sunset clause terminating the time horizon of any standard, or an individual exit-option for setting national standards. Otherwise, the same unanimity rule which serves national autonomy initially would impede national autonomy later on, if every single member has to agree on revisions of or exits from a given standards.

[146] See U Ehling (in this volume) on problematical effects of the unanimity rule in the WTO context.

[147] Herwig, n 48 above, at 212.

veto power. With respect to non-economic claims, the overall consequences of a qualified majority rule might similarly be beneficial. On the one hand, a larger number of potentially intrusive decisions are prevented than under the simple majority rule, because at least some of the decisions which gain the support of a simple majority do not gain the support of a qualified majority. On the other hand, the contested standards adopted (only) by a qualified majority are additionally backed by the legitimatory force of great number of supporters. On average, at least, such decisions might be more acceptable even to the losing minorities. In summary, a qualified majority rule applied in the Codex standard-setting process, along the lines of what the Evaluation has suggested, would be suited to promoting certain (national) claims of democracy and autonomy, without significantly compromising economic efficiency.[148]

V. CONCLUSIONS

It is clear that our analysis in this chapter does not confirm the rather sceptical, if not directly disapproving, conclusions of many earlier studies of the Codex. To sum up this analysis, let us now review the findings in the light of a few more explicitly formulated normative criteria. Since we cannot here elaborate on the reasons for selecting particular criteria, the selection is restricted to criteria which either correspond to the minimal (but insufficient) conditions for the acceptable working of this kind of international institution, or—to the extent that they exceed minimal conditions—are widely uncontested. Perhaps the most obvious candidate for this selection of normative criteria would be the extent to which the decisions that are made by the Codex are substantively adequate and actually solve the problems they are meant to address. For reasons mentioned in the introduction, this is anything but easy to judge, given the multidimensional set of tasks which the Codex is meant to perform, and would, in any event, have required a different kind of analysis. Instead, we take the following three criteria into account in the remainder of this section: (1) an ideal of equal participation or sufficient representation, (2) an ideal of deliberation (in contrast to pure bargaining), and (3) efficiency of decision-making.

What do these criteria entail more specifically? First, a decision-making body in which every member has the same degree of influence is more valuable than one with more or less powerful actors for several reasons:

[148] The aim of protecting a certain degree of national autonomy can also be served by means other than decision rules, such as the 'corridor' solution suggested in Sect III.2. above for cases of significant scientific uncertainty, or advanced labelling schemes which leave the ultimate decision on a product's acceptability to consumers. On labelling, see, in the case of genetically modified foods, A Herwig, *Taking Pluralism Seriously: How the WTO Should Regulate Food Safety and Consumer Choice Aspects of Trade in Genetically Modified Foods* (JsD thesis, New York University School of Law, 2005), at Chapter 5 with further references.

an equal degree of influence is a way of respecting national autonomy; the 'input' of a wide range of citizens' preferences from all over the world is better than the restricted input of such preferences; and respecting citizens' preferences indicates at least one aspect of democracy. Secondly, an argumentative or deliberative mode of interaction is more likely to accommodate divergent claims and produce good results than a style characterised by threats and deceptions. And thirdly, an institution which needs fewer resources to produce the same output is preferable to one which needs more resources.[149]

The overall picture of Codex performance, measured against these criteria, is ambiguous. As was to be expected, what we observe clearly falls short of normative ideals in several respects: State participation and influence are still unequal; societal participation is biased in favour of wealthy countries, and, within these countries, it is biased in favour of business interests. We cannot deny that actors within the Codex process pursue their respective national or regional interests, nor can we claim that the institutional design would perfectly neutralise this kind of strategic behaviour. With respect to the incorporation of economic evidence, for example, we have shown that the institutional design both favours unequal opportunities to influence Codex standards and unnecessarily opens up room for the pursuit of particularistic interests.

However, the increase in stakes that result from the Codex's incorporation into WTO law appears to have furthered the recognition of at least some of the existing problems, and for some of them a straightforward solution is hard to think of in any event. More concretely, on the positive side we note that overall participation in Codex processes has increased significantly. This is true for the participation of nation-states as well as for that of non-governmental organisations. Clearly, formally equal opportunities and rights for member states are not enough; in an unequal world, actual equality is what is required. The inequalities in member states' resources as well as influence do remain, but have been recognised as being problematical and are beginning to be remedied by financial means such as the Trust Fund for Enhanced Participation and institutional innovations such as the co-chairing of meetings.

NGOs have several channels by which to influence Codex processes. Here, we have mainly discussed their opportunities to participate directly at international level. In general, the quality of the observer status which the Codex grants to international NGOs is adequate. The meetings of the Executive Committee are an exception, and they ought to be made more transparent as a precondition for holding its few members accountable to the member states. Transparency of the Executive Committee's proceedings

[149] Needless to say, there are trade-offs to be faced between these criteria under certain circumstances, which we do not take into account here.

would also grant NGOs better access to the formal political process in its entirety. For the future, two other developments might further enhance NGO participation. First, the provision of scientific advice to the Codex should be made more transparent, in a way similar to that which is currently being discussed for the meetings of the Executive Committee. Over and above what the current statutes already foresee in terms of interaction between risk managers and risk assessors, greater transparency of risk assessment would increase awareness of the insecurities and flaws even of the best scientific expertise in a complex world. Secondly, Codex committees could be required not only to listen to NGO arguments, as is presently the case, but also to respond to these arguments explicitly.

Despite its task of setting food-safety standards on the basis of scientific knowledge, critics have always argued that much of Codex decision-making can be viewed as the interest politics of a few powerful actors with conflicting preferences. And since Codex standards have increased in binding power as a result of being referred to in the SPS Agreement, many observers expect decision-making processes to become even more strongly politicised and prone to 'powering', rather than 'puzzling' (in the sense of problem-solving) and rational deliberation.[150] In our analysis, we have focused on institutional design rather than modes of interaction, not only because the latter are notoriously difficult to observe empirically,[151] but also because representing their countries' interests and particular normative claims is what we would expect from the representatives of member states. Thus, the remaining question is whether the institutional design enhances or even forces the actors to reach some kind of deliberative uptake, independently of their original motivations?

Our findings are more optimistic than most of the existing literature, but are still ambivalent. Insulating empirical scientific questions to a certain extent from evaluative political questions is central for rational deliberation. The actual practice of going back and forth between the different bodies and questions not only shows how difficult such an insulation is to achieve, but is also part of the demanding process of rational deliberation. Only with respect to economic evidence does the line which the Codex draws between empirical and normative questions seem arbitrary or, at least, not very favourable for their deliberative quality; leaving this task to the member states unnecessarily institutes interest politics here. On the

[150] Increased politicisation in this sense is noted by A Cosbey, *A Forced Evolution? The Codex Alimentarius Commission, Scientific Uncertainty and the Precautionary Principle* (Winnipeg: International Institute for Sustainable Development, 2000), at 9; Victor, n 4 above, at 892; Veggeland and Borgen, n 4 above, at 701; Poli, n 9 above, at 630; Thomas, n 7 above, at 18. 'Powering' and 'puzzling' are terms coined by H Heclo, *Modern Social Politics in Britain and Sweden* (New Haven, Conn: Yale UP, 1974) at 305.

[151] On these difficulties, see, with regard to international negotiations, ML Maier, *Negotiating Greenhouse Gas Emission Limits in the European Union* (Florence: Project report, European University Institute, 2002).

other hand, the whole process of Codex evaluation, the quasi-independent assessment of its working and the inclusive and (mainly) transparent dealing with the results and recommendations is, in itself, noteworthy as a significant contribution to the institutional improvement of the Codex.[152]

If the insulation of different types of processes from each other is favourable for deliberation, and if respecting citizens' preferences and policy claims requires wide and effective participation, it would be naïve to expect that this can be achieved without substantial costs in terms of time, expertise and money. Clearly, it is difficult to accept that setting a certain food standard should take 10 years or more, but we have to distinguish between decisions which are merely fast and decisions which are efficient—i.e., they are taken as fast as possible without reducing their quality. As the Evaluation Report has shown, there is much scope for improving efficiency in this sense, and the Codex has adopted a good many of the pertinent recommendations. With regard to decision rules, however, members have preferred to re-emphasise the desirability of consensus, rather than face the question of how to deal with the remaining disagreement squarely. We have argued that this question cannot be avoided, and that a qualified majority rule would be best suited to reconcile plural national autonomies with efficient international decision-making.

[152] For a general treatment of this connection, see C Sabel, 'Learning by Monitoring: The Institutions of Economic Development' in N Smelser and R Swedberg (eds), *Handbook of Economic Sociology* (Princeton, NJ: Princeton UP, 1994), at 137.

10

The Precautionary Principle in Support of Practical Reason: An Argument Against Formalistic Interpretations of the Precautionary Principle

ALEXIA HERWIG

I. INTRODUCTION

THE PRECAUTIONARY PRINCIPLE is widely discussed, often referred to and included in several legal instruments, yet its actual meaning and content remain ambiguous. For some commentators, this ambiguity renders the principle an unsuitable guideline for decision-making or simply leads to the maximising of unchecked administrative discretion.[1] Some claim that it allows decision-makers to react to unfounded fears and the theoretical uncertainty that is always interwoven with scientific evidence.[2] Because the principle does not stipulate a clear evidentiary basis or lay down other limits for its own application, they consider that it always enables decision-makers to conjure up some worst case scenario that 'justifies' putting a stop to useful social activities. At worst, some claim the principle will do more harm than good.[3] Other commentators have noted that it is arbitrary to proceed on the assumption that the worst of several

[1] J Adler, 'More Sorry Than Safe: Assessing the Precautionary Principle and the Proposed International Biosafety Protocol' (2000) 35 *Texas International Law Journal* 173; F Cross, 'Paradoxical Perils of the Precautionary Principle' (1996) 53 *Washington and Lee Law Review* 851; G Majone, 'What Price Safety? The Precautionary Principle and its Policy Implications' (2002) 40 *Journal of Common Market Studies* 89; C Stone, 'Is There a Precautionary Principle?' (2001) 21 *Environmental Law Reporter* 10790; C Sunstein, 'Beyond the Precautionary Principle', *John M. Olin Law & Economics Working Paper No. 149*.

[2] M Victor, 'Precaution or Protectionism? The Precautionary Principle, Genetically Modified Organisms, and Allowing Unfounded Fear to Undermine Free Trade' (2001) 14 *Transnational Lawyer* 295.

[3] Adler, n 1 above.

outcomes will materialise as there is no empirical basis for this assumption when there is scientific uncertainty.[4]

There is indeed a wide array of references to the precautionary principle in court decisions, and the way it is phrased differs between international legal instruments. The EC views the precautionary principle as part of risk management, while the US sees precaution as inbuilt into the process of risk regulation.[5] There are various formulations of the principle in international treaties. One commentator has distinguished between a deliberation-guiding and an action-requiring version in international treaties.[6] The Rio Declaration on Environment and Development contains a deliberation-guiding version, as it states that:

> where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[7]

The OSPAR Convention contains an action-requiring version, as it states that:

> the Contracting Parties shall apply the precautionary principle, by virtue of which preventive measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship between the inputs and the effects.[8]

Do these differences mean that the precautionary principle is non-sensical or does not exist?

One contributor to this volume has already exposed the shortcomings of the search for a common understanding of the precautionary principle across very different legal cultures.[9] As Fisher and other commentators rightly note, the critics of the precautionary principle overlook the differences between rules and principles.[10] Rules apply in an all-or-nothing

[4] Majone, n 1 above.

[5] Communication from the Commission on the Precautionary Principle COM (2000) 1 final; D Bodansky, 'The Precautionary Principle in US Environmental Law' in: J Cameron and T O'Riordan, *Reinterpreting the Precautionary Principle* (London: Cameron May, 2001), at 203 and 204.

[6] B Dickinson, 'The Precautionary Principle in CITES: A Critical Assessment' (1999) 39 *National Resources Journal* 211.

[7] Rio Declaration on Environment and Development, A/Conf.151/26 (vol. 1), Principle 15, available at www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

[8] Convention for the Protection of the Marine Environment of the North Atlantic (OSPAR Convention), available at www.ospar.org/eng/html/1992-ospar-convention.htm, Art 2.2(a).

[9] E Fisher, 'Precaution, Precaution Everywhere: Developing a 'Common Understanding" of the Precautionary Principle in the European Community' (2002) 9 *Maastricht Journal of European and Comparative Law* 7.

[10] Ibid. See, also, A Arcuri, 'The Case for a Procedural Version of the Precautionary Principle: Erring on the Side of Environmental Protection', *Global Law Working Paper* 09/04, 7 ff.

fashion: a rule either applies or it is trumped by another rule. A principle is a relevant consideration among other principles that are brought into relation with each other through a balancing act. Rather than an all-or-nothing decision, Fisher concludes, principles make it possible to devise solutions that give less weight to one principle or strike a middle ground. Thus, the nature of precaution as a principle accounts for some of the variation in its application. The other reason that Fisher gives for why the principle is so variegated is that it is always shaped by the legal culture and, notably, by the role for state authority/constitutional sovereignty of the place where it is to be used. Developing a common understanding, she concludes, necessitates understanding and taking into account the different legal cultures where the principle is to be used.[11]

I agree with Fisher that calling for a highly-determined, uniform definition of the precautionary principle fails to do justice to the principle, albeit for different reasons from the ones that she advances. One difficulty with cultural explanations is that it is difficult to tell whether one observes true precaution or something else, especially if risk profiles are not consistent. Is the failure of the United States to regulate obesity-related health risks due to other valid considerations that outweigh precaution, or is it due to interest group capture by the US food and drink industry? Is the stricter approach to new pesticides, chemicals or marine mammal protection due to other considerations being less salient or a lack of interest group capture or a response to anxieties expressed in public opinion? Similarly, is the reluctance of some European Member States to authorise GMOs true precaution or merely protectionism? Under a context-bound definition of precaution, it also becomes difficult to criticise the application (or lack of it) of the precautionary principle from outside a legal culture. This, however, is what transnational law seeks to do. In other words, the SPS Agreement reviews the way administrative discretion is exercised without prescribing a certain decision to national regulators. Since transnational and supranational law deals with conflicts between very different legal cultures and has its own particular culture, the precautionary principle would then invariably cause friction when invoked to deal with hazards that are not fully confirmed.

In this chapter, I argue that the indeterminacy of the precautionary principle is not a deficit but an advantage, and propose an account of the principle as guiding a reasoning process. I submit that the precautionary principle is best interpreted as a prohibition, namely, on the use of the lack of scientific confirmation as the sole justification for deciding not to act. As such, the precautionary principle invites decision-makers to search for alternative and better grounds for justifying regulatory responses to hazards. It is precisely because the principle is so open-ended that its inclusion

[11] Fisher, n 9 above, at 28.

in supranational and transnational legal instruments allows risk regulators to create solutions to problems of uncertainty that enjoy substantive legitimacy without predefining certain outcomes. As a flexible instrument, the precautionary principle allows decision-makers to expand the empirical basis for risk regulations and to respond to pressing non-scientific normative concerns in ways that will be accepted as deserving recognition by those affected by a decision. In short, the precautionary principle can increase the accountability of risk regulators to those having to bear the risk, but it should also be understood and interpreted as requiring risk regulators to follow a certain reasoning and decision-making process. When subjected to some procedural constraints, the precautionary principle is also capable of fostering accountability vertically between levels of governance and, paradigmatically, between the politics of anxiety and the politics of risk.

In the following section, I develop a justification for the precautionary principle out of considerations about the nature of scientific evidence and risk regulation. The second part analyses the scope for precautionary measures under the WTO SPS Agreement.

II. THE JUSTIFICATION FOR PRECAUTION

II.1 Trigger for Precaution

Risk regulation is multidimensional because it touches upon questions of an empirical, normative and evaluative nature. Thus, risk regulation requires a determination of whether hazard is possible or likely, whether the imposition of the hazard is justifiable, and whether tolerating the hazard is worthwhile. The immediate impact of the precautionary principle is that it expands the range of empirical evidence upon which risk regulations can be based. It does not require conclusive scientific evidence about causation. Instead, threats of hazard or reasonable grounds for suspecting hazard may suffice as empirical bases for taking preventive action. By the same token, the precautionary principle expands the requirements for normative and evaluative justifications for setting protection levels against risk because a broader array of scientific evidence has to be considered by decision-makers. Bearing in mind the multidimensional nature of risk regulation, I submit that the precautionary principle makes good sense.

Risk assessments are generally accepted as proof of causation under the SPS Agreement. For instance, the Appellate Body in *Japan—Apples* stated that:

> Indeed, we are of the view that, as a general matter, 'risk' cannot usually be understood only in terms of the disease or adverse effect that may result. Rather, an evaluation of risk must connect the possibility of adverse effects with an antecedent or cause. For example, the abstract reference to the 'risk of cancer'

> has no significance, in and of itself, under the *SPS Agreement*; but when one refers to the 'risk of cancer from smoking cigarettes', the particular risk is given content.[12]

The Appellate Body has also considered that general evidence about the harmfulness of a substance is not a risk assessment when the measure applies to the substance as a residue.[13] The decision in *EC—Hormones* implies that a member has to assess the risk at the exposure level and in the form that is targeted by the measure. From the perspective of research science and the objective of the SPS Agreement, such a requirement makes sense because lower doses of a substance are often not harmful at all. The SPS Agreement can thus ensure that members do not engage in unwarranted protectionism. However, it has also been pointed out that an obligation to provide specific dose-dependent risk assessments makes it more difficult for members to regulate small but chronic exposure or synergies between different agents where hazard cannot be verified because adequate and sufficiently sensitive methods of assessment are not available.[14] The lack of fully validated testing methods and data gaps has been considered such a common feature of risk regulation that Jasanoff has called this form of science 'regulatory science' and distinguished it from laboratory science in which stricter standards for corroboration apply.[15]

What kind of evidence should be permissible as an empirical basis for risk regulation ultimately depends on the answer to the question what role scientific evidence should play in risk regulation. Is the goal of science to present well-corroborated and definite issues to policy-makers upon which they should decide? Or is the role of science to flag all the outcomes in need of assessment and normative or ethical justification? The former interpretation has been criticised on the ground that it uses a yardstick without normative content to dismiss normative arguments connected to more general or speculative evidence.[16] Jasanoff has also cautioned that requirements

[12] Appellate Body Report, *Japan—Measures Affecting the Importation of Apples*, WT/DS245/AB/R, note 372.

[13] Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, para 200; Panel Report, *EC—Hormones (USA)*, WT/DS26/R, para 8.257, Panel Report, *EC—Hormones (Canada)*, WT/DS48/R, para 8.260. On the issue of the generality and specificity of scientific evidenc, see also Panel Report, *Australia—Measures Affecting Importation of Salmon*, WT/DS18/R, para 8.74; Appellate Body Report, *Japan—Apples*, para 202; Panel Report, *Japan—Measures Affecting the Importation of Apples*, WT/DS245/R, para 8.271.

[14] A Sykes, 'Domestic Regulation, Sovereignty, and Scientific Evidence Requirements: A Pessimistic View', reprinted in P Mavroidis and A Sykes (eds), *The WTO and International Trade Law/Dispute Settlement* (Cheltenham and Northampton, Mass: Edward Elgar, 2005), at 178 and 189.

[15] S Jasanoff, *The Fifth Branch: Science Advisers as Policymakers* (Cambridge, Mass. and London: Harvard UP, 1990), at 42 and 77–9.

[16] J Peel, 'Risk Regulation under the WTO/SPS Agreement: Science as an International Normative Yardstick', *Jean Monnet Working Paper*, 02/04, available at www.jeanmonnetprogram.org/papers/04/040201.pdf, 95 ff.

for scientific proof and carrying out more and more research will simply expose more and more uncertainties.[17] Legal regimes requiring scientific proof paradoxically highlight the limited ability of science to provide definite answers, and thus undermine the credibility of the empirical bases that they endorse as valid and appropriate for regulatory decisions.

One problem with requiring conclusive scientific proof in the form of risk assessments is, in my view, that such a position is not based on sound empirical grounds. A risk assessment enjoys validity principally within the theoretical parameters of its own study design. In contrast, the existence of a risk assessment cannot be used to judge the quality and validity of scientific theories or other forms of more general scientific evidence that are based on different paradigms. To use the argument that the alternative evidence fails to prove conclusively the hazard as a justification for not regulating creates an accountability gap. On the one hand, policy-makers base their decision not to take measures on their lack of a clear mandate to do so, and thus place the ball in the court of scientists for their failure to develop methods of assessment. On the other, scientists will reject any responsibility for events for which evidence is so sketchy that it is not even accepted as a confirmed finding by their peers. From the perspective of citizens, it becomes impossible to pinpoint any one institution as responsible if the suspected, but poorly corroborated, harm indeed occurs.

It is against this backdrop that the precautionary principle becomes clear, because it affirms that the lack of scientific proof *alone* shall not be used as a justification for not responding to feared, but poorly corroborated, hazards. Thus, the effects of the precautionary principle are that it, first, expands the range of normative and evaluative arguments that policy-makers have to consider because it enlarges the range of empirical evidence relevant for a problem. Secondly, it invites policy-makers to find different justifications for their decisions about how to regulate hazards. The only constraint that the precautionary principle introduces is that the evidence upon which decisions are based must be reasonable (in cases of the action-requiring version) or that a threat could actually exist (in cases of the deliberation-guiding version). The precautionary principle does not require decision-makers to use the best or most reasonable evidence and it does not proffer a set of normative or evaluative considerations to direct a decision. Thus, the third effect of the precautionary principle is primarily to introduce variation into the way that decision-makers regulate hazards. In some cases or jurisdictions, decision-makers may use more poorly corroborated evidence as the evidentiary bases for their regulations; in other cases or jurisdictions they may rely on risk assessments even if there are other threats of hazard, provided they can give an alternative justification for their decision.

[17] Jasanoff, n 15 above, at 3.

Leaving flexibility to risk regulators to draw on more speculative, but nevertheless reasonable, evidence makes good sense. The question of which evidence to use in risk regulation is, I submit, a secondary one as long as the evidence is not highly doubtful or plainly wrong, and thus distorts political decisions about acceptable levels of protection. What is wrong with a regulation based on less confirmed evidence rather than on the available risk assessment if citizens would always prefer to avoid the suspected outcome and forego the potential gains of the substance or technology even if they later turn out to have been mistaken? Thus, with respect to the evidence relied on, we can formulate that evidence must be reasonable and can introduce a 'no-regrets' rule. As long as decision-makers will not regret having taken a decision based on the less confirmed evidence, even when their decision later turns out to be wrong, we can conclude that the decision has been reasonable. Conversely, if decision-makers will not regret having taken a decision on the basis of the risk assessment even if they later turn out to be wrong, there would be no reason for precautionary action. A difficulty really arises only if decision-makers determine *ex ante* that they would regret having taken an erroneous decision based on the risk assessment but that they would equally regret having taken an erroneous decision based on the less confirmed evidence. This will be the case where better-confirmed benefits and suspected, unproven hazards are of roughly equal magnitude. In that case, either decision would be equally reasonable.

What do these considerations imply for the role of risk assessment and precaution under the SPS Agreement? Scientific evidence is always in the service of analysing costs and benefits. A decision about what type of evidence to rely on makes sense only after costs and benefits have been analysed, and not before. As a result, the SPS Agreement should not prescribe to members which evidence to use according to their degree of corroboration. However, it should oblige members to examine all relevant evidence and to assess costs and benefits comprehensively, and to justify their choice of evidence on the basis of the 'no-regrets' principle.

II.2 Setting Levels of Protection on the Basis of Precaution

In addition to the question of the trigger for precaution and the extent to which precautionary decisions have to be corroborated by some evidence, precautionary measures can also be evaluated according to whether the level of protection and the measures used to contain adverse effects are reasonable. In this connection, two positions are often discussed in the literature. One relates to the prohibitory precautionary principle (also called 'radical' precaution by some[18]), the other to the types of hazard that

[18] Arcuri, n 10 above, 9 ff; R Stewart, 'Environmental Regulatory Decision-making under Uncertainty' (2002) 20 *Research in Law and Economic* 71; Sunstein, n 1 above.

the precautionary principle can be used for, i.e., whether hazards have to be serious and irreversible or whether even hazards of a lesser magnitude are sufficient to take precautionary action.[19]

Some commentators argue that a prohibitory precautionary principle does not make sense, mainly because they consider that this would justify putting a stop to all social activity, thereby giving rise to its own dangers.[20] It is useful to distinguish whether the prohibitory principle is criticised as a general decision-making rule which prescribes a certain outcome or whether the prohibitory precautionary principle is criticised as a decision in a particular case. When commentators argue against the prohibitory precautionary principle, it seems they attack it as a generally applicable decision-making rule, and, to this extent, I agree with their objections because the principle would then justify putting a stop to all kinds of activities. As a matter of a decision taken in an individual case, however, a prohibition may well make sense. If the confirmed benefits are smaller than the expected, but uncertain, adverse effects, their occurrence is not tolerable and no other measures would be effective to prevent the adverse effect, a prohibition may be a reasonable measure, provided it is provisional and adjusted in the light of further evidence. Whether a prohibition is justified depends, therefore, on a case-by-case assessment of the costs and benefits of adopting a prohibition or adopting an alternative course of action. It makes as little sense to prescribe prohibitions in all cases in which the precautionary principle can be applied as it does to rule out prohibitions categorically. Because of the multitude of situations to which the precautionary principle may apply, a one-size-fits-all approach prescribing certain courses of action is inappropriate. In the same vein, the action-requiring precautionary principle makes no sense as a version of the precautionary principle which is generally applicable to risk regulation. What the precautionary principle as a mechanism for re-integrating practical rationality into risk regulation should prescribe is a transparent assessment of costs and benefits and the provision of public justifications that respond to the practical rationality of the public for the course of action chosen. A well-justified decision in favour of a course of action presumes a thorough and comprehensive assessment of costs and benefits. Thus, the costs and benefits of both precautionary action and action/non-action based on alternative evidence of hazards have to be assessed. Beyond this, however, further attempts at circumsribing the principle in substantive terms will lead to a diminuition of the role of practical rationality in risk regulation.

Similarly, precautionary measures cannot be limited to situations that concern only serious and irreversible risks.[21] Some situations exist in which it would be defensible to take regulatory action without full scientific proof

[19] Arcuri, n 10 above, at 10 ff.
[20] Ibid, at 9 ff.
[21] Arcuri argues so, however. See ibid, at 10 ff.

even if the adverse effects are reversible. Consider the example of a medicine against heartburn that is suspected to cause kidney failure. Kidney failure, as such, is reversible through transplants, and the effects of kidney failure can be reversed through dialysis. Nevertheless, the suspected, but uncertain, damage to kidneys seems sufficiently serious to justify taking preventive action in the light of the small benefits of having an additional medicine against heartburn. Conversely, situations can exist where even threats of serious and irreversible damage ought to be tolerated. For example, authorising an AIDS medicine that delays death significantly and is suspected, but not proven, to lead to heart failure if taken for many years would be reasonable if there are no other suitable alternatives available. Similarly, the cost of taking remedial action can be so excessive for some countries that a reversible suspected hazard becomes irreversible in practice.

To sum up, I have argued that the precautionary principle is useful because it expands the empirical basis that has to be considered when assessing the pros and cons of regulatory action. As such, the precautionary principle fits into a framework of risk regulation in which practical reason and not—primarily—the ability of science to prove risk determines the appropriate courses of action. However, even under a framework of risk regulation in which practical reason dominates, there still has to be some minimal form of reasonable empirical evidence, because acting on the basis of complete ignorance or disregard for empirical facts remains arbitrary. When a risk assessment exists and additional evidence provides some preliminary indications of adverse effects, what regulatory action to take and which evidence to rely on can—rationally—be decided only *after* the costs and benefits have been comprehensively assessed. Thus, where the costs of suspected, but uncertain, outcomes are so serious that they outweigh the benefits of all the other better-corroborated scenarios, it generally makes sense to regulate with less than full scientific proof. Precaution is, therefore, part and parcel of a comprehensive analysis of the costs and benefits of alternative courses of action at the end of which stands a decision based on practical rationality. The best one can hope for in relation to the precautionary principle is to impose procedural requirements for justification that force decision-makers to account to the public and be responsive to any of their arguments. Assessments of the costs and benefits, which use reasonable evidence and justification of the empirical basis through practical reason, are an integral part of public accountability. In brief, if supported by appropriate procedures, the precautionary principle contributes to well-justified, reasonable risk regulation. However, designing ever more specific substantive constraints on the precautionary principle through evidentiary thresholds or constraints on the appropriate precautionary action to be taken is counter-productive.

III. PRECAUTION UNDER THE SPS AGREEMENT

III.1 Scope and Trigger for Precautionary Action

This section assesses the role of precautionary approaches under the SPS Agreement. By precautionary approaches I understand measures that are not based on conclusive scientific proof in the form of a specific risk assessment, and where one or several elements remain uncertain. For the purposes of this discussion, it is useful to distinguish between different degrees of uncertainty. A relatively high degree of confirmation exists where the hazard has been observed but the influence of other factors cannot be ruled out because the test populations were not subjected to exactly the same conditions. A lesser degree of confirmation exists where only one type of hazard is plausible in the light of circumstantial evidence or scientific theories, but the existence of the hazard cannot (yet) be verified. In both cases, what is most likely to be missing is the determination of a probability under controlled circumstances in order to arrive at a conclusive finding about risk.

A much lesser degree of confirmation exists where scientific theories or circumstantial evidence make several different scenarios of harmfulness appear reasonable. The uncertainty here relates to ambiguity about the type of hazard that is to be expected. Where there is relatively little ambiguity, some of the scenarios are more likely, while others remain less likely. More ambiguity exists where all the scenarios appear equally likely and a very high degree of ambiguity exists where the inferences themselves are very tenuous. Uncertainty can, of course, also relate to whether risk management, that is, the measures to mitigate risk, are appropriate or not.

The crucial question under the SPS Agreement will, therefore, be whether there is an evidentiary cut-off, that is, whether the SPS Agreement allows members to respond to some degrees or types of uncertainty, but not to others. If there is such an evidentiary cut-off, some non-scientific considerations will become irrelevant as they relate to scenarios that are considered too speculative. The other crucial question under the SPS Agreement concerns the relationship between an existing risk assessment and other forms of scientific evidence, such as scientific theories or circumstantial evidence. Is there a hierarchy of forms of evidence under the SPS Agreement such that the better confirmed risk assessments are favoured over other forms of evidence that suggest higher or different hazards? Depending on where the line is drawn under the SPS Agreement, the action-requiring precautionary principle—if contained in an international treaty—could then actually modify SPS obligations if its evidentiary standards were more permissive than those of the SPS Agreement. If there is no evidentiary cut-off, the whole range of arguments derived from practical rationality could be used to justify regulations.

So far, precautionary thinking has been accepted by the Appellate Body in two situations: when Article 5.7 is invoked and where irreversible human

health risks are concerned. In the latter case, the Appellate Body has been prepared to grant more leeway to members when they regulate. Thus, in *EC—Hormones*, it held that:

> a panel charged with determining, for instance, whether 'sufficient scientific evidence' exists to warrant the maintenance by a Member of a particular SPS measures, may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, for example, life-terminating damage to human health are concerned.[22]

The statement suggests that panels or the Appellate Body adopt a more deferential approach when reviewing scientific evidence concerning irreversible hazards. When irreversible risks are concerned, they may find that evidence with a lesser degree of confirmation constitutes sufficient scientific evidence. However, the Appellate Body in the quoted statement refers to risk and not to ambiguity about hazards. Where the evidence at issue does not clearly point to one hazard or can be interpreted as supporting several scenarios of hazard, it will not meet the threshold of sufficient scientific evidence. The Appellate Body also found that the precautionary principle does not override the obligation to base a measure on a risk assessment contained in Article 5.1 and 5.2 of the SPS Agreement.[23] When a risk assessment is available, a member must thus base its measure on that risk assessment so that precaution and prudence become relevant only to additional aspects of the measure. Annex A.4 defines a risk assessments as:

> The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.[24]

The crucial difference between the two definitions is that risk assessment for food-or feed-borne effects does not require the assessment of risk as a function of the risk management measures to be applied. For human animal or plant diseases and pests, in contrast, members also have to evaluate risk as a function of the risk management measures which can be applied and to analyse the economic and biological secondary consequences of the adverse effect.

Based on the definition of risk assessment, it appears that the precautionary principle cannot justify ambiguity about what hazard results and

[22] Appellate Body Report, *EC—Hormones*, n 13 above, para 124.
[23] Ibid, para 125.
[24] SPS Agreement, Annex A.4, available at www.wto.org/English/tratop-e/sps_e/spsagr_e.htm.

what causes it Moreover, if a risk assessment is available, the relevance of precaution under a valid Article 5.1 defence is limited to aspects not mentioned in the definition of risk assessment. For food- and feed-borne risks, greater uncertainties about the suitability of risk management measures and the assessment of secondary consequences seem to be permitted. Here, it appears that members enjoy a margin of safety—at least, where the risks concerned are sufficiently serious. For pests and diseases, in contrast, the SPS Agreement seems to grant less leeway to members to apply margins of safety that are not clearly supported by scientific risk assessment.

Japan—Apples seems be based on such a line of reasoning. The case concerned Japanese phytosanitary measures to prevent fire blight from entering through apples and from then spreading. According to the scientists consulted, immature apples can be infected with fire blight but mature, symptomless apples do not harbour fire blight bacteria.[25] The scientists did not completely exclude the possibility that fire blight could exist in a non-pathogenic relationship on the surface of mature, symptomless apples if harvested from severely blighted orchards.[26] Because a vector for transmission of fire blight was missing, completion of the pathway through apples in general was considered unlikely.[27] Nevertheless, the scientists were not comfortable with abandoning all phytosanitary controls and one cautioned against exporting apples from severely blighted orchards.[28] They also acknowledged a 'small' or 'debatable' risk that handling error and illegal action could lead to the importation of infected apples.[29] The panel focused specifically on two elements of Japan's risk management measure as lacking scientific support in isolation and cumulatively with the other seven elements of Japan's measure.[30] One of the measures at issue concerned a requirement for a fire blight free buffer zone around orchards. The panel rejected the measure because the scientists found that a buffer zone for apple orchards was not yet scientifically supported.[31] As another measure, Japan required that orchards be inspected three times a year. The experts acknowledged that inspection was needed, but considered inspection three times a year to be more than necessary, and the panel rejected the measure.[32] In other words, both the scientists and the panel faulted Japan for being excessively cautious in its choice of risk management measures whose necessity was not yet scientifically proven. As a result, Japan could not

[25] Panel Report, *Japan—Apples,* n 13 above, paras 8.114–8.119, 8.125–8.127 and 8.132–8.135.
[26] Ibid, para 8.134.
[27] Ibid, para 8.166.
[28] Ibid, paras 8.151 and 8.173.
[29] Ibid, para 8.160.
[30] Ibid, paras 8.182, 8.191 and 8.197–8.199.
[31] Ibid, para 8.187 and 8.191.
[32] Ibid, paras 8.196 and 8.197.

justify its risk management measures under Article 5.1 of the SPS Agreement.

The decision left open, however, which of the seven other elements Japan could maintain as a precaution against the risk of handling error or importations of mature, symptomless apples from severely blighted orchards, *although* apples, in general, were unlikely to serve as a pathway for introducing fire blight into Japan. Japan's implementation of the report consisted in restricting the buffer zone to 10 metres and inspection of orchards to once a year. When the compliance panel finally examined all the elements of the measure, it found only the requirement for the US to certify that it exported only mature, symptomless apples free from fire blight to be justified.[33] In terms of quality control and measures to prevent handling errors, the panel considered the steps under the US Apple Export Act sufficient.[34] It acknowledged that there was no guarantee that US controls would not fail, but considered there was no evidence that this had occurred in the past.[35]

In terms of precaution, the bottom line of the *Japan—Apples (21.5)* panel report is that the panel did not accept precautionary measures to prevent exports of healthy-looking mature apples from severely blighted orchards and additional measures against the risk of handling errors by the US. However, the panel accepted that Japan could limit imports of apples to mature, symptomless apples, this being a precautionary measure because the panel had found no scientific evidence that importation of even infected apples could spread fire blight to Japan.

The compliance panel never fully explained why it considered precaution justified in relation to the quality of apples but not in relation to the highly blighted status of orchards or quality control additional to the US measures. In relation to quality control failure it merely stated there was no evidence of US errors, but it *also* stated there was no guarantee that US measures would be effective. Consequently, there was a grey area, where it was uncertain whether or not there would be error that the panel deemed acceptable. Against the backdrop that the panel considered it legitimate to take *precautionary* measures to ensure that only mature, symptomless apples were exported to Japan, their finding that the US measures were reasonably available alternatives that achieved Japan's protection objective surely required more of an explanation than just the lack of evidence about US errors, given that the absence of evidence is a common feature of all precautionary measures. As regards exportations from severely blighted orchards, the compliance panel and experts backtracked from the earlier

[33] Panel Report, *Japan—Measures Affecting the Importation of Apples (Recourse to Article 21.5 of the DSU by the United States)*,WT/DS245/RW, paras 8.89, 8.84, 8.9, 8.101, 8.102, 8.106, 8.111, 8.112 and 8.116–8.118.

[34] Ibid, paras 8.176–179 and 8.194–8.195.

[35] Ibid, para 8.178.

report in the original proceeding because the panel and experts considered there were no scientific reasons for not exporting apples from severely blighted orchards.[36] The panel also arguably introduced a new justification for SPS measures because it found that inspection could nevertheless be justified as *good agricultural practice*.[37] However, if there was no scientific reason whatsoever to guard against apples from severely blighted orchards being imported into Japan, the *good agricultural practice* would be useless in contributing to a reduction of risk/hazard and should have been rejected. If, on the other hand, there were even extremely tenuous scientific reasons for restricting imports of apples from severely blighted orchards, the panel should have at least explained why it considered trusting apple growers to follow good agricultural practice to be sufficient to address these concerns.

The trouble with the panel's decisions is that the decision whether precautionary measures are warranted in one case but not the other is inherently a political one that requires the acceptability of an ill-confirmed, suspected hazard to be judged. Even decisions about whether risk management measures are appropriate can touch on political questions, because there is often no guarantee that risk management measures will be 100 per cent effective in preventing risk. When they are not 100 per cent effective, one of the experts in *Japan—Apples* acknowledged, a trade-off is required between the cost and practicability of further controls and the risk.[38] If the panel, assisted by scientists, determines whether precautionary risk-management measures are warranted, it is the panel, and not accountable policy-makers, which is making that trade-off.

Precautionary thinking was also relevant in the *Japan—Apples* case under Article 5.7 directly. Concerning the evidentiary trigger for Article 5.7, the Appellate Body held that evidence was insufficient if it did not allow a risk assessment to be carried out.[39] As I have discussed above, the Appellate Body views risk assessment as tantamount to a causation analysis. Thus, whenever the evidence allows a causation analysis to be made, it follows that the evidence is no longer insufficient within the meaning of Article 5.7. This interpretation seems to be confirmed by the finding of the panel that unreliable or inconclusive evidence constitutes 'insufficient scientific evidence' within the meaning of Article 5.7.

On appeal, Japan complained that the panel's interpretation restricted Article 5.7 to a situation of 'new' uncertainty, presumably referring to a situation in which little information was available. In response, the Appellate Body stressed that Article 5.7 could apply to a situation in which there was a considerable quantity of evidence which had not led to reliable or

[36] Ibid, paras 8.86 and 8.89.
[37] Ibid, para 8.90 (the panel also finds inspection may be justified for other diseases).
[38] Panel Report, *Japan—Apples*, n 13 above, para 8.160.
[39] Appellate Body Report, *Japan—Apples*, n 13 above, para 179.

conclusive results.[40] The important issue in the Appellate Body finding was what it understood by the terms 'reliable' and 'conclusive'. 'Reliable' evidence could mean evidence 'giving the same or compatible results in different clinical experiments and trials'.[41] 'Reliability' is also defined as 'a degree of stability exhibited when a measurement is repeated under identical conditions'.[42] However, 'reliable' can also be defined as 'conforming to fact' and some anti-dumping panels have used 'reliable' as synonymous with 'accurate' or 'correct'.[43] 'Conclusive' could have been used by the Appellate Body in the scientific sense of referring to an assessment that used a control group and that had reduced the interference of other factors in the risk assessment. However, the Appellate Body might also have used the dictionary meaning of 'definitive' or 'determinative' or of 'proof that puts an end to a debate or questioning especially by reason of irrefutability'.[44]

In summary, a broad 'definition of 'reliable' would mean 'inaccurate', while a narrow definition of 'reliable' would refer to studies failing to yield consistent results. Which definitions the Appellate Body used is not clear, but there are some indications that the Appellate Body had the narrower definition of 'reliable' in mind, in as much as it used the disjunctive 'or' to speak of unreliable or inconclusive results. If the Appellate Body had used 'reliable' in the sense of 'correct' or 'accurate', the disjunctive 'or' would no longer make sense because 'unreliable' under this definition would encompass evidence with inconclusive results as an accurate or correct interpretation cannot be made. There are also grounds for doubting that the Appellate Body used 'conclusive' in the sense of irrefutable proof, as science is able to offer such proof only within the parameters of the study design. This is the problem that I alluded to at the beginning: a risk assessment is conclusive proof that the risk will be x, and only x, when the study is designed in a specific manner, but it is not irrefutable proof that other scientific theories leading to different assumptions about risk are wrong.

If the Appellate Body's holding in *Japan—Apples* is interpreted in this manner, its other statement in the case, that Article 5.7 is not triggered by uncertainty but by the insufficiency of scientific evidence instead, also begins to have some meaning.[45] The Appellate Body seems to view Article 5.7 as a provision designed to address lacks of scientific method or data

[40] Ibid, para 185.

[41] Merriam Webster Medical Dictionary, available at http://www.intelihealth.com/IH/ihtIH/WSIHW000/9276/9267.html.

[42] On-Line Medical Dictionary, available at: http://www.cancerweb.ncl.ac.uk/cgi-bin/omd?reliability.

[43] Panel Report, *India-Steel Plate*, para. 7.171 [spoke of reliable and accurate], GATT Panel, *EC—Cotton Yarn*, para. 512 [assessed whether Eurostat data was accurate, reliable or correct].

[44] See the entry relating to conclusive at http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=conclusive.

[45] Appellate Body Report, *Japan—Apples*, n 13 above, para 184.

gaps that prevent valid, established methods from being performed. In contrast, Article 5.7 is not triggered merely by the existence of alternative scientific theories or circumstantial evidence that provides grounds for a different scenario of hazard where a method of risk assessment is already available and data is sufficient to perform the method. In fact, the panel report in *Japan—Apples* suggests that there is a hierarchy within forms of evidence that are scientific because it considered it 'obvious that evidence which does not directly prove a fact might not have as much weight as evidence directly proving it, if it is available'.[46]

If this is the case, the SPS Agreement hinges essentially on the existence or absence of a method of risk assessment and the availability of sufficient data to carry out the risk assessment. Moreover, panels may assign different weight to different forms of scientific evidence even if they all analyse risk. The SPS Agreement is not an instrument that can be used by members for responding to intra-scientific disputes and continuous contestation (at least not once a risk assessment has been performed and there is merely some alternative speculative evidence available). *Japan—Apples* would thus follow the same logic as *EC—Hormones,* in which the Appellate Body affirmed that it would not arbitrate between competing risk assessments.[47] Similarly, the decision in *Japan—Apples* allows the Appellate Body to steer clear of complex questions regarding the validity of science in as much as the scope of Article 5.7 SPS Agreement is limited to cases where scientific methods are unavailable or do not yield consistent or repeatable results.

However, this interpretation of Article 5.7 of the SPS Agreement runs counter to the precautionary principle, which seeks to prevent countries from using the absence of conclusive scientific proof as the sole reason for not reacting when there are reasonable grounds for assuming or inferring that an adverse effect may exist. Where a scientific risk assessment is already possible and a different scientific model or theory is proposed, the SPS Agreement rejects such models or theories because of the absence of proof. As I have argued above, such delineation is unconvincing because a risk assessment implies nothing for the validity of the models or theories that use different paradigms.

Because the SPS Agreement calls on members to use risk assessments as the evidentiary bases for risk regulation regardless of whether alternative reasonable evidence is available, it forecloses some possibilities of reaching decisions about the levels of protection motivated on the basis of practical rationality. As a result, the SPS Agreement promotes decisions that are located closer to the scientific rationality paradigm than the practical rationality paradigm of risk regulation. The potential advantage of the precautionary principle of encouraging decision-makers to seek alternative

[46] Panel Report, *Japan—Apples,* n 13 above, para 8.98.
[47] Appellate Body Report, *EC—Hormones*, n 13 above, para 194.

reasons for the regulation of risk is thereby lost. Article 5.7 also fails to mediate between the politics of risk and the politics of anxiety, as it requires members to ignore evidence that is too speculative in favour of the available risk assessment. The justification for doing so, however, is ultimately derived from the politics of risk, because it is based on the idea that risks can be established with sufficient certainty and managed effectively.

III.2 The Burden of Proof Under Article 5.7

This allocation of the burden of proof under Article 5.7 has important ramifications on the ease with which a measure can be defended under Article 5.7 Commentators have also suggested that the precautionary principle generally requires the burden of proof to be shifted to the proponent of a harmful activity, thus requiring the proponent to show safety.[48] CITES and the Biosafety Protocol also shift the burden of proof.[49] Article 2.2 of the SPS Agreement suggests that Article 5.7 is an exception to the obligation in Article 5.1 because it reads:

> Members shall ensure that any sanitary or phytosanitary measure...is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.[50]

When a provision is an exception to a rule in WTO law, as Article XX GATT is to Article III GATT for instance, the complaining party usually bears the burden of making a *prima facie* case that the general rule has been violated. Afterwards, the full burden of making its case rests on the defending member, including the burden of bringing itself within the exception. However, the mere fact that the SPS Agreement characterises a provision as an exception or requires a defendant to show necessity is not relevant to the allocation of the burden of proof.[51] In cases not involving Article 5.7, the burden to make a *prima facie* case has been assigned to the member claiming an inconsistency with a particular provision of the SPS Agreement.[52] If this case has been made, the burden then shifts to the defending member, which must rebut the alleged inconsistency.[53]The complaining member has met the burden of making its *prima facie* case when the panel is required to rule in favour of the complaining party in the absence of effective refutation by the defending member.[54] Exactly what

[48] V Walker, 'Some Dangers of Taking Precautions Without Adopting the Precautionary Principle' (2001) 31 *Environmental Law Reporter* 10040.

[49] See Section I.A.2.

[50] SPS Agreement, Art 2.2.

[51] Appellate Body Report, *EC—Hormones*, n 13 above, para 102.

[52] Appellate Body Report, *US—Shirts and Blouses*, WT/DS33/AB/R, adopted 23 May 1997, at 335; Appellate Body Report, *EC—Hormones*, n 13 above paras 98 and 104.

[53] Ibid.

[54] Appellate Body Report, *US—Shirts and Blouses*, n 52 above, at 335 and Appellate Body Report, *EC—Hormones*, n 13 above, para. 104.

kind of evidence is required to make a *prima facie* case varies, depending on the circumstances.[55]

The *Japan—Apples* case was the first opportunity for a panel to address the question of the burden of proof under Article 5.7. Because Japan used Article 5.7 as an alternative to its full Article 5.1 defence, the panel assigned to Japan the burden to make a *prima facie* case of the consistency with Article 5.7.[56] The assignment of the burden of proof was not challenged on appeal, but the Appellate Body stressed that it was in the particular context of the claims made that the panel assigned the burden of proof.[57]

It is submitted that the panel in *Japan—Apples* incorrectly assigned the burden of proof, although in the specific case, where a full Article 5.1 argument was first made, the result was not so problematical. Always assigning the *prima facie* burden under Article 5.7 to the regulating member and the full burden to the complaining member undermines the whole logic of the SPS Agreement. Under such an allocation, the defending member could choose not to rebut an Article 5.1 *prima facie* case (for which little has to be proven) and simply raise a *prima facie* case under Article 5.7 (for which, again, little has to be proven). The full burden of making the case would then fall on the complaining member. Given that the defending member could raise an Article 5.7 defence very late in the proceedings, it could make it impossible for the complaining member to make its case.

Under the panel's allocation of the burden of proof, the burden of making a *prima facie* case might also shift, depending on whether a full Article 5.1 argument was first made by the defending member or whether a defendant claimed that its measure was consistent with Article 5.7 (and thus used it as a defence) or whether a complainant claimed that a measure was inconsistent with the obligations of Article 5.7.[58] Form the perspective of legal certainty and regulatory autonomy, a shifting allocation of the burdens is problematical because the defending member's weight of the burden of making its case under Article 5.7 depends on the complaining member's litigation decisions. If the complaining member does not invoke Article 5.1 at all, the defending member bears a heavier burden. From the perspective of regulatory autonomy and legal certainty, this is unacceptable because a regulating member needs to know how much evidence it has to provide and who should provide it.

[55] Appellate Body Report, *US—Shirts and Blouses*, n 52 above, at 335.

[56] Panel Report, *Japan—Apples*, n 13 above, para 8.212.

[57] Appellate Body Report, *Japan—Apples*, n 13 above para 175.

[58] See, also, the EC's First Submission in *EC—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS 291, 292 and 293 available at http://trade-info.cec.eu.int/doclib/docs/2004/june/tradedocs_177687.pdf, paras 587–88.

III.3 Review of Levels of Protection Under The SPS Agreement

The indeterminacy of the precautionary principle with regard to the alternative justifications for regulation is not only its force, but also its principal danger. As the deliberation-guiding version of the precautionary principle does not stipulate whether the justification for regulatory action has to be based on empirical, normative or evaluative reasons, it allows risk regulators to seek out the justification that is most acceptable to their constituencies. In this way, the precautionary principle allows the regulators of jurisdictions in which scientific rationality enjoys acceptance to use empirical arguments, and it also allows the regulators of jurisdictions in which practical reason enjoys acceptance to draw on normative or evaluative arguments. The advantage of the precautionary principle is thus that it allows different jurisdictions to seek out the level of protection that will be accepted as most appropriate by its constituents while still imposing some minimal evidentiary requirements on policy-makers. Expressed differently, the precautionary principle uses evidentiary standards that can accommodate pluralism.

The principal danger of the precautionary principle stems from the fact that it does not provide a mechanism for ensuring that regulators justify their decisions with better arguments. When risk assessments and other reasonable evidence are available in two different situations, and regulators base their regulation on the risk assessment in one case and the reasonable evidence in another case, the precautionary principle currently leaves it unclear whether they do so for normative reasons, empirical reasons or out of mere arbitrariness and protectionism. The SPS Agreement does, of course, impose additional requirements for justification, because it calls on members to avoid arbitrary and unjustifiable distinctions between levels of protection in similar situations.[59] The Appellate Body has found similar hazards or similar economic and biological consequences to be comparable situations.

I submit that Article 5.5 is not a particularly suitable means of reviewing the reasonableness of the distinctions between the levels of protection because its obligations remain unclear. In fact, I suggest Article 5.5 could even lead to unreasonable results in risk regulation. Since arbitrary and unjustifiable distinctions are to be avoided, it could be argued that Article 5.5 calls on decision-makers to justify their protection levels more comprehensively by providing reasons that will stand up under judicial scrutiny. However, Article 5.5 can also be interpreted as encouraging consistent levels of risk tolerance for the same agent or hazard regardless of the non-empirical reasons that favour distinguishing between comparable situations. A textual analysis of Article 5.5 suggests that changing the level of protection may well be the way to comply with Article 5.5 because it

[59] SPS Agreement, Art 5.5.

begins with the words 'with the objective of achieving consistency in the levels of protection'.[60]

As consistent levels of protection seem to provide a safe haven under the SPS Agreement, Article 5.5 discourages decision-makers from seeking out the alternative justifications that the precautionary principle calls for. If Article 5.5 is interpreted so that consistent levels of protection constitute an automatic safe haven it tolerates a disconnection between the levels of protection chosen and the practical rationality paradigm of risk. The result is that the advantages of the precautionary principle are lost.

If Article 5.5 calls for better justifications of distinctions, there still remain questions of who should judge the validity of the non-scientific arguments members advance. Will a panel or the Appellate Body assess the non-scientific justifications offered against its own set of values? Such a result fits uneasily with the notions of the regulatory autonomy of WTO members that the Appellate Body affirmed as an important right in *EC—Hormones*. It could also be objected that it leads to excessive juridification, i.e., the replacing of political decisions through judicial decisions, albeit with results that are no less impregnated with values and discretion than political decisions.

Article 5.5 could also be interpreted so that panels or the Appellate Body will generally defer on the substance of members' justifications and will merely ensure that members' concerns are genuine. Such an interpretation of Article 5.5 would preserve the flexibility of the precautionary principle because it would allow members to draw on empirical, normative or evaluative reasons as they saw fit. In its appellate submission in *EC—Hormones,* the EC attempted such an argument. It maintained that an examination of whether distinctions in the levels of protection are arbitrary cannot be made without considering the public perceptions of danger and acceptable risks, as well as the benefits of risks.[61] The Appellate Body failed to take up this argument directly. It also has to be concluded that Article 5.5 is ill-suited to enabling panels or the Appellate Body to review whether members' normative or evaluative justifications are genuine. For one, Article 5.5 does not invite members to provide evidence which corroborates any of their non-scientific arguments.[62] What is more, Article 5.5 starts from the wrong premise because panels or the Appellate Body look to similar hazards or similar biological or economic consequences as comparable situations. However, arbitrariness can be inferred only when the comparable situations involve the same norms or ethical values as relevant

[60] Ibid, Art 5.5.

[61] Appellate Body Report, *EC—Hormones,* n 13 above, para 32.

[62] The SPS Agreement requires members to assess biological and economic consequences relating to pests, but for food-related human health risks, there is no requirement that a member evaluate the consequences any further and provide evidence. See SPS Agreement, Annex A.4.

justifications. Where one hazard has an ethical dimension, but the other does not, the comparison allows no inference on whether the proffered justification is genuine. It may be that the WTO member concerned is very serious about the ethical value; it may be that the ethical argument is just a hoax. Assessment through comparison of whether members' concerns are genuine is also impossible when one situation requires a trade-off and the other does not.[63] One hazard may give rise to additional health benefits, while for the other equal hazard, the additional effects on health are negative. A comparison between the two situations leaves it unclear whether distinctions are arbitrary because how much the member values the additional health benefit/additional negative health consequence cannot be inferred from the comparison. What makes situations comparable should, therefore, not be so much that they result in the same hazard or risk or that they involve the same agent, but rather that they involve the same non-scientific goods with the same positive or negative value for each good individually.

In the cases where Article 5.5 has so far been relevant, panels or the Appellate Body have faulted members for not regulating substances which *prima facie* appeared to have a higher risk factor than the substance targeted by the measure. In *EC—Hormones*, the EC regulated hormones used as growth promoters, but did not regulate antibiotic agents used for growth promotion purposes in pigs, although there was significant scientific agreement that the antibiotic agents were more dangerous than the growth hormones.[64] In *Australia—Salmon,* Australia regulated uncooked salmon to prevent the spread of fish diseases, but did not regulate herring, ornamental finfish or fish used as bait, although these categories of fish constituted a higher risk than salmon.[65] Surely, there can be no doubt that unexplained differences between the levels of protection are a problem under the SPS Agreement, and if I am not suggesting that these two cases were wrongly decided.

However, the decisions do raise a question of what is—and what should be—required by members when they regulate risk. Should a member first regulate one area comprehensively for example fish diseases or carcinogens used as growth promoters, before turning to the next issue, such as carcinogenic food additives? Or should a member regulate the worst risks first, i.e., the risks that are most fatal, regardless of whether they be cancer or disease risks, and regardless of whether they be caused by food additives or by bird flu carried by chickens. Wolf has made the criticism that courts would usurp the competencies of the branches of government if they dismissed measures to prevent risks due to a specific agent and exposure

[63] This was pointed out to me in a useful discussion with Thorsten Hüller.

[64] Appellate Body Report, *EC—Hormones,* n 13 above para 235.

[65] Appellate Body Report, *Australia—Salmon,* WT/DS18/AB/R, para 158 and Panel Report, *Australia—Salmon,* n 13 above, para 8.141.

because they are not part of an integrated strategy of prevention of the entire category of risk.[66] I am not sure the Appellate Body usurped the EC's regulatory powers in *EC—Hormones* when it pointed out the apparent inconsistencies between protection levels against hormones and antimicrobial agents and the failure of the EC to provide any justification.

With this *caveat*, however, I consider that Wolf has a general point. From the perspective of consistency, it may well make sense to regulate the worst risks first—regardless of what causes them. Attaching consistently high value to human life may thus call for regulating bird flu first, anti-microbial agents second, several food additives third, and, only a long way down the line, regulating carcinogenic hormones (assuming that adverse effects can be shown). Under the current test of Article 5.5, however, the discrepancy between regulating anti-microbial agents and not regulating hormones (yet) may look arbitrary and unjustifiable. Further issues that touch on the subjective quality of risk merit discussion in this connection. Is an immediate cancer risk which affects few people worse than a long-term cancer risk which affects many people? In terms of magnitude, the latter is clearly the answer. In terms of regulatory priorities, immediate prevention may be warranted because the long-term risk can perhaps be effectively prevented later. Attaching consistently high value to human life would, in fact, call for preventing the immediate risk first. A requirement to regulate the worst risks first also raises the issue of whose definition of risk counts. This issue relates to lay and expert perceptions of risk. Risk regulators often view risk merely in terms of fatalities, while laypeople further distinguish between types of risk. To put it too bluntly, dying at the age of 70 from cancer may not be the same to people as dying at the age of 20 from bird flu. What these considerations suggest is that a good deal of idiosyncrasy and muddling through is inevitable when accountable policy-makers regulate risks. They also suggest that judicial review that attempts to fine-tune protection levels is riddled with problems.

Article 5.5 could also be interpreted as a discursive-argumentative provision. Under this interpretation, panels and the Appellate Body would consider distinctions between comparable situations of risk or hazard to be arbitrary as long as they could find better arguments to rebut the justification proffered by the defending WTO member. The advantage of such an interpretation is that it encourages members to deliberate extensively with a view to developing the best possible justification for their SPS regulations. Such a version of Article 5.5 also still enables members to develop their own responses to risk and hazards as long as the responses are well justified. If the SPS Agreement were to encourage deliberative decision-making, Article 5.5 would then usefully complement the precautionary

[66] S Wolf, 'Risk Regulation, Higher Rationality, and the Death of Judicial Self-Restraint: A Comment on Ladeur' (2004) 41 *Common Market Law Review* 1175, 1177 and 1180.

principle because it would ensure that the reasons for regulating not only go beyond those related to the current status of scientific methodologies but are actually better reasons.

Under their current versions, however, Article 5.5 and the SPS Agreement do not sufficiently ensure that members engage in extensive deliberations prior to regulating. Annex B to the SPS Agreement allows exporting members to comment on proposed regulations and obliges the regulating member to discuss the comments and take both the comments and the result of discussions into account.[67] This is surely a first step, but the SPS Agreement neither requires that the discussions be made publicly available by the regulating member, nor contains provisions that allow other affected constituencies to make comments or receive reasoned statements, let alone participate in regulatory processes. Where a member does not apply an international standard, guideline or recommendation as a condition for importation, it is required to furnish an explanation to the SPS Committee,[68] but, again, there is no requirement for the member to have extensively consulted other affected constituencies. Members can, therefore, wait until they have to defend their measures before a WTO dispute settlement panel to justify their protection levels more comprehensively. Even when a dispute is brought, however, Article 5.5 still makes it possible to avoid seeking better justifications through deliberation because changing the levels of protection upward or downward still remains an option.

The SPS Agreement, in short, oscillates between giving too much or giving too little deference to members' determinations of the protection levels based on normative or evaluative concerns because it does not give a sufficiently clear guideline either to panels or to the Appellate Body on how to review non-scientific factors. As a result, the SPS Agreement cannot remedy the deficiencies that arise from the indeterminacy of the precautionary principle. Regardless of the shortcomings of the current deliberation-guiding version of the precautionary principle, good reasons can be given for why the precautionary principle should have a place in risk regulation. I have submitted that the precautionary principle acknowledges the nature of science as a continuous process of discovery and the nature of regulating hazards as requiring acceptable justifications. Because the precautionary principle does not predetermine what the right justification will be, it creates a possibility for decision-makers to draw on justifications that have the recognition of those affected by their decisions. The precautionary principle is, therefore, a way of dealing with reasonable pluralism about questions of risk.

[67] SPS Agreement, Annex B.5(d).
[68] SPS Agreement, Art 12.4.

IV. CONCLUSION

As I have argued above, the scope for precautionary measures under the SPS Agreement is limited to situations when no risk assessment method is available Whenever a risk assessment can be performed, the SPS Agreement cuts off normative and evaluative arguments based on scientific evidence that is more speculative. Where normative and evaluative arguments still matter, they are subject to the test of Article 5.5, which does not perform well in ensuring that risk regulation is reasonable. Is the SPS Agreement's quest for ensuring that SPS measures are science-based futile then? Not at all.

If decisions about risk or suspected hazard require decisions based on practical rationality, scientific evidence performs a useful function in highlighting the issues that are, or could become, relevant for taking a decision. Here, the SPS Agreement can play a useful role in ensuring that the evidence has been comprehensively assessed and that the evidence upon which decisions are based is regarded by scientists as reasonable. The need to consider evidence in decision-making should even be extended under the SPS Agreement to require members to assess the consequences of all the plausible scenarios of adverse effects. In this way, the SPS Agreement makes transparent the trade-offs required, depending on which option is chosen. What the necessary measures to protect against risk actually are, however, can ultimately be decided only on the basis of the practical rationality prevalent in a WTO member.

To ensure that the measure is indeed necessary in the sense of being supported by practical rationality, I have argued that the SPS Agreement should extend the justificatory requirements incumbent upon decision-makers. Iterative deliberative processes of risk regulation that allow both citizens and the affected trading partners to raise arguments ensure that the outcomes of risk regulation are connected to the practical rationality of those affected by decisions. Deliberation calls on risk regulators to justify their decisions with good arguments, but it also implies that decisions can be revisited when better arguments become available. As such, deliberative processes have an in-built potential for learning and adaptation, which includes learning from others. An SPS obligation to consider scientific information in risk regulation comprehensively can usefully bolster this potential for learning and adaptation and will contribute to making decisions more informed.

Because learning and adaptation also constitute an area of overlap between the politics of risk and the politics of anxiety, deliberation can mediate between them. The politics of risk is premised in its faith in human reason and its capacity to develop responses to new hazards. The politics of anxiety is more sceptical about the infallibility of human reason and the possibilities of control. However, it must necessarily also believe that some effective control is possible sometimes, because if we could never avoid

danger, the critique levelled by the politics of anxiety against the politics of risk would be pointless.

If the SPS Agreement were changed to promote deliberative processes of risk regulation and to encourage widespread consideration of scientific and other evidence, it would then support and remedy the apparent *lacuna* of the precautionary principle in its current formulation—namely, that the principle does not require regulators to give better reasons for regulating, and that it does not envisage a mechanism whereby such better reasons can be developed.

11

Beyond the Science/Democracy Dichotomy: The World Trade Organisation Sanitary and Phytosanitary Agreement and Administrative Constitutionalism

ELIZABETH FISHER*

IN RECENT YEARS, it has become popular to characterise the interaction between national risk regulation standards and the World Trade Organisation (WTO) Sanitary and Phyto-Sanitary Agreement (SPS Agreement) as a clash between democracy and science. According to this characterisation, national risk regulation standards are the product of a sovereign nation's democratic process, and, as such, reflect the values which that nation's citizenry espouses. In contrast, the SPS Agreement, with its obligation that a national SPS measure is to 'be based on scientific principles' and 'not maintained without adequate scientific evidence',[1] is understood as requiring standards to be based on objective scientific evidence.

In this chapter, I argue that this characterisation is not only wrong, but also in danger of distorting scholarship and jurisprudence in relation to the SPS Agreement. It is wrong because risk regulation standard-setting is primarily an activity for public administration. As the SPS Agreement is concerned with regulating risk regulation standard-setting so that it is reasonable and legitimate, it is concerned with regulating administrative action. Moreover, in so being, interpretations of the Agreement rest on assumptions about how legitimate public administration is constituted, limited and held to account, or, in other words, theories of administrative

* I would like to thank Roderick Bagshaw, Christian Joerges and the participants at the 'Legal Patterns of Transnational Social Regulation and International Trade' Workshop (EUI, 24–25 Sept 2004) for constructive feedback on a previous draft of this chapter. Any errors or omissions that remain are my own.

[1] Article 2(2).

constitutionalism. The present focus on the science/democracy dichotomy is dangerous because it is resulting in scholars and lawyers pursuing the wrong lines of inquiry in thinking about the SPS Agreement, dispute settlement and the interface between trade regulation and social regulation. In particular, scholars are failing to see that debate and dispute over the SPS Agreement are essentially an extension of national debates over administrative constitutionalism and risk regulation.

This chapter is structured as follows. In the first section, I give a brief overview of the SPS Agreement, the science/democracy dichotomy and the implications of the dichotomy for scholarship. In the second section, I show how the dichotomy is false by examining the administrative nature of risk regulation standard-setting and how it is influenced by debates about how legitimate public administration should be constituted and limited, which I call administrative constitutionalism. I then sketch the rational-instrumental and the deliberative-constitutive paradigms of administrative constitutionalism that have dominated national risk regulation debates. In the third section, I examine how the Panel and Appellate Body interpreted Article 5(1) of the SPS Agreement in the *EC—Hormones* dispute to illustrate how these differing interpretations can be understood to be based on the rational-instrumental and deliberative-constitutive paradigms respectively. The final section considers the implications of re-orienting SPS scholarship away from the science/democracy dichotomy towards administrative constitutionalism. I argue that such a re-orientation has implications for interpreting the SPS Agreement, for WTO dispute settlement, and for how we, as scholars, should think about the transnational trade/national social regulation interface.

One clarification should be made before starting, particularly in relation to the wider agenda of this book. This chapter is not directly concerned with the legitimacy and constitutionalisation of the WTO itself; its agenda is far less ambitious. It is simply to get scholars to ask the right questions about the interface between trade and social regulation. As this is my aim, a considerable part of the chapter is taken up discussing risk regulation separately from trade regulation. While, at first sight, this may seem odd, it is necessary because, without understanding risk regulation, there can be no proper exploration of its interface with trade regulation.

I. THE SPS AGREEMENT AND THE SCIENCE/DEMOCRACY DICHOTOMY

The SPS Agreement was developed as part of the Uruguay Round and came into force in 1994 along with the associated, but less substantively stringent, Technical Barriers to Trade Agreement.[2] The Agreement entrenches

[2] Note that an earlier version of the TBT Agreement was developed as part of the Tokyo Round.

the right of members to act so as to protect human, animal and/or plant health,[3] but regulates the process[4] by which such standards can be set, including the basis for decisions,[5] what can be taken into account,[6] decision-making transparency,[7] who should be consulted,[8] and how trade-restrictive standards can be.[9] In other words, the Agreement defines, in some detail, what is an 'acceptable' way for a member to set risk regulation standards and, as such, is directly concerned with the 'reasonableness' of standard-setting. It is thus a considerable departure from the more modest trade liberalisation objectives of the General Agreement on Tariffs and Trade (GATT) and has not surprisingly been the subject of considerable comment.

From the outset, the obligations under the SPS Agreement were perceived to be lacking in clarity. In part, this imprecision can be understood as a product of political compromise and thoughtless drafting, particularly as so many of the problems in interpreting the Agreement lie in the unclear relationship between its different provisions.[10] The lack of clarity can also be understood, however, to derive from conflict over the purpose of the Agreement. Indeed, the Agreement can be seen to have two, not always mutually consistent, objectives. First, SPS measures can be seen as needing special regulation under the WTO regime because, historically, members had used SPS measures as covert vehicles for trade protectionism.[11] From this perspective, regulating SPS measures is an extension of the discrimination principles, and, in particular, the national treatment principle.[12] The second purpose of the Agreement can be seen as reducing regulatory heterogeneity which can act as a form of trade barrier, due to the fact that different regulatory standards in different states cause extra costs to

[3] A right also evidenced in Art XX(b) of the General Agreement on Tariffs and Trade (GATT).

[4] Process should be distinguished from procedure. On the distinction, see J Jowell, 'Of Vires Or Vacuums: The Constitutional Context of Judicial Review' in C Forsyth (ed), *Judicial Review and the Constitution* (Oxford: Hart Publishing, 2000).

[5] Arts 2(2), 3(2) and 5(1).

[6] Arts 5(2) and 5(3).

[7] Art 7 and Annex B.

[8] Arts 3(4), 9 and 12.

[9] Arts 5(4), 5(5) and 5(6).

[10] D Wirth 'The Role of Science in the Uruguay Round and NAFTA Trade Disciplines' (1994) 27 *Cornell International Law Journal* 817.

[11] See, W Maruyama, 'A New Pillar of the WTO: Sound Science', (1998) 32 *International Lawyer* 651; D Roberts, 'Sanitary and Phytosanitary Risk Management in the Post-Uruguay Round Era: An Economic Perspective' in National Research Council (ed), *Incorporating Science, Economics, and Sociology in Developing Sanitary and Phytosanitary Standards in International Trade: Proceedings of a Conference* (Washington, DC: National Academies Press, 2000), 33 at 35; and T Weiler, 'International Regulatory Reform Obligations' (2000) 34 *Journal of World Trade* 71.

[12] See J Trachtman, 'International Trade as a Vector in Domestic Regulatory Reform: Discrimination, Cost-Benefit Analysis, and Negotiations' (2000) 24 *Fordham International Law Journal* 726 for a discussion on how the national treatment principle can be extended into a discussion of the rationality of national regulation.

importers.[13] The abandonment of tariffs has made such non-tariff trade barriers more obvious and SPS standards have had a particularly high political profile in this regard.[14] From this perspective, the Agreement is a form of 'policed decentralisation', in that it addresses the regulatory heterogeneity problem by creating common rules for national SPS standard-setting.[15] Due to the ambiguous nature of the Agreement's obligations and the unclear relationship between these obligations, the Agreement is open to interpretations informed by either purpose.[16]

While commentators have attributed these divergent purposes to the Agreement, there has, however, been a general consensus that the SPS Agreement is about promoting a 'scientific' approach to standard-setting.[17] The Agreement is described as: requiring reliance on 'sound science',[18] creating an objective system,[19] and giving science the 'key role' in determining whether a standard is legitimate.[20] This is not surprising because the Agreement makes it clear that a SPS measure must be 'based on scientific principles'[21] and that, if states wish to introduce or maintain measures which result in a 'higher level' of protection than international standards, they can do so only if there is a 'scientific justification'.[22] A corollary of the SPS Agreement which is understood as requiring a scientific approach to SPS standard-setting is that it is also assumed that members would carry out standard-setting by more democratic means if they were not bound by the Agreement.[23] Whether science or democracy is a better basis depends on a scholar's starting assumptions.[24] If national regulatory intervention is largely understood as another mode of trade protectionism, then the SPS Agreement and the objectivity that it 'requires' are desirable.[25] In contrast, if one

[13] A Sykes, 'The (Limited) Role of Regulatory Harmonisation in International Goods and Services Markets' (1999) 2 *Journal of International Economic Law* 49.

[14] M Trebilcock and R Howse, 'Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competitive Politics' (1998) 6 *European Journal of Law & Economics* 5 at 6.

[15] Sykes, n 13 above, at 61–5.

[16] See Sect III below.

[17] C Button, *The Power to Protect: Trade, Health and Uncertainty in the WTO* (Oxford: Hart Publishing, 2004), at 44.

[18] Maruyama, n 11 above.

[19] K Ambrose, 'Science and the WTO' (2000) 31 *Law and Policy in International Business* 861.

[20] O Perez, *Ecological Sensitivity and Global Legal Pluralism* (Oxford: Hart Publishing, 2004), at 117.

[21] Art 2(2).

[22] Art 3(2).

[23] A Guzman, 'Food Fears: Health and Safety at the WTO' (2004) 45 *Virginia Law Review* 1, and J Bohanes, 'Risk Regulation in WTO Law: A Procedure-Based Approach to the Precautionary Principle' (2002) 40 *Columbia Journal of Transnational Law* 323.

[24] See A Sykes, 'Regulatory Protectionism and the Law of International Trade' (1999) 66 *University of Chicago Law Review* 1, and Trebilcock and Howse, n 14 above, for a discussion of these assumptions.

[25] See, e.g. G Sampson, 'Risk and the WTO' in D Robertson and A Kellow (eds), *Globalisation and the Environment: Risk Assessment and the WTO* (Cheltenham: Edward Elgar, 2001).

sees the objectivity of science as a mirage and/or SPS measures as part of the democratic responsibility of a state, then the SPS Agreement is problematical.[26] There are some scholars who take a more sophisticated view of the dichotomy, in that they see science and democracy working in tandem. However, the dichotomy remains an important one, even for them.[27]

The prevalence of the science/democracy dichotomy has many implications, and it is useful to highlight three of these. First, scholarship has tended to focus on the 'scientific' aspects of the Agreement at the expense of its other provisions. These provisions have also tended to be interpreted in scientific terms. The risk assessment requirement in Article 5 (1) is a case in point.[28] There has been very little appreciation of the fact that both the Agreement and the concept of 'science' are open to differing interpretations.[29] Secondly, the characterisation of the SPS Agreement as being primarily about science has meant that dispute settlement has largely been understood as requiring members to 'prove' that their standard has a scientific basis.[30] As this is the case, the task of Dispute Settlement Panels is largely understood as the assessing of the scientific evidence upon which a member has based its measure.[31] Indeed, the Panels themselves have tended to see their role in such terms,[32] and have placed considerable emphasis on burdens of proof.[33] Third, the science/democracy dichotomy has contributed to the schism that already exists between transnational trade governance and social regulation. Science is understood to be the rationality

[26] See, e.g. V Walker, 'The Myth of Science as a "Neutral Arbiter" for Triggering Precautions' (2003) 26 *Boston College International and Comparative Law Review* 197.

[27] R Howse, 'Democracy, Science, and Free Trade: Risk Regulation on Trial at the WTO' (2000) 98 *Michigan Law Review* 2329, and D Winickoff *et al*., 'Adjudicating the GM Food Wars: Science, Risk and Democracy in World Trade Law', (2005) 30 *Yale Journal of International Law* 81.

[28] Sampson, n 25 above.

[29] However, see Winickoff *et al*., n 27 above.

[30] S Harlow, 'Science-based Trade Disputes: A New Challenge in Harmonising the Evidentiary Systems of Law and Science' (2004) 24 *Risk Analysis* 443; T Christoforou, 'Settlement of Science-based Trade Disputes in the WTO: A Critical Review of the Developing Case Law in the Face of Scientific Uncertainty' (2000) 8 *New York University Environmental Law Journal* 622; and the questions asked in the 'dumb duck disease' case study in T Cottier and P Mavroidis (eds), *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (Ann Arbor, Mich: University of Michigan Press, 2003), at the Appendix.

[31] Bohanes, n 23 above, and J Peel, 'Risk Regulation under the WTO SPS Agreement: Science as an International Normative Yardstick', *Jean Monnet Working Papers 02/04*.

[32] This is also partly due to what is understood to be the 'standard of review' under the Dispute Settlement Understanding. See Art. 11 DSU; Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones),* WT/DS26/AB, 16 Jan 1998, at para 115–118; D Palmeter and P Mavroidis, *Dispute Settlement in the World Trade Organisation*, (2nd edn, Cambridge: CUP, 2004), at 152–5; and M Oesch, *Standards of Review in WTO Dispute Resolution* (Oxford: OUP, 2003).

[33] AB Report, *EC—hormones*, at 96–108; Appellate Body Report, *Australia—Measures Affecting Importation of Salmon,* WT/DS18/AB/R 20 Oct 1998 at 257–61; Appellate Body Report, *Japan—Measures Affecting Agricultural Products,* WT/DS76/AB/R, 22 Feb 1999, at 118–31; and Palmeter and Mavroidis, *n 32 above,* at 143–50.

and vocabulary of trade regulation, while democracy is understood as the rationality and vocabulary of social regulation. If this is the case, it is unlikely that these two areas of law will be reconciled.

II. RISK REGULATION AND ADMINISTRATIVE CONSTITUTIONALISM

The science/democracy dichotomy is appealing, due to its simplicity and the way it often bolsters arguments from both trade regulation and social regulation perspectives, but it is also wrong. This is because it bears no relation to how standard-setting operates in practice. While, in nearly all jurisdictions, the state is perceived to bear the ultimate responsibility for risk regulation standard-setting,[34] the actual detailed business of standard-setting is overwhelmingly an administrative enterprise: standard-setting is nearly always delegated by a primary law-maker to a non-elected body (a secondary law-maker).[35] There are four main reasons for this.[36] First, standard-setting requires the collection and organisation of an array of different types of *information* about a risk, a process for which the legislature has neither the time nor the resources.[37] This activity is invariably carried out in circumstances of scientific uncertainty which create a series of methodological, epistemological and ontological problems.[38] The second necessary feature of standard-setting is *expertise*, which is required in the interpreting and analysing of information. Expertise is a relative concept, in that an expert is someone who can lay claim to specific skills, experience or knowledge which others do not have. As such, expertise can take many different forms.[39] The third reason for delegation is that the central question in standard-setting is nearly always what an acceptable risk is in a particular circumstance, and this requires specific consideration of how a *normative prescription* (for example, 'adequate level of safety') applies in a specific

[34] There are many reasons for this. See U Beck 'Risk Society And The Provident State' in S Lash and B Szerszynski (eds), *Risk, Environment And Modernity: Towards A New Ecology* (London: Sage Publications, 1996, at 27, and D. Moss, *When All Else Fails: Government as the Ultimate Risk Manager*, (Cambridge, Mass: Harvard UP, 2002).

[35] Delegation may be to a public or private body, although for the purposes of this chapter the concentration is upon public standard-setting as it is it which must be found consistent with the SPS Agreement. It should be noted however that the interface between public and private standard setters is a complex one. See *AFL-CIO v OSHA,* 965 F 2d 962 (11th Cir 1992), and H Schepel, *The Constitution of Private Governance* (Oxford: Hart Publishing, 2005).

[36] E Fisher, *Risk Regulation and Administrative Constitutionalism* (Oxford: Hart Publishing, forthcoming) at Chap 1.

[37] This is a traditional reason for delegation. See C Sunstein and E Ullmann-Margalit, 'Second-Order Decisions' (1999) 110 *Ethics* 5 at 17.

[38] B Wynne, 'Uncertainty And Environmental Learning' (1992) 2 *Global Environmental Change* 111.

[39] Consider, e.g., the literature on citizen science and lay wisdom. See A Irwin, *Citizen Science* (London: Routledge, 1995), and S Krimsky, 'Epistemic Considerations on the Value of Folk-Wisdom in Science and Technology' (1984) 3 *Policy Studies Review* 246.

factual and social political context. The final feature of risk standard-setting is that it requires some form of *communication* between those involved in decision-making. At its simplest, this is required because no single individual can possess all the information and expertise required for a particular risk problem. Communication and dialogue can also be a means of identifying different normative views over a particular problem and mediating between them. It can take many different forms and embody many types of public participation.[40] Such communication and participation do not and cannot democratise standard-setting. The output of such participation may reflect democratic concerns, but administrative processes cannot act as substitutes for democracy because they can never ensure that 'political power is ultimately in the hands of the whole adult population'.[41]

An important and obvious implication which flows from risk regulation standard-setting being an administrative activity is that it will draw on both science and democracy and integrate them in its operation.[42] The administrative nature of standard-setting and the varying, but complementary, roles for science and democracy are obvious when one looks at risk regulation regimes in different jurisdictions. While there is considerable variation in the institutional nature of such regimes, they are all simultaneously scientific and democratic in the sense that they require both science and democracy to operate. Likewise, regulatory regimes cannot be understood as being divided between those that rely on experts and those that rely on public participation, as nearly all standard-setting draws on both.

This is not to say, however, that standard-setting regimes are universal in their structure and nature. As already suggested, there is considerable variation in them both across jurisdictions and within any particular jurisdiction. In part, divergences in standard-setting regimes will be to do with the type of risks being regulated.[43] More significantly, however, variation is due to the fact that there is a polarisation of views about what is and what should be the role and nature of public administration in this area.

[40] Compare, e.g., S Funtowicz and J Ravetz, 'Three Types of Risk Assessment and the Emergence of Post Normal Science' in S Krimsky and D Golding (eds), *Social Theories of Risk* (Westport, Conn: Praeger, 1992), at 251, and J Rossi, 'Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decision-Making' (1997) 92 *North Western University Law Review* 173.

[41] See D Robertson, *The Penguin Dictionary of Politics*, (2nd edn, London: Penguin, 1993), at 129. See, also, Dahl's four criteria for democracy, in R Dahl, 'Democracy' in N Smelser and P Baltes (eds), *International Encyclopaedia of the Social and Behavioural Sciences* (Oxford: Elsevier Science Ltd., 2001), at 3405. For a discussion of this point in the environmental context, see J Steele, 'Participation and Deliberation in Environmental Law: A Problem Solving Approach' (2001) 21 *Oxford Journal of Legal Studies* 415.

[42] B Latour, *Politics of Nature: How to Bring the Sciences into Democracy* (Cambridge Mass: Harvard UP, 2004).

[43] E Fisher, 'The Rise of the Risk Commonwealth and the Challenge for Administrative Law' [2003] *Public Law* 455, and E Fisher, 'Risk and Environmental Law: A Beginner's Guide' in B Richardson and S Wood (eds), *Environmental Law for Sustainability: A Critical Reader* (Oxford: Hart Publishing, 2006).

In other words, standard-setting is shaped by normative assumptions about what is legitimate public administration, and these assumptions are not fixed. The operation of such assumptions can be seen across all administrative law,[44] but is particularly obvious in relation to risk regulation standard-setting because it involves the highly contentious matter of delegating considerable discretionary judgement to expert decision-makers to carry out tasks which have widespread impact on individuals. In such circumstances, it comes as no surprise that different actors have different views about what is the ideal role for public administration.

These normative assumptions are best described as theories of administrative constitutionalism,[45] in that they are theories about how public administration should be constituted, limited and held to account so as to ensure that it is legitimate. The use of the term constitutionalism in the administrative context may look odd to those who tend closely to link constitutionalism with democracy, particularly when standard-setting can never be democratic. It reflects, however, the more traditional connotations of constitutionalism which are with the constituting and limiting of government so as to ensure its principled operation where there are divergences of opinion over what this means and entails.[46] The term is apt because it reflects two features of the legal/policy debates concerning public administration, particularly in the risk regulation area. The first is that while meta-constitutional principles, such as the rule of law and the separation of powers, are relevant, they are wholly inadequate by themselves to address in full the issue of how administrative power should be constituted and limited. Instead, the process of 'constituting' and 'limiting' public administration is invariably distinct from the processes of constitutionalism, and any particular constitutional structure can accommodate different models of good administration—a fact evidenced by the clear distinction between constitutional and administrative law in most jurisdictions. Secondly, and as already noted above, the term reflects the profoundly normative nature of constituting and limiting public administration. Legal frameworks for public administration necessarily reflect models of good administration, but there is often very little agreement over what these models should be.

As already noted, the lack of agreement can be seen in relation to risk regulation standard-setting, and standard-setting regimes have been shaped by incommensurable paradigms of administrative constitutionalism. These theories are not often made explicit, but if one identifies the basic

[44] J Mashaw Greed, *Chaos and Governance: Using Public Choice to Improve Public Law* (New Haven, Conn: Yale UP, 1997), and P Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford: Clarendon Press, 1990).

[45] See Fisher, n 36 above.

[46] C McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca, NY: Cornell UP, 1947), at 3.

assumptions on which a particular law or policy rests, then one can see that these assumptions reflect normative ideals about legitimate administration. Indeed, there is a close interdependent relationship between law and administrative constitutionalism. The latter will be a foundation for the former, and the former will promote the latter. Basically speaking, the two paradigms that have dominated risk regulation standard-setting are the rational-instrumental and the deliberative-constitutive paradigms of administrative constitutionalism.[47] Both are sketched briefly below.

The rational-instrumental (RI) theory of administrative constitutionalism construes public administration to be an 'instrument' of the legislature—a 'robot' or 'transmission belt'[48] whose task is strictly to obey the pre-ordained democratic will (as expressed in legislation) and to act effectively and efficiently. Its discretion is to be constrained as much as possible, and ideally by an analytical methodology (such as risk assessment or cost/benefit analysis) which ensures that administration applies the facts to the legislative mandate in as accurate a way as possible.[49] The role of communication is to gather more information, be it scientific information or information about value preferences; the administration is simply a data collector or umpire which does not make substantive decisions for itself.[50] Public administration may not be democratic, but it does represent the harnessing of science so as to ensure the efficient pursuit of goals generated by the democratic process. In this sense, it has democratic legitimation. The RI theory had a high profile throughout the twentieth century for precisely this reason—it seemed a commonsensical way to constrain administrative power for democratic purposes and its most obvious expression can be seen in the Weberian model of bureaucracy.[51]

The problem with the RI theory is that it depends on the problems that public administration must address as being solvable through a set of pre-ordained methodologies and rules. The reality is, however, that many risk problems are physically and socio-politically complex, and risk assessment, cost/benefit analysis and crude legislative mandates are inadequate to address them.[52] In contrast, the deliberative-constitutive (DC) paradigm of administrative constitutionalism promotes a model of public administration that is designed to address the complexities of risk problems by understanding public administration as being constituted by the legislature so as to

[47] See Fisher, n 36 above.

[48] R Stewart, 'The Reformation of American Administrative Law' (1975) 88 *Harvard Law Review* 1661.

[49] C Sunstein, *Free Markets and Social Justice* (New York: Oxford UP, 1997), at Chap 14.

[50] Stewart, n 48 above, at 1369.

[51] M Weber, *From Max Weber: Essays In Sociology*, (London: Routledge, 1991) at Chap 7.

[52] A Stirling, 'Risk, Uncertainty and Precaution: Some Instrumental Implications from the Social Sciences' in F Berkhout *et al*. (eds), *Negotiating Environmental Change: New Perspectives From Social Science* (Cheltenham: Edward Elgar, 2003).

wield substantial and continuing problem-solving discretion in relation to particular issues. This exercise of discretion is wide ranging and the nature and exercise of this discretion will vary depending on the specific problem. Tools such as risk assessment may have a role to play, but their legitimacy is not guaranteed, and, in every circumstance, the quality and veracity of scientific knowledge must be assessed. Likewise, a significant role is recognised for deliberation, in that the process of considering the different factors involved in a decision will produce a result which is greater than the sum of these factors.[53] From an accountability perspective, the DC paradigm is, at first sight, an alarming prospect because there is no simple means of holding decision-makers to account due to the breadth of discretion given to decision-makers and the fact that problem-solving techniques will vary from circumstance to circumstance. This is not to say that public administration is unaccountable, but rather that, in holding decision-makers to account, the focus must be on assessing the substantive exercise of discretion rather than on whether a decision-maker has adhered to a methodology.[54]

What is clear from above is that these two theories represent incommensurable theories of both public administration and risk problems. This can be clearly seen from Table 1,[55] which outlines the features of each theory and how they define the constituent elements of public administration and the problems with which they are dealing.

In comparing the theories side by side, it can be seen that the difference between these two understandings of administrative constitutionalism is not a difference between science and democracy or between expertise and participation. Both models incorporate all these elements but define and integrate them in different ways. Most importantly, these two different theories define reasonable and legitimate action differently. Under the RI paradigm, legitimate action requires a standard-setter to act within strict legislative boundaries on the basis of an analytical methodology. In contrast, under the DC paradigm, legitimate action will be determined by how administration addresses the problem and considers its different aspects.

These theories are not just interesting constructs, and elsewhere I have shown how these paradigms can be understood to impact on regulatory design, policy, legal doctrines and accountability mechanisms at national level.[56] Indeed, the history of risk regulation standard-setting in

[53] On the use of deliberation in this sense, as opposed to a democratic sense, see Steele, n 41 above. See, also, A Klinke and O Renn, 'A New Approach to Risk Evaluation and Management: Risk-Based, Precaution Based, and Discourse Based Strategies' (2002) 22 *Risk Analysis* 1071.

[54] M. Shapiro, *Who Guards the Guardians: Judicial Control of Administration* (Athens, Geo: University of Georgia Press, 1988).

[55] Based on a more detailed version Fisher, n 36 above, at Chap 1.

[56] E Fisher and R Harding, 'The Precautionary Principle and Administrative Constitutionalism: The Development of Frameworks for Applying the Precautionary Principle' in E Fisher

Table 1: The Rational Instrumental and Deliberative Constitutive Theories of Administrative Constitutionalism

	Rational-Instrumental	Deliberative-Constitutive
	Features of Risk Problems	
Nature of Risk Problems	Objective and quantifiable and the problems of complexity, uncertainty and socio-political ambiguity as largely manageable	Complex socio-political disputes in which complexity, uncertainty and socio-political ambiguity dominate
	Features of Public Administration	
Relationship with Primary Law Maker	Principal/Agent—Transmission belt—Weberian model	Constitutive authority granted by primary law-maker
Limits on Discretion	Legislation and analytical Methodology	Constitutive structure and deliberative process
Accountability	Policing the methodology of decision-making and ensuring that decision-makers have kept within legislative limits	Requires those reviewing the decisions to engage in a substantive review of decision-making
	Features of Risk Regulation Standard Setting	
Normative Factors	Embodied in legislation but limited role for preferences in administrative decision-making	Inherent in all aspects of decision-making
Information	Scientific and heavy reliance on analytical tools such as risk assessment and cost/benefit analysis	A range of information the relevance of which will depend on the nature of the problem
Expertise	Rational and kept strictly within methodological boundaries	Broadly defined
Communication	Interest Representation	Deliberation

jurisdictions with an advanced administrative state has been a history of conflict between these two paradigms. This is because the two paradigms reflect the tension at the heart of risk regulation regimes.[57] The RI paradigm emphasises strict control of administrative action rather than effective engagement with complex problems and the DC paradigm *vice versa*. This is not to say that the RI paradigm will not result in the addressing of risk problems or that the DC paradigm will result in unaccountable action, but that their dual operation illustrates that the relationship between effective regulatory problem-solving and legitimacy is often a paradoxical one. An

et al. (eds), *Implementing the Precautionary Principle: Perspectives and Prospects* (Cheltenham: Edward Elgar, 2006); E Fisher 'Precaution, Law and Principles of Good Administration' (2005) 52(6) *Water Science and Technology* 19; and Fisher, n above 36.

[57] See Fisher, n above 36, at Chap 7. See, also, B Latour, *We Have Never Been Modern* (Cambridge, Mass: Harvard UP, 1993).

effective standard-setting regime threatens to usurp democratic power, but a standard-setting regime under strict democratic control risks being useless.[58]

III. THE SPS AGREEMENT, ADMINISTRATIVE CONSTITUTIONALISM AND DISPUTE SETTLEMENT

The administrative nature of risk regulation standard-setting has not been well recognised in social regulation scholarship, let alone in trade regulation scholarship. Much of this is to do with the fact that public administration is both institutionally awkward and unfashionable. Yet, as already noted, if one examines risk regulation standard-setting regimes, they are primarily administrative in nature. Moreover, a quick glance at the law reports, policy debates and commentaries highlights that the bulk of disputes over standard-setting are, in essence, debates concerned with its legitimacy as an administrative enterprise. The process of holding a decision-maker to account is often a means of challenging the paradigm of administrative constitutionalism under which they are operating.[59]

Just because the SPS Agreement is a part of transnational trade regulation and not the administrative superstructure internal to a jurisdiction does not mean that it is not also concerned with administrative constitutionalism. As noted in the first section, the Agreement is concerned with regulating the process of standard-setting to ensure that it is reasonable. The issue of reasonableness is context dependent, and, as the context for risk regulation standard-setting is public administration, the SPS Agreement is directly concerned with the reasonableness of administrative action and thus administrative constitutionalism. Indeed, when one reads the whole of the Agreement it is clear that it is regulating all aspects of standard-setting and that the administrative nature of standard-setting is an implicit assumption in the Agreement.[60] Thus, for example, the Agreement lays down rules for the four different aspects of standard-setting discussed above. There are provisions concerned with the role of normative prescriptions[61] and ensuring that they are 'appropriate' in any particular circumstance.[62] There are a considerable number of provisions regulating the type of information on

[58] Fisher, n 36 anove.

[59] On accountability as a destabilising influence, see E Fisher, 'The European Union in the Age of Accountability' (2004) 24 *Oxford Journal of Legal Studies* at 495.

[60] For example, Art 9(1), 13 and Annex B(3).

[61] Art 2(1) and the Preamble. Although note that the concept of 'level' of protection (see Arts 3(3) and 5(6) suggests that the issue of normative prescription is linear when it is multidimensional. See S Rayner and R Cantor, 'How Fair is Safe Enough? The Cultural Approach to Societal Technology Choice' (1987) 7 *Risk Analysis* 39. Also note that other provisions of the Agreement will limit the discretion of a member in relation to how a normative prescription applies. See Art 2(2) (extent necessary), Art 5(4) (need to take into account minimising negative trade effects in determining the 'appropriate level of protection') and Annex A(5).

[62] Arts 5(4) and (6).

which standards can be set.[63] Implicit in these provisions is the utilisation of a range of different types of expertise,[64] including the expertise of international bodies[65] and national regulatory bodies.[66] Finally, the Agreement includes a number of provisions which regulate communication and transparency,[67] particularly concerning consultations between members.[68]

As already noted in the first section, there is considerable latitude in how the SPS Agreement is interpreted, and the Agreement can be understood in both RI and DC terms. The ability to interpret the Agreement as promoting either paradigm of administrative constitutionalism can be seen most markedly in the process of dispute settlement, and it is obvious from the Panel and Appellate Body reports that there is not a settled understanding on what is reasonable action for a member to take in setting SPS standards. One very simple example of this can be seen in the difference between how the Panel and the Appellate Body interpreted Article 5(1) of the Agreement in the *EC—Hormones* dispute.[69] This dispute involved the United States (US) challenging the EU's ban on beef being sold from cattle that had been treated with certain growth hormones. Among other things, both the Panel and the Appellate Body found that the EU measure had not been consistent with Article 5(1) but their interpretation of this provision diverged. The Panel defined it in RI terms, while the Appellate Body defined it in DC terms.

Before, however, turning to these decisions, it is useful to set out the relevant provisions. Article 5(1) of the SPS Agreement states that:

> Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organisations.

Furthermore, risk assessment is defined in Annex A(4) as:

> The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.

[63] Art 3(1) (information for international bodies); 2(2) and 3(3) (scientific principles and scientific justification); 5(1)–5(3) and Annex A(4) (a range of information).

[64] See, in particular, the provisions of Art 5(2) and (3).

[65] Art 3(1) and Annex A(3).

[66] Art 9.

[67] Art 7 and Annex B.

[68] Arts 3(4), 9 and 12.

[69] Panel Report, *EC—Hormones Complaint by the United States,* WT/DS26/R/USA, 13 Feb 1998, and Appellate Body Report, *EC Hormones,* n 33 above.

As well as these two provisions, Article 5(2) and 5(3) states what should be taken into account in carrying out a risk assessment:

> 5.2. In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.
>
> 5.3. In assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, members shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing member; and the relative cost-effectiveness of alternative approaches to limiting risks.

I have included these provisions because they are an example of the complex and ambiguous nature of the SPS Agreement. Thus, for example, the definition in Annex A(4) is a dual definition, and in *EC—Hormones* what was being considered was the first definition, while in most other SPS Agreement dispute settlement cases the focus has been on the second definition.[70] Likewise, Article 5(2) and 5(3) requires a very broad number of issues to be taken into account. It should also be noted that, within regulatory science, what is understood to be a 'risk assessment' varies considerably across and between jurisdictions.[71] Indeed, I would go so far as to argue that risk assessment is a construct of administrative constitutionalism instead of being innately scientific.[72] In the light of this fact and the broad nature of the wording of the above provisions, what is understood as a risk assessment for the purposes of the SPS Agreement is open to interpretation. It thus comes as no surprise that the Panel and the Appellate Body deviated in what they understood to be the risk assessment obligations laid down in the Agreement. Moreover, the reason for this divergence can be understood as being due to the Panel and the Appellate Body developing their understandings of 'reasonable' standard-setting on different paradigms of administrative constitutionalism.

The Panel's starting point for its analysis was that Article 5(1) must be understood in terms of the division between a scientific process of risk

[70] Appellate Body Report, *Australia—Measures Affecting Importation of Salmon*; Appellate Body Report, *Japan—Measures Affecting Agricultural Products*; and Appellate Body Report *Japan—Measures Affecting the Importation of Apples,* WT/DS245/AB/R, 26 Nov 2003, all n 33 above.

[71] L Rhomberg, *A Survey of Methods for Chemical Risk Assessment Among Federal Regulatory Agencies* (Washington, DC: National Commission for Risk Assessment and Management 1997) and Interdepartmental Liaison Group on Risk Assessment, *Use of Risk Assessment Within Government Departments (*London: Health and Safety Executive, 1996).

[72] Fisher, n 43 above.

assessment and a political process of risk management.[73] Its characterisation of the standard-setting process in this way seemed to have little to do with the text of the Agreement and more due to the way in which the arguments were put to it by the parties.[74] The division rests upon a presumption that standard-setting can be divided into a wholly scientific process of analysing the facts and a political process of applying these facts to the relevant normative prescription.[75] This division makes sense only if risk assessment is understood to be an objective process of 'scientific' information assessment which is indeed the way in which the Panel characterised it. It stated that Article 5(1) should be understood as a 'specific application' of the obligations set out in Article 2(2).[76] Moreover, it stated that the assessment of risks required the 'scientific examination of data and factual studies'[77] and applied a relatively narrow definition of risk assessment techniques by relying on documents from international bodies even though the Codex Alimentarius had not issued a formal statement of risk assessment at that time.[78] The rationalistic nature of risk assessment was reinforced by the fact that the Panel also stated that a member should evaluate the 'potential or probability' of the adverse effects occurring.[79] The term 'probability' is not included in the Agreement and it is a primarily quantitative notion.[80] Furthermore, the Panel interpreted the phrase 'based on' in Article 5(1) to mean that the scientific conclusions of the risk assessment and the scientific conclusions reflected in the measure were in conformity with each other.[81]

For the Panel, the task of a member's regulatory body in setting a standard was to apply the facts to a normative prescription by using an analytical methodology, and its decision is a perfect example of defining risk assessment in RI terms. Standard-setting was largely characterised as a compartmentalised process in which the standard-setter identified the facts and then applied those facts to a pre-ordained normative prescription. As this was the case, the process of assessing the EU's compliance with the SPS Agreement was understood as requiring the scrutiny of the analytical methodology of the risk assessment and the methodological rigour of the scientific basis. The burden on the EU was also primarily understood as an

[73] Panel Report, *EC—Hormones—Complaint by the United States,* n 69 above, at paras 8.91–8.97.

[74] Ibid, at para 8.95.

[75] Ibid, at paras 8.94, 8.96 and 8.97.

[76] Ibid, at para 8.93.

[77] Ibid, at para 8.94.

[78] Ibid, at 8.103. The authority for relying on these documents is Art 3(1).

[79] Ibid, at para 8.98.

[80] Although note that in the *Australia—Salmon* proceedings both the Panel and the Appellate Body stated that probability could be qualitative in nature. See Panel Report, *Australia—Measures Affecting Importation of Salmon,* n 30 above, at para 8.80 and Appellate Body Report, *Australia—Measures Affecting Importation of Salmon*, at para 123.

[81] Panel Report, *EC—Hormones—Complaint by the United States*, n 69 above, at para 8.117.

evidential one,[82] and the Panel relied heavily on the appointed experts in its assessment of the evidence.[83] Furthermore, there was little role for principles such as the precautionary principle or for discussion of the problems that scientific uncertainty created for standard-setting.[84] Risk assessment was not complicated by scientific uncertainty or socio-political complexity.

The Appellate Body, in contrast, took a very different approach and one that was far more aligned with the DC paradigm, in that it characterised the process of standard-setting in far more complex terms. First, it noted that there was no authority for the distinction that the Panel made between risk assessment and risk management, and that the utilisation of such a distinction resulted in 'a restrictive notion of risk assessment'.[85] Moreover, while it stated that Article 5(1) should be interpreted in the light of Article 2(2), it was less adamant that it was a specific application of it.[86] Moreover, it stated that the Panel's use of 'probability' as an alternative for 'potential' created a 'significant concern' because it implied both a 'higher degree of a threshold of potentiality or possibility' and that its use introduced 'a quantitative dimension to the notion of risk'.[87] It went on to state that the imposition of such a quantitative requirement had no basis in the Agreement, although it did note that there were conceptual problems concerned with ascertaining risk.[88]

Here, we can see the Appellate Body took an approach to standard-setting that is not about conceptualising it as a series of discrete tasks which could be constrained by a strict methodology. Instead, it recognised that risk assessment required a broader definition. It stated that the Panel's approach to risk assessment was too narrow because it purported to exclude from the scope of risk assessment 'all matters not susceptible of quantitative analysis by the empirical or experimental laboratory methods commonly associated with the physical sciences'.[89] For the Appellate Body, this would have been clearly inconsistent with Article 5(2) of the Agreement, and it stated that Article 5(1) was not only concerned with:

> Risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and die.[90]

[82] Ibid, at para 8.100.
[83] This is particularly in relation to the issue of whether a measure was based on a risk assessment. See ibid, at para 8.133.
[84] Ibid, at paras 8.157–8.138
[85] Appellate Body Report, *EC—Hormones*, n 33 above, at para 1.81.
[86] Ibid, at para 180.
[87] Ibid, at para 184.
[88] Ibid, at para 186.
[89] Ibid, at para 187.
[90] Ibid, at para 187.

Moreover, the Appellate Body also noted there was flexibility in the requirements of Article 5(1).[91] Ultimately, risk assessment could take into account a whole range of different forms of information and could be quantitative and qualitative in nature. This could also be evidenced by Article 5(2) and 5(3).

Implicit in the Appellate Body's approach is an appreciation of the complexities in assessing risk and the problems of scientific uncertainty. The Appellate Body was not being 'scientific' or 'anti-scientific' but was instead requiring the assessment of risk to be on a broader basis than understanding risk assessment as an analytical straitjacket would allow. In other words, the Appellate Body was conceptualising standard-setting and risk assessment more as reasoning processes than as fact-finding processes. This can also be seen in the Appellate Body's discussion of the precautionary principle, where it acknowledged the principle's relevance right across the standard-setting process.[92] The principle and the concept of precaution were understood to inform a member's general approach to standard-setting rather than simply to apply in discrete circumstances. Furthermore, the Appellate Body ruled that the Panel's interpretation of 'based on' was far too narrow. Instead, it argued that Article 5(1) required that a risk assessment 'must sufficiently warrant—that is to say, reasonably support'[93] an SPS measure, but that there was no need for a risk assessment to come to a monolithic conclusion.[94] Indeed, the Appellate Body recognised that there may be a range of different scientific conclusions and problems created by scientific uncertainty.[95]

The Appellate Body's approach can be treated as being underpinned by a DC approach. Standard-setting was understood to be a complex enterprise not easily kept within the boundaries of stringent risk-assessment methodologies. Instead, the Appellate Body assessed the compatibility of the EU's measure with the Agreement by determining whether the EU had carried out a coherent process of reasoning.[96]

It is interesting to consider why there is a difference of approach of the Panel and the Appellate Body in the *EC—Hormones* dispute. No definitive answer can be given, but a there are a number of possible reasons that can be identified. First, the difference can be understood as being due to the different bodies taking divergent understandings of risk and risk-problems as their starting point. The Panel was clearly influenced by quantitative understandings of risk while the Appellate Body was not. As noted above,

[91] Ibid, at para 129.
[92] Ibid, at para 124.
[93] Ibid, at para 193.
[94] Ibid, at para 194.
[95] Ibid, at para 194.
[96] Ibid, at paras 205 and 207. Although note here the limits of the Appellate Body's review. For a discussion of this, see Appellate Body Report, *Australia—Measures Affecting Importation of Salmon*, n 33 above, at para 261.

there is a close relationship between how risk-problems are characterised and what is understood to be a legitimate role for public administration in addressing them.

The second reason for the difference is that it can be understood as a product of the fact that the Panel and Appellate Body understood the SPS Agreement as serving different purposes.[97] The Panel largely characterised the Agreement as being a means of reducing regulatory heterogeneity[98] As this was the case, the Agreement was understood to require the harmonisation of standards on the basis of international standards. The imposition of an RI approach would seem to provide a greater guarantee of this occurring, because it would appear to give a lesser role for discretion by placing the same analytical burden on decision-makers.[99] In contrast, the Appellate Body understood the Agreement as being far more about ensuring that bogus SPS measures were invalidated.[100] As this was the case, it was not so much concerned with ensuring that standards were consistent, as concerned that they were 'genuine' SPS measures. The DC approach is entirely consistent with this, and the complexity of risk as recognised by this paradigm is a major reason why different members may legitimately have different measures.[101]

A third reason for the difference in approach is a procedural one, concerning how the Panel and the Appellate Body interpreted what their role should be under the Dispute Settlement Understanding (DSU) and the relevant provisions of the SPS Agreement.[102] This is particularly the case with regard to the standard of review. The DSU contains no explicit statement about the standard of review, although it does state that a Panel should 'make an objective assessment of the matter before it, including an objective assessment of the facts',[103] and this has been taken by the Appellate Body as the starting point for understanding a Panel's standard of review.[104] It

[97] The Panel in *EC—Hormones* interpreted Art 3(1) as the general rule which a member bore a burden of proof in departing from (in line with the Agreement being concerned with reducing regulatory heterogeneity): see Panel Report, *EC—Hormones—Complaint by the United States*, n 69 above, at para 8.86. The Appellate Body in contrast did not adopt this approach. See Appellate Body Report, *EC—Hormones*, n 33 above, at paras 102–10 and 177.

[98] This can be seen in their ruling that Art 3(1) creates a general rule for which Art 3(3) is an exception. See Panel Report, *EC—Hormones—Complaint by the United States*, n 69 above, at para 8.86.

[99] This has also been a major reason for the popularity of the RI paradigm in national systems. See E Fisher, 'Drowning by Numbers: Standard Setting in Risk Regulation and the Pursuit of Accountable Public Administration' (2000) 20 *Oxford Journal of Legal Studies* 109.

[100] Appellate Body Report, *EC—Hormones*, n 33 above, at para 104.

[101] Ibid, at para 124.

[102] Art 11.

[103] Art 11 which describes the functions of Panels.

[104] Appellate Body Report, *United States—Definitive Safeguard Measures on Import of Wheat Gluten from the European Communities*, WT/DS166/AB/R, 19 Jan 2001, at para 175 and Appellate Body Report *EC—Hormones*, n 33 above, at para 74. See, also, Oesch, n 32 above, at 83–8.

could be argued that this very simplistic notion of standard of review, by characterising the Panel's role as a factual one, led the Panel to understand a standard-setter's role in such terms as well. Standards of review which act as imperfect indicators of administrative constitutionalism can be seen in the nature context,[105] and what this highlights is that the nature of the dispute settlement procedure are also important.

The final reason that can be given is that the Panel and the Appellate Body were simply choosing between different national regulatory styles. Thus, for example, the Panel's risk assessment/risk management distinction is a product of US regulatory politics,[106] and, in embracing this distinction, the Panel also embraced the RI paradigm that has dominated US risk regulation for the last 20 years.[107] In contrast, the Appellate Body could be understood as reflecting the more deliberative nature of EU regulatory standard-setting.

IV. IMPLICATIONS OF ADMINISTRATIVE CONSTITUTIONALISM

From the analysis above, it is clear that construing the SPS Agreement in terms of administrative constitutionalism opens many different lines of enquiry. In particular, it can be seen that there is a mutually constitutive interrelationship between the paradigms of administrative constitutionalism, the operation of risk regulation regimes and the dispute settlement proceedings. Each contributes to the other to produce regulatory development and change. In this last section, I highlight what I see as the three most important sets of implications for this interrelationship.

First, as is clear from above, the SPS Agreement is open to divergent interpretations. It can be construed as serving two distinct purposes and its provisions are ambiguous. What this means is that the type of 'reasonable' action that it dictates is not fixed and the Agreement may be used to promote different paradigms of administrative constitutionalism. The divergences in how the Agreement can be interpreted are even more obvious from a comprehensive study of the rulings in relation to the Agreement which have been decided as part of the WTO dispute settlement process.[108]

[105] For example, the 'substantial evidence test'. See E Fisher, 'The Risks of Quantifying Justice: The Use of the Substantial Evidence Test in Judicial Review of OSHA Rule-Making' in R Baldwin (ed), *Law and Uncertainty, Risks and Legal Processes* (The Hague: Kluwer Law International, 1997), at 293.

[106] Fisher, n 43 above, and S Jasanoff, *The Fifth Branch: Science Advisers as Policy Makers* (Cambridge, Mass: Harvard UP, 1990).

[107] Fisher, n 36 above, at Chap 2.

[108] For example, Appellate Body Report, *Australia—Measures Affecting Importation of Salmon*; Appellate Body Report, *Japan—Measures Affecting the Importation of Apples*; and Appellate Body Report, *Japan—Measures Affecting Agricultural Products,* all n 33 above. It should be noted that the impact of harmonisation at the global level on administrative constitutionalism can be seen in these rulings.

Yet, construing the Agreement in terms of the science/democracy dichotomy has tended to discourage a closer textual analysis of Panel and Appellate Body reports.[109] Science and risk assessment have tended to be treated as having single definitions, and very little analysis has been given to the way in which these terms can be differently defined.[110]

The second set of implications of thinking about the SPS Agreement in terms of administrative constitutionalism is for WTO dispute settlement. Dispute settlement proceedings are important because the rulings of the Panels and the Appellate Body represent the most authoritative interpretations of the SPS Agreement. Moreover, it is also clear that dispute settlement proceedings are a site for debating which theory of administrative constitutionalism the SPS Agreement should promote. However, at present, SPS Agreement dispute settlement proceedings are not conceptualised in such a way. As noted above, there has been a tendency on the part of the Panels to construe dispute settlement in this area as requiring a member to 'prove' that its standard has a scientific basis.[111] In other words, dispute settlement is primarily understood as an exercise of evidentiary assessment for a Panel. The problem with this conceptualisation is that it conflates the main question a Panel needs to be asking—has a member acted consistently with the Agreement?—with a secondary procedural question—how much evidence is necessary for a member to prove that it has acted consistently? In so doing, it has also ignored the fact that the Agreement is open to different interpretations. The Appellate Body has pointed out the problem with this,[112] although its role in questioning the Panel's findings is a limited one due to the nature of their review.[113]

As already noted, the evidential focus of the Panel's review can be attributed to how the Panel's standard of review has been characterised, but it is also a product of a much larger problem which is that, while the Uruguay Round saw the 'thickening of legality'[114] of the dispute settlement process, there is no clear vision of the nature and status of this process. Panels are still *ad hoc* and modelled on a diplomatic model, while the Appellate Body has more the guise of a judicial-type body.[115] There may be increasing consensus that dispute settlement, in producing interpretations of WTO law, is creating a 'broad normative binding matrix',[116] but there is no agreement

[109] However, see Perez, n 20 above.

[110] An exception to this is Winickoff *et al*, n 27 above.

[111] Clearly, a complainant would first need to discharge its 'burden' before it would shift to the member. See Palmeter and Mavroidis, n 32 above, at 142–50.

[112] Appellate Body Report, *EC—Hormones*, n 33 above, at paras 101–8 and 132–143.

[113] Appellate Body Report, *Japan—Measures Affecting Agricultural Products*, n 33 above, at para 141.

[114] Lafer as quoted in Palmeter and Mavroidis, n 32 above, at 303.

[115] J Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2002) 13 *American Review of International Arbitration* 177.

[116] Ibid, at 190.

on what this means, and what the role of the Panels is in creating that matrix.[117]

The relevance of this for the SPS Agreement and administrative constitutionalism is that, while the Panels and Appellate Body are hearing arguments about administrative constitutionalism and adjudicating on them, there needs to be greater clarification of both this process and its end product. In relation to the former, there needs to be recognition of the fact that the Panel is essentially assessing whether there has been consistency with the Agreement, and, in this sense, its task is like, although different from, a national court carrying out judicial review of administrative action.[118] It is akin in the sense that such review raises issues of relative institutional and 'constitutional' competence,[119] and also acts as an arena for debating administrative constitutionalism. It is different because such review will be shaped by understandings of both horizontal and vertical competence as well as by principles of trade liberalisation.[120] In relation to the latter issue, there needs to be greater consideration of the normative status of dispute settlement decisions. In this regard, it should be stressed that, historically, legal pluralism and administrative constitutionalism have had a close relationship, and that debates over administrative constitutionalism have occurred in novel arenas.[121]

Finally, understanding the SPS Agreement in terms of administrative constitutionalism has important implications for what is understood to be the nature of the interface between transnational trade governance and national social regulation regimes. These two areas of law are understood as having rival logics, but, as the above analysis illustrates, disputes in both areas raise the same issues. Both areas are concerned with reasonable action in relation to risk regulation standard-setting and thus administrative constitutionalism. WTO dispute settlement in relation to the SPS Agreement is thus a new arena for debating administrative constitutionalism and there needs to be far greater scrutiny of the implications of this for national risk-regulation regimes beyond dispute settlement infusing trade 'concerns' into risk-regulation debates. Thus, for example, despite its ambiguous nature, dispute settlement is perceived as a new source of legal authority. This can be seen from the European Commission's interpretation of the precautionary principle, which reflects the RI thinking of the Panel's decision in

[117] R Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints' (2004) 98 *American Journal of International Law* 247.

[118] For a paper that makes that argument, see Peel, n 31 above.

[119] C Sunstein, *Designing Democracy: What Constitutions Do* (New York: OUP, 2001), and Jowell, n 4 above.

[120] For an interesting discussion of this in relation to standards of review, see Oesch, n 32 above, at Chap 2. See, also, M Maduro, *We, The Court: The European Court of Justice and the European Economic Constitution* (Oxford: Hart Publishing, 1998).

[121] H Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth Century England* (Toronto: University of Toronto Press, 1985).

EC—Hormones.[122] Thus, dispute settlement decisions have an effect not only on national and supranational policy, but also on judicial review doctrine[123] and the institutional structures of risk regulation standard-setters.[124]

Moreover, as an arena for disputing administrative constitutionalism, WTO dispute settlement is operating across jurisdictional boundaries, which brings with it challenges as to how legal norms and legal culture are understood.[125] In particular, and as touched on above, WTO dispute settlement will often require the reconciling of different understandings of administrative constitutionalism derived from different legal cultures. There may be a tendency to try to eradicate such a plurality of theories of administrative constitutionalism, but, as already noted, such 'constitutional' heterogeneity is an omnipresent feature of risk regulation, and not only is it not easily eradicated, but it is also, arguably, undesirable to do so.[126]

Related to these concerns is the need to think more carefully about how debates over the legitimacy of standard-setting regimes at national and transnational level interact. Transnational standard-setting regimes will also be shaped by debates over administrative constitutionalism, and the question is how such debates interact with national discourses. This is something that is beyond the scope of this chapter, but its importance can be seen in other dispute settlement proceedings. Thus, for example, in *Australia—Salmon*, both the Panel and the Appellate Body deferred to the International Office of Epizootic's (OIE) definition of risk assessment,[127] although this definition could be understood as a product of the OIE's own legitimacy concerns. A similar interaction between two different levels of debate over administrative constitutionalism can also be evidenced in the EU.[128] In this sense, there is an important relationship between the constitutionalisation process at transnational level and at national level, although it is one that is not about democratic constitutionalism but about administrative constitutionalism.

[122] Commission of the European Communities, *Communication from the Commission on the Precautionary Principle* (COM(2000) 1 final).

[123] Case T–13/99, *Pfizer Animal Health SA Council* [2002] ECR II–3305. For an analysis of this, see Fisher, n 56 above.

[124] E.g., the European Food Authority. See Commission of the European Communities *White Paper on Food Safety* (COM(1999) 719 final).

[125] A point that has been made about environmental principles. See N de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford: OUP, 2002).

[126] Fisher, n 36 above, at Chap 7.

[127] Panel Report, *Australia—Measures Affecting Importation of Salmon,* n 33 above, at para 8.48 and Appellate Body Report, *Australia—Measures Affecting Importation of Salmon,* n 33 above, at para 123. For an excellent analysis of this case, see Perez, n 20 above.

[128] See, e.g., how the Commission's *Communication on the Precautionary Principle*, a product of Community legitimacy concerns, has come to regulate Member State action: Commission of the European Communities, n 122 above, and Fisher, n 36 above, at Chap 6.

V. CONCLUSION

This chapter has been an exercise in re-orientation. In it, I have argued the need for scholars and lawyers to abandon the idea that the operation of the SPS Agreement creates a dichotomy between science and democracy. Risk regulation standard-setting is an administrative enterprise which raises issues of administrative constitutionalism, and the impact of administrative constitutionalism can be seen in how the Panels and Appellate Body have interpreted the SPS Agreement. The divergent interpretations by the Panel and Appellate Body of Article 5(1) in the *EC—Hormones* dispute settlement proceedings are a case in point. Re-orienting the focus away from the flawed science/democracy dichotomy towards administrative constitutionalism has important implications not only for how the SPS Agreement itself is characterised, but also for understandings of WTO dispute settlement and for how the relationship between transnational trade governance and national social regulation regimes is understood. Such an exercise in re-orientation is hardly likely to yield simple answers, but it will at least result in the right questions being asked.

12

Administrative Globalisation and Curbing the Excesses of the State

DAMIAN CHALMERS

I. INTRODUCTION

THERE IS A paradox at the heart of globalisation debates. Globalisation suggests the possibility of 'society centred' polities in which institutional power is diffused away from administrations to numerous types of social actors, all of which, even large MNCs, can be made accountable to one another. It holds, therefore, a real potential for self-government. This globalised world is, however, one characterised by administrative density, specialisation and intrusion. It is a world with unprecedented levels of civil servants, high administrative budgets and ever increasing departmental specialisation, layering and overlap. Moreover, it cannot be coincidence that 'global' sectors, such as financial services, environmental protection and electronic communications, are also some of the most heavily regulated sectors. Globalisation seems to contain at least two narratives, therefore. If the protests against globalisation have targeted MNCs, they have possibly been even more ferocious, however, in their focus on questions of administrative intrusion—be it the actions of the IMF, OECD trade restrictions, the European Council or TRIPs. Concern with globalisation is, thus, largely a concern with a form of global government. This global government is not, however, coalescing in some international secretariat, but is rather characterised by asymmetrical multi-lateralism. International norms enable administrations to exercise more competencies, greater reach, and solve more problems through entry into selective relations with other state administrations. Global government is an administrative arrangement with a peculiar admixture of forms, functions and frames that prevents the direct replication of national public law controls. Put simply, it does certain things in certain ways and through certain relays that bear no close correlation to government within a purely domestic context.

The central thesis of this chapter is that any legitimatory project concerned with transnational government must consider the administrative

nature of the beast. In particular, it must carefully identify the forms, frames and functions of global government. In this regard, it will be argued that global government is centred around the granting of access to markets or to credit by EU or US administrations. It is thus marked by asymmetrical relationships—in terms of their geography, their power and their subject-matter—between these administrations and the administrations of other states. The politics constituted by these administrative networks are not those of élite competition, contestation of ideas or the negotiation of political community, but those of problem-solving, instead. With problem-solving as a frame, global government emerges precisely to enhance the problem-solving capacity or to subvert other forms of politics.

For all its potential benefits, global government raises a number of particular concerns. There is a concern about asymmetries of power between governments. Relationships are not those of equals, with the consequence that global government can lead to arrangements which deny governments the possibility of being able to deliver the goods they consider optimal for their citizens. There also has to be a concern with the formal effectiveness of the problem-solving procedures. Global government is notoriously difficult to manage: what processes of revision and reflexivity are in place to undo bad arrangements? The biggest challenge is, however, that any political problem-solving process usurps other forms of politics. Moreover, as our knowledge is finite and context-oriented, any solution to a problem generates new points of contestation which it does not address. Increased global problem-solving disenfranchises, and it disenfranchises in a denationalised way. This is to say that it is not powerful states diminishing weaker states, but constellations of interests adopting collectively binding decisions that are ill-suited to other interests with no possibility for the latter to exercise either voice or exit.

Two sources of emancipation are immanent to global government. One is the principle of mutual justification. No matter how egregious the arrangement, it cannot be framed in the language of crude *Realpolitik*. Instead, it must be stated to be an intersubjective project with the parties committed to realising common concerns. In this project, parties are also committed to acting under the charity principle. They are assumed to mean what they say, and are held to their commitments on this basis. Alongside the principle of mutual justification, global government creates another principle, that of the 'community of concern'. By entering into arrangements with other states about increasingly wide arrays of topics, states have committed themselves to treat matters that happen in these other territories as not merely matters that concern them, but also as matters for which they have a shared responsibility. It is no longer credible for states to demand common action over certain matters without also claiming a shared responsibility.

These principles of mutual justification and communities of concern are, it will be argued, laying a tentative framework for the emancipatory project

in global government, which has begun to emerge most explicitly in a couple of recent WTO Panel Reports. They suggest a series of norms which form a constellation around the three problem areas identified.

With regard to asymmetries of power between states, it will be argued that these suggest that any action denying market access must now be justified, and must be justified on a limited number of grounds. Any action must be aimed at realising a public good in good faith. It must also acknowledge the principle of home state control, namely, that responsibility for realising that the public good lies, in principle, with the state on whose territory the problem occurs, and that that state has the *prima facie* capacity to resolve it.

With regard to questions of the formal effectiveness of problem-solving, similar incipient norms of coherence and effectiveness are emerging. No measure can be taken unless it can be shown to be appropriate to the end realised, and that it has been based on empirical evidence. This would suggest a commitment to reflexivity, with a commitment to re-thinking government as environmental circumstances change.

The most difficult problem, it will be argued, is one of disenfranchisement. There is an emerging norm, it will be argued, of mediation. The different interests of states commit themselves to seek common goods, it will be argued, as this very difference generates the possibilities for conflict in the absence of co-operation. Mediation means, in this regard, a commitment to realising one's own interests in a way that accommodates the interests of others as much as possible. This principle is entrenched in the very notion of the global economy and the tension that lies at its heart between particular places and global spaces. With global government dominated by administrative interests, it will be argued that this mediation still occurs in a manner which is too Westphalian. It is a mediation between administrations, rather than between the different societal interests that unite and divide us globally.

II. GLOBALISATION AND THE NATION STATE

II.1 A Well-told Global Tale

Traditional accounts of globalisation are tales of the erosion of national government. Globalisation reverses the traditional relationship between polity and market, as institutionalised in the Westphalian system, in which the market is a plane of action over which the political institutions of governance act through the development of regulatory institutions, rules of exchange and property rights.[1] These accounts contain three tales.

[1] N Fligstein, 'Markets as Politics: A Politico-Cultural Approach to Market Institutions' (1996) 61 *American Sociological Review* 656.

There is the tale of 'fugitive power'. The globalisation of core economic and electronic activities has created networks of 'fugitive power' whose autonomous and fluid nature allows them to escape from the regulatory remit of the state.[2] Evidence of the increasing power of capital flows is shown in the growth of foreign direct investment, which has increased more than 20-fold in the last 20 years.[3] Evidence of the growing power of information and communications networks is seen in the 'economy of signs', where it is brands that have increasing universal value and recognition.[4] Even where this power is contoured by the laws of the jurisdictions in which the central players are based, the heart of power within these networks is located in the sinews of the networks that join up relations between the different actors so that national governmental power has, at best, a weak steering effect.[5] This not only leads to a gap in the rule of law, but the mobility and power of these networks is so destabilising that policy-making in areas such as company law, financial regulation, fiscal and budgetary law is also overshadowed by the fear of its effects on capital movements.

The second tale is that of de-regulation. Governments are hedged in by a web of transnational norms, which restricts their policy choices. MFN provisions, IMF creditor agreements and World Bank structural adjustment programmes limit programmes to boost public spending and to protect national industries. The growth of the WTO and regional agreements, most notably those of the European Union, has also limited national capacity to protect public goods, as environmental, consumer and public health regimes are ruled illegal because of their trade restrictive effects.

The third tale is that of markets developing their own institutions of rule, which act as surrogates for legal and political institutions. In some instances, private parties capture international policy-making through transnational governance regimes, processes of interaction between socio-economic actors and civil servants, which are so powerful that they do not merely frame, but largely pre-determine, formal policy-making at a transnational level.[6] In other instances, completely autonomous private rule-making processes emerge, most explicitly in the standardisation processes

[2] K Ohmae, *The Borderless World: Power and Strategy in the Interlinked Economy* (New York: Harper, 1990); J Habermas, *The Postnational Constellation* (Cambridge, Mass: Polity, 2001) Chap 4.

[3] For analysis, see A Mody, Is FDI Integrating the World Economy, [2004] *World Economy* 1195, 1196–2000.

[4] M Featherstone, *Undoing Culture: Globalisation, Postmodernism and Identity* (London: Sage, 1995).

[5] E.g., S Sassen, *The Global City: New York, London, Tokyo* (Princeton, NJ: Princeton UP, 1991); M Castells, *The Rise of the Network Society* (Oxford: Blackwell, 1996), Chap 2. For a legal account, see F Snyder, 'Governing Economic Globalisation: Global Legal Pluralism and European Law' (1999) *5 European Law Journal* 334.

[6] K Armstrong and S Bulmer, *The Governance of the Single European Market* (Manchester, Manchester UP, 1998), Chap 3.

of the CEN, the IEC and the ISO. These have developed a collective corpus of norms, which resemble and are increasingly recognised as having some quasi-legal status within both the WTO and the EU.[7] Finally, it is argued that private parties are developing their own systems of political accountability through development of tort regimes, so that these can be used across frontiers as a basis for holding private parties, most notably MNCs, liable for human rights violations.[8]

This story has been countered by narratives which emphasise the comparative resources of governmental actors and contest the decline of the state. These narratives note that trade as a proportion of GDP has not increased dramatically in the last 50 years, that MNC penetration of global markets is an old phenomenon and that structures of industrial organisation have not converged under the pressures of global capital or information networks, but have remained resolutely and idiosyncratically national. Such accounts perceive the traditional relationship between the state and market as unchanged, as they claim that markets are relatively unstable creations and rely upon government intervention for their stability. Globalisation represented no more than a series of ideological changes, which are interpreted differently by different governments. It is used as a justification to press for the opening of foreign markets where domestic firms are competitive, and it is invoked as an external threat to close off domestic markets where firms have not traditionally traded internationally.[9]

Both accounts see markets and states as enjoying some form of dialectical relationship with each other in which the actions of each are a functional response to the actions of the other. They merely debate the extent of the phenomenon and which has the upper hand over the other. Concerns identified with globalisation start from these common premises. Globalisation is therefore associated with producing asymmetries of power. The holders of transnational resources—be it capital, transnational expertise, the agenda-setting capacity in international organisations or governance regimes—are enfranchised at the expense of those who do not hold them. This asymmetry, in turn, leads to a representative deficit. Representative institutions, such as national or regional parliaments, have few transnational resources (for example, expertise or capital), and thus are unable to participate actively in the processes of globalisation, and are stripped of many traditional functions by globalisation. The growth of the market as a structure of political rule has, in turn, led to a growth in instrumental rationality in political reason, as value becomes increasingly calculated in terms of

[7] H Schepel, *The Constitution of Private Governance* (Oxford: Hart Publishing, 2005); O Perez, *Ecological Sensitivity and Global Legal Pluralism* (Oxford: Hart Publishing, 2004).

[8] G Hufbauer and N Mitrokostas, 'International Implications of the Alien Tort Statute' (2004) 7 *Journal of International Economic Law* 245.

[9] E.g., N Fligstein, *The Architecture of Markets* (Princeton, NJ: Princeton UP, 2001), at 195–222.

material wealth. It also leads to a decline in accountability, as the locus of authority shifts from a political system of checks and balances to new structures of power, such as the MNC, standard-setting bodies, international civil servants and epistemic communities of experts.

II.2 The Separate Dialectics of Globalisation

This dialectic is not convincing as an explanation of the inter-relationship between transnational economic, political and legal processes. The European Union is an excellent case study, for it has all the phenomena described above. Trans-national economic exchange is at its most intense within the European Union with the European Union dominating world trade.[10] It has put an elaborate and extensive web of legal norms in place, all 70,000 pages of which constrain national decision-making. Finally, it is well known as the central laboratory for private law-making. In mandated areas, the New Approach to Harmonisation delegates the detailed conditions under which products can secure market access within the European Union to standard-setting bodies.[11] In such areas, products conforming to the standards developed by these bodies are presumed to meet all the health and safety requirements that will allow them to be marketed within the European Union.

One would expect an increase in economic integration to lead to a reduction in the steering capacities of national governments. Increased mobility of economic resources both provides incentives for increased competition for scarce economic resources with other states and suggests a diminution in the regulatory authority that states have over socio-economic actors, who are now given real possibilities of evading regimes which they dislike. Secondly, one would expect to see a restriction in the formal freedom available to national decision-makers as their choices are increasingly trumped by EU legal norms. Thirdly, there should be some relationship between an increase in economic integration and an increase in legal integration. The European Union has put compensatory mechanisms in place—namely, its law-making procedures—whereby market processes can be tamed if they threaten excessive negative externalities. One would, therefore, expect economic integration to precede legal integration. One would also expect legal integration to precede economic integration, as legal norms impede national capacities to restrict trade and provide structures to enable traders to trade. Finally, one would expect the exponential growth of private standard-setting bodies with these gradually replacing administrative structures.

[10] The European Union of 25 accounts for about 40% of international trade in goods for both imports and exports. The next largest is the US, which accounts for 9.6% of exports and 16.8% of imports. About 60% of the EU's trade is intra-EU trade: WTO, *International Trade Statistics* (Geneva: WTO, 2003), Table 1.5.

[11] [1985] OJ C136/1.

It is difficult to find evidence of any of these phenomena. First, the European Union is largely credited with increasing and formalising the steering capacities of national governments over their societies by providing justifications (namely, the meeting of EU obligations) for the creation of new centralised agencies and for more extensive intervention by these agencies over socio-economic life. In the United Kingdom, in areas as diverse as broadcasting,[12] regulation of foodstuffs,[13] competition,[14] environmental protection[15] and policing,[16] implementation of EC directives was no more than a catalyst for or contributor to a broader process of reform which has, in all cases, led to the establishment of new centralised regulatory institutions or the formalisation and consolidation of existing central ones. Secondly, there is little evidence of regulatory competition taking place within the European Union. To be sure, whilst current debates about the levels of corporate taxation in Estonia and Malta might provide some evidence of the constraining effects of capital mobility on decision-makers, more wide-ranging studies across broader policy areas have found not only that regulatory competition is a relatively rare phenomenon, but that, where it does occur, it is more likely to lead to the 'California effect', rather than the 'Delaware effect'. Highly regulated markets, not just in Europe but also elsewhere, tend to be the largest and wealthiest markets.[17] By imposing high regulatory standards as a condition for market access, these have led to a wider ratcheting up of standards.[18] In other instances, national administrations bearing higher costs both saw their regimes as a model for other regimes and felt that such costs should be born by other administrations.[19] Thirdly, there is simply no correlation between density of

[12] C O Leary and D Goldberg, 'Television without Frontiers' in T Daintith, *Implementing EC Law in the United Kingdom* (Chichester: John Wiley, 1995).

[13] N Burrows and H Hilam, 'The Official Control of Foodstuffs' in ibid.

[14] C Bellamy, 'The Europeanisation of United Kingdom Competition Law' in N Green and A Robertson (eds), *The Europeanisation of UK Competition Law* (Oxford: Hart Publishing, 1999); S Eyre and M Lodge, 'National Tunes and a European Melody? Competition Law Reform in the United Kingdom and Germany' (2000) 7 *Journal of European Public Polices* 63.

[15] A Weale, 'Environmental Regulation and Administrative Reform in Britain' in G Majone (ed), *Regulating Europe* (London: Routledge, 1997).

[16] B Hebenton and T Thomas, *Policing Europe* (Basingstoke: Macmillan, 1995), at 25–37.

[17] J Mey-Sun and J Pelkmans, 'Regulatory Competition in the Single Market' (1995) 33 *Jornal of Common Market Studies* 67.

[18] On chemicals, see W Patterson, W Grant and C Whitston, *Government and the Chemical Industry—A Comparative Study of Britain and West Germany* (Oxford: Clarendon, 1988), at 298–300; F Boons, 'Product-orientated Environmental Policy and Networks: Ecological Aspects of Economic Internationalisation' in D Judge (ed), *A Green Dimension for the European Community* (London: Frank Cass, 1993), 84 and 93–6. On car emissions, see S Boehmer-Christiansen and H Weidner, *The Politics of Reducing Vehicle Emissions in Britain and Germany* (London: Cassell, 1995), at 54–65; J Liefferink, *Environment and the Nation-State* (Manchester: Manchester UP, 1996) at 97–114.

[19] The most famous example of comparative advantage which surrounded the development of the Aquatic Discharges Directive: N Haigh, *EEC Environmental Policy & Britain* (Harlow: Longman, 1989) 2nd rev edn, at 71–4.

economic transactions and the pace of legislation. Whilst there has been an increase in both over time,[20] legal integration has not led in any linear way to greater economic integration. The Single Market Programme of the early 1990s, the most wide-ranging market liberalisation programme, has been found by Commission-oriented studies to have very limited liberalising effects which affected only about 15 industries.[21] Conversely, the mid-1980s, the period preceding the Single Market Programme, was not a period of increased trade between EU states sufficient to generate demand for greater rules of the game. The most interesting study in this regard on the possible relations between macro-economic conditions and increased legal transnationalisation found that demand for regional integration increased when a state found that its growth was persistently below that of the regional average. Globalisation was not a cause of depressed economic demand; instead, economic demand, lower consumption and lower standards of living were a force for legal globalisation.[22] The final phenomenon, the growth of private law-making, represents something of a puzzle. There is no doubt that today's output is, in quantitative terms, impressive. Standards developed by European standardisation bodies account for about 80 per cent of standards within the Union.[23] These standards are developed relatively quickly, and there seem to be relatively effective synergies between them and international standardisation bodies. However, this was not always so. As recently as 1997, 14 years after the establishment of the New Approach, the Commission found that European standardisation bodies produced poor quality standards inefficiently and unevenly.[24] Private law-making does not emerge spontaneously or easily.[25] Instead, it has began to operate more extensively only in the last five years, following reforms inspired by the Commission.[26] Even then, it has not acted to replace formal legislative processes. Most European standardisation occurs outside the framework of the New Approach, and legislative harmonisation remains the preferred choice in most sectors.[27]

[20] See N Fligstein and A Stone Sweet, 'Institutionalising the Treaty of Rome' in A Stone Sweet, W Sandholtz and N Fligstein (eds), *The Institutionalisation of Europe* (Oxford: OUP, 2001).

[21] C Allen *et al*., 'The Competition Effects of the Single Market in Europe' (1998) 27 *Economic Policy* 441.

[22] W Mattli, *The Logic of Regional Integration* (Cambridge: CUP, 1999).

[23] EC Commission, *Actions Following the Resolutions on European Standardisation adopted by the Council and the European Parliament in 1999*, COM(2001)527.

[24] EC Commission, *Efficiency and Accountability in European Standardisation under the New Approach*, COM(1998) at 291.

[25] R Weerle, 'Institutional Aspects of Standardization—Jurisdictional Conflicts and the Choice of Standardization Organizations' (2001) 8 *Journal of European Public Polices* 392.

[26] First set out in EC Commission, *Efficiency and Accountability in European Standardisation under the New Approach*, COM(98)291, these were pushed forward by Council Resolution on the The Role of Standardisation in Europe [2000] OJ C141/1.

[27] Statistics are rather old, but the New Approach and standardisation accounted for only 17% of industrial production in 1996: EC Commission, *The Impact and Effectiveness of the Single Market*, COM(96)520.

Processes of legal, political and economic globalisation develop relatively independently of one another, with the latter in no way etching out the details or contouring the development of the former. There is nothing surprising about this. It correlates with studies in other areas, which have found only weak relations between macro-economic and social superstructures and administrative infrastructures, and have argued that the stickiness of political institutions, the depth of administrative resources and the insularity and specialisation of bureaucratic communities provide the administrative sphere with considerable autonomy from its environment.[28]

If this is right, then globalisation here is a form of discourse concerned with the praxis and arrangement of administrative power.[29] Its central determinants are to be found in the growth of the administration. This is because global government implies another tier of government, not less government. Thus, in the last 100 years, states have grown in every sense. Budgetary analyses find that, within OECD states, government share in GDP quadrupled in size between 1870 and 1980. Since that date, it has stabilised but not reduced, but there has been a tilt in which there has been increased spending on regulatory policies at the expense of redistributive policies.[30] If the amount of money spent on government has increased, then so have the number of things that government does. A wide-ranging quantitative study, by Boli and collaborators, of a survey of 419 constitutions between 1870 and 1970 found that administrative jurisdiction over social life has expanded considerably.[31] On Boli's methodology, 28 new arenas of socio-economic life were subjected to government intervention by the end of the period, double that of the beginning. Secondly, the state has pluralised and specialised. It has both become increasingly differentiated and used a much greater variety of mechanisms of implementation for securing government ends. Thirdly, there is increasing homogeneity in national constitutional structures, educational systems, environmental policies, demographical instruments, welfare systems and development-oriented economic policies. The growth and complexity of government did not lead to increased cleavages and conflicts about the nature of government. Instead, the reverse happened. A dominant and universalistic hegemony emerged, which was the cause of the growth and the splintering of government.[32]

[28] See, e.g., T Skocpol *et al*. (eds), *Bringing the State Back In* (Cambridge: CUP, 1985) (on the resources of political administration); J March and J Olsen, *The Logic of Appropriateness*, ARENA WP 04/9 (on the autonomy of political reason).

[29] For a similar if highly polemical view, see P Bourdieu, *Acts of Resistance: Against the Tyranny of the Market* (New York: New Press, 1998), at 29–44.

[30] V Tanzi and L Schuknecht, *Public Spending in the 20th Century: A Global Perspective* (Cambridge: CUP, 2000).

[31] J Boli, 'World Polity Sources of Expanding State Authority and Organisation, 1870–1970' in J Thomas, J Meyer, F Ramirez and J Boli (eds), *Institutional Structures: Constituting State, Society and the Individual*, (London: Sage, 1987), at 48 and 72.

[32] *Ibid*., 152–3.

Internationalisation has occurred in the areas of government (for example, financial services, environment, intellectual property, etc) that are marked by the features of administrative growth, specialisation and a common way of framing the problems of government.[33] Indeed, there has often been a direct relationship between the establishment of national ministries and regulatory agencies and the growth of transnational administrative cooperation, with each feeding the other.[34] It is associated in such fields with the development of a series of particular policies and administrative rearrangements. A good example is a recent book with contributions by Pascale Lamy, Peter Mandelson and Lionel Jospin—the outgoing and incoming Trade Commissioners, and one of Europe's most celebrated left-of-centre politicians.[35] The book sets out the tale of globalisation described above and suggests how the European Union should respond to it. The prescriptions are, however, parochially European with little clear relationship between problem and solution—they include development of the European constitution, the Lisbon Agenda and the enhancement of European defence capacity. Globalisation, in other words, is used as a point of de-stabilisation to argue for institutional change. The dynamics of this change are controlled, however, by the world of bureaucratic politics.

III. THE FORMS, FUNCTIONS AND FRAMES OF THE NEW GLOBAL ADMINISTRATION

If legal and political globalisation is principally an outgrowth of the administrative state, it becomes a more tractable subject for lawyers. The processes may be complex and multi-layered, with power being diffused across multiple sites, but they build upon pre-existing, stable, identifiable sources of institutional power, which are as susceptible to the disciplines of public law as any other administrative process. The mission becomes simply one of rearranging the architecture of public law in such a way that it can effectively regulate the new constellations of administrative power. However, such a re-arrangement would need to be sensitive to:

— The forms and institutions of transnational government. It becomes important to identify the precise relays through which administrative power is exercised. These include not merely the formal norms, but also the institutional processes that simultaneously embed and articulate these norms and give them a material presence.

[33] On this in the field of immigration policy, see M Ugur, 'Freedom of Movement v Exclusion' (1995) 25 *International Migration Review* 964.

[34] On the relationship between the development of EC environmental policy and national environmental ministries, see M Jänicke, 'Conditions for Environmental Policy Success: An International Comparison' in M Jachtenfuchs and M Strübel (eds), *Environmental Policy in Europe: Assessment, Challenges and Perspectives* (Baden-Baden: Nomos, 1992).

[35] L Jospin, *My Vision of Europe and Globalization* (Cambridge: Polity Press, 2002), and P Lamy and J Pisani-Ferry, *The Europe We Want* (Cambridge, Mass: Polity, 2002).

— The frames of transnational government. Transnational government will be marked by a series of values, beliefs and systems of knowledge that will provide a way of seeing both the world and government's place within it. This episteme will both inform action and justify it.
— The functions of transnational government. Transnational government is purposive. It, more than other arrangements, will be consciously deployed to realise a number of goods. To be sure, the evaluation of these will be informed by the frames of transnational government, but the function of government goes here to the second order arguments which lead to its deployment and continued use.

To be sure, the heterogeneity of transnational government entails that its forms, frames and functions will vary considerably. A central contention of this chapter is, however, that a predominant trope runs through all transnational government. It is concentrated in a limited number of powerful institutions, and is deployed in a limited set of circumstances.

III.1 The Relays of Power of Transnational Government

Pivotal levers in the development of central government in both the United States and the European Union have been the commerce clause and Article 28 EC respectively. These provisions limited the extent to which states were free to develop their own local political economies autonomously from their neighbours. More substantially, these instruments acted as the justification for political integration, as the need to secure the mobility of the factors of production with minimum externalities within the United States and European Union led to extensive law-making by the central authorities. In both, the balance has leaned more towards positive integration and central regulation than towards negative integration and de-regulation. Neither polity was interested in creating a 'market society' in which socio-economic relations were structured around abstract classical market principles. Instead, local legal and socio-economic institutions have been amalgamated at a central level.

A similar process is occurring within the global political economy. Market access to both the European Union and the United States within the WTO and access to capital from financial institutions is conditional upon third states meeting a host of obligations that include combating drugs,[36] protecting the environment and labour rights,[37] combating money

[36] E.g., Andean Trade Preferences Act 1991 as amended by the Trade Promotion and Drug Eradication Act of 2002, which makes credit, assistance and trade with the US dependent on efforts to combat the cultivation of illicit drugs by the ANDEAN States.

[37] The recent US Free Trade Agreements with Chile (2003), Morocco (2004) and Australia (2004) as well as NAFTA all provide for withdrawal of benefits and resort to dispute settlement procedures outside the WTO where parties fail to enforce environmental or labour laws effectively or are considered by the other party not to offer satisfactory protection.

laundering,[38] terrorism,[39] organised crime and illegal immigration, and promoting human rights, democracy and respect for the rules of law and good governance.[40] Goods are also not to be provided with market access if their sectors are marked by lack of respect for international intellectual property norms, competition law, banking or standards of food safety. A form of world government, consisting of administrative bilateral relations, has emerged, which governs large sectors of market regulation, public law and protection of public goods. It has an asymmetrical multilateralism characterised by four features.

The first feature is *concentration* of power. The elements underpinning these legal and political structures are the access to markets, aid and credit provided by two players, the European Union governments and the United States of America. The central arenas for the interpretation and materialisation of these obligations are, thus, remarkably concentrated. They are to be found in the *national* ministries and agencies of these two actors, where decisions are taken as to the meanings that these obligations are to have in precise scenarios, and the occasional application of sanctions. The 'internationalisation' of these relations through their being conducted via the auspices of the World Bank, the IMF or the EU merely concentrates power. It increases the benefits/losses to the third country from non-co-operation, whilst increasing the number of veto players who can determine the obligations of the latter. If one looks at the withdrawal of GSP to Myanmar in 1997 by the European Union on grounds of its human rights abuses, it can be seen that it was held up for some time by the French government, which was concerned about the effect it would have on interests held by Elf Aquitaine in that state.[41] Similarly, negotiations between the IMF and Argentina on the latter's access to international credit are currently conditional upon its making a satisfactory offer to private creditors in a small number of states, Italy, Germany, Austria, Japan and the United States (Global Committee of Argentinian Bond Holders) to cover the losses these

[38] A good example is the EU neighbourhood policy with Newly Independent States (NIS), Southern Mediterranean States, and Russia which includes all these under the mantra of reform and sustainable development. These are to co-operate not only on combating drugs, terrorism, money laundering but are to align their legislation with that of EC in single market, competition, environment, labour and consumer law. For example, Partnership and Co-operation Agreement between the European Union and the Ukraine, Dec 98/149/EC [1998] OJ L49/1. Failure to do any of these can lead to 'appropriate measures' (e.g., sanctions) being taken: ibid., Art 102(2).

[39] Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt [2004] OJ L304/39; US Trade Act of 2002.

[40] Partnership Agreement between the ACP States and the European Union 2000 (Cotonou), Art 9 Even more wide-raging is the US Africa Growth and Opportunity Act of 2004, HR 4103, which allows for the US to designate aid and trade advantages to 34 sub-Saharan States conditional on prohibition of child labour, political pluralism, availability of health care and education.

[41] These are now set out Reg 1853/2004 [2004] OJ L323/11.

suffered as a result of the 2001 collapse of the *peso*.[42] It is a banal truism that this concentration of power prevents any political, or even legal, equality between actors. These structures are set up as objects of rule over less developed states. They have little substantive voice in the development or interpretation of these obligations, even where there are 'consultation procedures' available to them; only sanctions for breach of the rules of the game apply to them.

The second is *pluralisation within the structures of administrative power*. Pluralisation occurs in part as a result of 'internationalisation'. The creation of a common front between those holding the key to market access or access to capital markets also provides arenas for contestation and competition to arise between states. Debates about debt relief to Iraq and Africa have, thus, been plagued by disputes between creditor states. Pluralisation has also occurred because of the increased intensivity and extensiveness of this form of government. More administrative resources and expertise are required to formulate, supervise, and co-ordinate these relations of government: consequently, the initial trade and co-operation agreements with Central and Eastern Europe involved 21 of the Commission's then 24 DGs. This not only leads to the possibilities of competition between government agencies, but it also cuts across local interests within the European Union and the United States, which, in turn, often have a variety of administrative and judicial avenues at their disposition to pursue their interests.[43]

The third are *geographical asymmetries*. It is inaccurate to see the central relays of power in international political economy merely as global institutions such as the WTO or the IMF. Instead, these facilitate two uneven, multilateral relations between the EU and the US. There are the relations between the EU and the United States, the Transatlantic Dialogue, characterised by a symmetry of power and, in many ways, a symmetry of interests. Then, there are the relations between either the European Union or the United States and a large number of orbit states, which structure economic relations between these: Cotonou, the European Neighbour Policy, pre-accession agreements in the case of the EU, and a series of free trade arrangements between the US and other states, most strongly characterised by a push towards a Free Trade Area of the Americas. Finally, one sees both the EU and the United States entering a series of bilateral relations with other states,[44] which are sufficiently large that they cannot be clumped together with other states (for example, Korea, India, China and Brazil)

[42] This was established in Rome in June 2002.

[43] The city of Amsterdam's attempt to restrict the mobility of prostitutes that occurred because of the mid-1990s Europe agreements ended in disaster in the courts: Case C–268/99 *Jany* [2001] ECR I–8615. More recently, the attempts to re-negotiate public debt between Argentina and its creditors have been stymied through private creditor action before the courts.

[44] The EU is formalising a series of 'strategic partnerships' with Canada, India, China and Russia. E.g., EC Commission, *EU–India: A Strategic Partnership*, SEC(2004)768.

but are insufficiently powerful for the relationship to be one of comity or equality.[45] These relations are characterised by an absence of formal treaty constraints, but are, instead, modulated through autonomous trade instruments (for example, safeguard or anti-dumping measures).

III.2 The Functions of Transnational Government

Global government operates in a world of institutional competition. As an institutional arrangement, it is always used as an alternative both to other forms of government and to non-government. It persists only because it is assumed by key actors to perform certain tasks more effectively. Whilst these will vary, transnational government serves a number of common themes.

Transnational government is used, first, to *enhance capacity*. This capacity is becoming highly multifaceted. It can take the form of the creation of 'security communities'. Geopolitical and 'realist' theories of international relations have, therefore, argued that a common security threat and a shared interest in diffusing conflict lead to co-operation as states are moved to protect their territorial sovereignty.[46] These threats, increasingly, come not from other states, but are internal threats from civil society—organised crime, terrorism and uncontrollable migration flow. The shape of co-operation is changing, therefore, away from common defence communities into common policing regimes. A second form of enhanced capacity is the creation of common goods that cannot be created unilaterally by any one state—the protection of the environment, trade liberalisation, etc. These are surprisingly difficult to realise between equal sovereign states, as not only must domestic preferences be aligned, but there must not be a high asymmetry in distributive costs. They tend to occur, therefore, only where there are clear gains for all the major players or when powerful epistemic communities warn of disastrous costs of non-co-operation. Thirdly, international regimes develop where they provide new forms of resources for states to manage their own territories. These can take the form of financial resources or, more invidiously, expertise (legal, scientific, economic, etc). This is not simply a rich state–poor state scenario. As government has become increasingly complex and diverse, an increasing number of states have had to rely on transnational resources to manage their territories. The regime on genetically modified food within Europe is a case in point. GM

[45] This asymmetry is also consistent with 'new trade' theory which insists that current gains and motives for international trade are due to returns from increasing economies of scale rather than classical comparative advantage. Patterns of trade are asymmetric and gains highly concentrated: J Gowa and E Mansfield, 'Alliances, Imperfect Markets and Major-Power Trade' (2004) 58 *International Organisation* 775; K Chase, 'Economic Interests and Regional Trade Agreements: The Case of NAFTA' (2003) 57 *International Organisation* 137.

[46] E.g., D. Verdier, *Democracy and International Trade* (Princeton, NJ: Princeton UP, 1994), Chap 1.

food can be marketed within the EU, on paper, only if it has been approved by a complex network of national regulatory authorities, the European Food Safety Authority and the Commission.[47] The large Member States (for example, France and the United Kingdom) often have two regulatory authorities—one that considers the effect of releases on the wider environment and the other that considers food safety. Most Member States have none. They tap into the regulatory expertise of the other states through their participation in EU governance regimes.

Transgovernmental government is used, secondly, to secure *de-politicisation*.[48] Sending issues 'upstairs' to 'international' areas removes them from domestic arenas. Task effectiveness, managerialism, technical imperatives and international standing become the central norms guiding policy. Transnationalisation has, in this context, become a powerful instrument for transforming how political issues are constructed. It reduces political mobilisation and makes administrative interactions the central processes of politics. Transnationally, this is used to secure 'lock-in'. International norms and institutions are established to foreclose domestic contestation and deviance. This leads to a paradoxical effect where there is a direct correlation between the consequences and risk of deviances and the level of institutional centralisation required. Centralisation occurs, therefore, either where there is a high level of mistrust between actors, or where there are concerns about the levels of the capacities of some actors, or where individual inaction places high costs upon other states.[49] De-politicisation also has important institutional and territorial implications within states. Institutionally, it reinforces the power of national executives domestically. They are usually the central interlocutors between other national actors and international arenas. Even in arenas such as the European Union, where other participants emerge within the international arenas themselves, the national executive always has a monopoly on the implementation of the international norms into the domestic legal settlement, with these norms providing a justification for the rationalisation, consolidation and centralisation of administrative power within the nation-state.[50] This expresses itself territorially in that parliamentary versus executive, or civil society versus administration, or local government versus central government conflicts become increasingly expressed along local versus global lines.[51]

[47] Reg 1829/2003/EC [2003] OJ L268/1.

[48] J Olsen, 'Unity, Diversity and Democratic Institutions: What we can Learn from the European Union as a Large-scale Experiment in Political Organisation and Governing', *ARENA Working Paper 04/13*.

[49] D Singer, 'Capital Rules: The Domestic Politics of International Regulatory Harmonisation' (2004) 58 *International Organisation* 531.

[50] See, also, the central argument of T Börzel, *States and Regions in the European Union* (Cambridge: CUP, 2002).

[51] J Kelly, 'International Actors on the Domestic Scene: Membership Conditionality and Socialisation by International Institutions' (2004) 58 *International Organisation* 421.

Internationalisation reinforces these tensions by emphasising the power of the central executive. Conversely, 'globalisation' becomes a useful discursive frame with which other actors can beat the national executive.

The third dimension to internationalisation is that it introduces another tier of policy-making, which opens up the possibility for '*two level' games*. Parties unable to realise objectives domestically increasingly use international *fora* as a means of bypassing domestic opposition. This can take the form of national governments using international law-making as a means of locking in unpopular policies. It can also be powerful private actors.[52] MNCs have, therefore, used trade liberalisation as a means of securing domestic economic reform.[53] Similarly, human rights, labour movements and environmental NGOs have seen the policing of international treaties as an important source of bringing about domestic change.[54] Internationalisation acts here as an avenue for 'outsider élites' or weak administration to affect change. The international/national cleavages established by it take the form of an élite game in which 'insider' domestic élites try to mitigate or limit the effect of transnational change.

III.3 The Frames of Global Government

Global government is, above all, concerned with the politics of problem-solving. Its central concern is not political creationalism. It is not concerned with polity-building or the creation or re-negotiation of the contours of political community. Nor is it concerned with the politics of adversarialism. Few structures are put in place that provide for contestation of office or transnational political parties. Questions of institutional design, political community and political contestation may arise, but they do so as second-order considerations. They are not the purpose of co-operation, but act rather as constraints on co-operation. If this is so, what does the politics of problem-solving involve? It is too simplistic to associate it with managerial or technocratic approaches to politics. Problem-solving, by contrast, involves a form of politics that accords a high degree of normative force to empirically derived knowledge.[55] It sets out an *empirically* derived ideal state of affairs (for example, a reduction of 25 per cent in premature deaths from lung cancer) with problems being the empirically identified points of

[52] On the WTO, see G Schaffer, *Defending Intersts: Public-Private Partnerships in WTO Litigation* (Washington DC: Brookings, 2003). On the SEA, see M Salter, 'Europe's New Industrial Revolution' (1988) 3 *European Affairs* 98.

[53] M Cowles, 'Organising Industrial Coalitions' in W Wallace and A Young (eds), *Participation and Policy Making in the European Union* (Oxford: OUP, 1997).

[54] H Cullen and K Morrow, 'International Civil Society and International Law: The Growth of NGO Participation' (2001) 1 *Non State Actors & International Law* 7.

[55] F Ewald, 'Justice, Equality, Judgment: On Social Justice' in G Teubner (ed), *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labour, Corporate, Anti-trust and Social Welfare Law* (Berlin and New York: de Gruyter, 1987), 91, at 104–5.

disequilibrium that threaten this (levels of tobacco use). The knowledge used to identify the problem is then used as the starting point both to identify and to test the solution (the reduction of smoking and its link to a reduction in cancer levels).

The problem with problems is that they are difficult to solve. Easy problems resolve themselves. This is not simply because of the technical complexity and specialisation of the information that may have to be used, but because of the multifaceted nature of knowledge.[56] Any corpus of knowledge committed towards its application to a particular context will involve a particular admixture of three elements. There will be a 'technical' element concerned with extending control over the processes in question, through representing these processes as a series of objectified processes. There will be a 'practical' dimension concerned with fostering mutual understanding, locating these against wider social processes. Finally, there will be an 'emancipatory' element concerned with the undesirable consequences of any process—be it ecological, social or economic. These elements are not discrete, but interact in such a way that it is impossible to disentangle one from the other so that, in each case, the identification and resolution of any problem involves a unique blend of these three elements with the knowledge being assessed in terms of its plausibility and relevance to the problem, rather than its universal veracity.[57]

The situatedness and action-orientated nature of modern forms of knowledge raise the barrier, however, as to who can participate in its creation. To add to the knowledge of other participants—to extend their sense of justified true belief—one must say something that they regard as convincing in terms of each of these three elements. For this reason, organisation theorists have discovered that knowledge is generated more quickly in highly exclusive 'communities of practice'.[58] These are not necessarily formal communities, but processes of interaction which involve 'any sustained pursuit of a shared enterprise and the social relations generated by it'.[59] They are characterised by three sets of bonds that create the internal resources for problem-solving: mutual engagement, joint enterprise and a shared repertoire. Mutual engagement requires not merely that persons identify themselves as engaging with a particular form of process, but that all members are included in what is deemed to matter. This mutual engagement may be

[56] H. Wilmott, 'Management and Organisation Studies as Science? Methodologies of OR in Critical Perspective' (1997) 4 *Organisation* 309. This draws on the division first drawn up in J Habermas, *Knowledge and Human Interests* (tran J Shapiro, London: Heinemann, 1978).

[57] For the vast literature on this, see D Yanow, 'Seeing Organisational Learning: A "Cultural View"' (2000) 7 *Organisation* 247. An excellent set of case studies is set out in Y Engeström and D Middleton (eds), *Cognition and Communication at Work* (Cambridge: CUP, 1999).

[58] The term was first developed in J Lave and E Wenger, *Situated Learning: Legitimate Peripheral Participation* (Cambridge: CUP, 1991). It was used in greater detail in E Wenger, *Communities of Practice* (Cambridge: CUP, 1998); E Wenger, 'Communities of Practice and Social Learning Systems' (2000) 7 *Organisation* 225.

[59] Wenger, Situated Learning, n 58 above, at 45.

conflictual, but it must be sustained to generate the trust that connects individuals in anything other than a formal way. Joint enterprise requires that the collective decision reflect the full complexity of mutual engagement in a manner that has resonance for all members of the community. A community of practice will exist only where there is a strong sense of collective ownership over the final decision and a strong sense of mutual accountability, which goes beyond the deliberative process of responding to the other's arguments in order to include common notions of what requires justification, what is relevant and what is to be foregrounded. A shared repertoire does not necessarily involve shared beliefs, but does involve a set of shared points of reference, which can consist of routines, narratives, words or symbols. It is through this repertoire that the practice of the community can be identified. It provides a vocabulary for community members to utter meaningful statements about the world, a mode of expression through which they can identify themselves and others as part of a community, and a form of collective self-identification through providing a history of mutual engagement and a point of departure for future engagement.

IV. JUSTIFYING GLOBAL GOVERNMENT

These features of global government result in any transnational practice, however venal it may otherwise be, having emancipatory elements immanent to it.

One is that of mutual justification. Access to credit or markets can be denied only by reference to multilateral obligations. There is a duty of justification, and a duty to couch this justification in particular terms. The EU or the US will, therefore, invariably invoke either the breach of some multilateral treaty or some implicit universal norm of behaviour (for example, tolerating organised crime) as a reason for denying another state benefits, or they will invoke the principle of *pacta sunt servanda*, namely, an explicit commitment to the European Union or the United States. *Pacta sunt servanda* is a commitment, at least at a formal level, to an inter-subjective existence. It is a formal acknowledgement of the other partner as an equal, and, therefore, of the project as a common project which imposes duties of mutual accountability to one another.

Moreover, the form of this mutual accountability is conditioned by the charity principle.[60] However venal their true motivations, the parties are interpreted as meaning and believing what they say, and are held to what they say on this basis. It is this charity principle that lies at the heart of traditional international law. It imposes duties of formal accountability, but these have been shown to be rather thin over time. The move towards

[60] Most famously, see D Davidson, 'Radical Interpretation' in D Davidson, *Inquiries into Truth and Interpretation* (2nd edn, Oxford: Clarendon, 2001).

global government has introduced another principle, that of 'communities of concern'. Government is something that conceives itself as acting not merely over its own target population, but also as acting for the benefit of its target population. Global government is no different in this regard. Any problem of government, no matter how one-sided the motivation for its original development, argues that it is for the benefit of all the people of the territories. For example, when the Andean Drug Eradication and Trade Promotion Act was introduced to Congress in November 2001, it was introduced in the following terms:

> To achieve a programme with the greatest potential benefit to the region and to the United States, the Administration supports as much expanded product coverage as can be agreed by Congress this year. Through strengthening the legitimate economies of the beneficiary countries, the ATPA is a key component of our efforts to combat the scourge of narcotics in the Andean region and in the United States. There are clear links between drug trafficking and terrorism and it is in our national interest to combat the drug trade and to promote healthy, strong economies and democracies.[61]

This creates a paradox. As the reach of global government grows, so, too, do its normative commitments. The United States introduced the policy of coca eradication in the Andean states because of its concerns over illicit drug production and its effects on crime and public health *within* the United States. The Act explicitly establishes an institutional link between the US administration and the coca producers. It is making a formal claim to be acting for their benefit, and, thereby, assuming a responsibility for their plight. To be sure, it is a diffuse commitment, and not an explicit one. At the very least, however, it means that it cannot disavow its responsibility for the people of the Andean states without throwing into doubt the sincerity of its commitments under the charity principle.

IV.1 Asymmetrical State Relations

The central problem posed by the formal institutions of global government concerns relations between governments. Malfunction can prevent governments from delivering goods to their citizens as effectively as they might. In this regard, the central changes are in asymmetry and consistency. Asymmetries of power allow more powerful states either to manipulate or to be insufficiently sensitive to small states for reasons of narrow self-interest or because they do not have, or are unwilling to have put before them, the information that will enable them to make fairer choices. The pluralisation of government has also led to powerful states being increasingly unable to deliver the goods that they promise, as one part of the

[61] http://www.whitehouse.gov/omb/legislative/sap/107–1/HR3009-h.html (accessed 25 Nov 2004).

administration undercuts, consciously or otherwise, promises by another part of the administration. In the last year, however, constraints have emerged in the WTO that have begun to address both these concerns. Evidence of the emergence of a new seam requiring powerful states to justify themselves inparticular ways has emerged in two recent decisions.

European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries concerned an action brought by India against the European Communities' operation of its General Scheme of Preferences for 2002–2004.[62] India was concerned at Special Incentive Arrangements that allowed members to be accorded further preferential treatment for their goods if they were deemed to comply with certain international treaties protecting labour rights and the conservation of tropical forests and marine stocks, and if they were considered to be taking measures to combat drug-trafficking. Initially, India brought an action against all three classes of Special Incentive Arrangements, arguing that they illegally discriminated against it, as it did not benefit from any of them. In the end, it confined its action to the Drug Arrangements, the privileges granted to the states which were deemed to be actively combating illegal drug production. Although much of the debate focussed on the relationship between the Enabling Clause and the Most Favoured National Principle,[63] the central point of interest for this chapter was the Panel's treatment of the European Communities' defence that the arrangements could be justified under Article XX(b) GATT, which allows parties to derogate from their obligations where this is necessary to protect human health, provided that the measures do not constitute unjustifiable discrimination or a disguised restriction on international trade.

The Panel stated, first, that any policy must be designed to realise the objectives set out in Article XX: in this case, public health. For these purposes, regard must be had not merely to the stated objectives, but also to the design, architecture and structure of the measure. From looking at the UN strategy on drugs, the Panel noted that market access was not a core component of the strategy for preventing drugs. The central component was, instead, found to be integrated rural development. The Panel also noted that improving market access did not, in its view, improve the health of the population in the European Communities. Secondly, the Panel noted that the measure had to be necessary to secure the Communities' health objectives. In this regard, it stated that 'necessary' involved being closer to indispensable than to making a contribution towards, and found this not to be the case here. It noted that the suspension of tariffs had not reduced the supply of explicit drugs from Myanmar. It also considered that the suspension of tariffs also involved the suspension of other measures, such

[62] WT/DS246/R, adopted on 1 Dec 2003.

[63] These were the points the Appellate Body focussed upon, WT/DS246/AB/R, Decision of 7 Apr 2004.

as aid to rural areas, with the counterproductive effect that punitive measures may induce farmers to re-introduce the cultivation of illicit drugs. Thirdly, the Panel stated that the measures must not discriminate between countries in which the same conditions prevail. In this instance, there was clear discrimination between the treatment of Iran and the treatment of Pakistan. Iran had been far more successful in the seizure of illicit drugs than Pakistan, but the latter was granted special privileges whilst the former was not. Finally, the Panel stated that any measure must consider its regulatory appropriateness for the conditions prevailing in the exporting country. The European Communities claimed that its arrangements were based on the statistics on illicit trade in drugs. The Panel noted that the statistics suggested that the scale of the drug problem had remained relatively unchanged in Pakistan throughout the 1990s. It was difficult to see why, starting from 2002, Pakistan was suddenly included on the list of those that were taking effective measures against the illicit drug trade.

Although the reasoning of the Panel follows that of previous Panels,[64] it is the first time that this analytical prism has been applied in such a wider-ranging manner to suggest the emergence of a number of incipient norms to control this form of government. The first norm is the presence of a principle of *good faith*. Measures must be justified by reference to some recognised multilateral interest, and they must be shown to be taken for this reason. The EC measures were declared illegal precisely because their sincerity was questioned. Secondly, there is the principle of *coherence*. Measures must make sense across space and across time, and must support global initiatives. Consequently, there must be similar treatment of equal situations between states and of the same state over time. In addition, it must be consistent with other international initiatives. Thirdly, any policy must be *knowledge-based*. It must be derived from some empirical understanding of the situation in the exporting states, and there must be a commitment to a minimum of reflexivity; in other words, measures must be reconsidered in the light of subsequent events. Fourthly, there is the principle of *effectiveness*. Measures which will be counterproductive or which will have very little impact over time cannot be taken. Fifthly, there is a commitment to *interdependence*. Importing states cannot take measures for wholly imperialistic reasons. There must be some evidence that the measure in question is necessary to protect interests within their own territory as well as in the territory of the exporting state.

The other decision of interest is *United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services*.[65] This involved a claim by Antigua and Barbuda that non-discriminatory restrictions imposed

[64] *US-Gasoline*, WT/DS2/AB/R, adopted 20 May 1996; *US–Shrimp*, WT/DS58/AB/R, adopted 6 Nov 1998; *Korea–Various Measures on Beef*, WT/DS34/AB/R, adopted 10 Jan 2001.

[65] Decision of the DSB of 10 Nov 2004, WT/DS/285/R.

by a number of states within the United States on internet gambling violated, *inter alia*, Article XVI(1) of the GATS. The Panel found that, in so far as the measures were taken to counter concerns about money-laundering, fraud, organised crime, under-age gambling and pathological gambling, they were necessary to protect public morals and public order. They could, therefore, in principle, be justified under Article XIV(a) of the GATS, which allows states to restrict commitments precisely on these grounds. The Panel, however, argued that an exception to the GATT could not be invoked as being necessary if there were other less trade-restrictive alternatives available. As the measures amounted to a prohibition on remote gambling, the Panel considered that the United States had to show that it had used measures other than a complete prohibition to address the concerns posed by remote gambling. The Panel accepted an Antiguan innovative argument at this point. Notwithstanding the basic legitimacy of the US regime, the Antiguans argued that the United States should have considered whether the Antiguan regime had sufficient guarantees to meet their concerns. Even if it did not, the Antiguans claimed that they had offered to consult with the Americans about how to reform their regime to meet these concerns, and that the Americans had failed to respond this. The Panel acknowledged this point and stated that the failure to consider the merits of the Antiguan regime and the failure to enter into either bilateral or multilateral consultations resulted in the United States being unable to use Article XIV as a defence.[66]

This decision could have the same implications for the WTO as *Cassis de Dijon* had for the EC legal order. This is because it adds two new justificatory norms. The first is that of home state control or mutual recognition. No matter how desirable a recipient or importing state's regime, it is under a duty to consider whether the concerns have been met by the exporting or provider state. The decision is, therefore, one about the allocation of jurisdictions. It states that the responsibility for the regulation of public goods lies with the provider or exporting state. This acts, in part, as a reserve of competence. If that state performs these tasks effectively, the importing or host state must accept the export of the regime with the receipt of the good or service. However, it also creates channels of accountability which justify action by the latter over the exporting/providing states. If these fail to regulate public goods adequately, the importing/host states can both demand an explanation from them and refuse to accept their goods. The demands from importing states may be more wide-ranging, however, than simply requesting an explanation for defective or hazardous goods or services; it can extend, as the *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries* Report

[66] The US has indicated that it will appeal on this point.

suggests, to any public good that the importing/receiver state considers to be a matter of pressing common concern.

The second implication of *United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services* concerns the situation in which the exporting/provider state fails adequately to regulate the public goods in question. The principle of mutual recognition in EC law would stop at this point. The importing state is free to refuse the goods or services. The requirement in the Panel Report is to go further and require consultations as a default position. These consultations cannot be a simple case of powerful states twisting the arm of other states. Instead, they must meet the criteria set out in *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries of Good Faith, Coherence, Effectiveness and Reflexivity.* The Report is, in other words, suggesting that a whole structure of government be created around these norms wherever there is a commitment to trade between states.

The norms in these Panel Reports are only incipient ones, but they suggest a fairly effective form of mutual justification. A requirement of justification, alone, is insufficient, however. It arises as an explanation of why an act was done, rather than a conditional structure that provides prior reasons for action. Justification, therefore, acts mainly as an *ex post* control that does not prevent malfunction but merely exposes it subsequently. Consequently, there is also a representation deficit: a requirement that states explain themselves before action in response to, and taking account of, the submissions made by other states, and that there is some correlation between the actions taken and the explanation given. A number of authors have argued, therefore, that the central 'deficit' facing both regional and global arrangements is the absence of a requirement for states to take account of non-national interests in coming to a decision.[67] Curbing the representation deficit would, in this context, require states to provide a detailed statement of how they intend to take account of the interests of other states, as represented by the latter in their decisions and arrangements prior to coming to a decision to deny market access or credit access. There would be a duty to give reasons on the basis of the evidence presented. It would also include a duty to explain how this was coherent with wider processes and policies (for example, how was it consistent with the poverty alleviation programmes that they might be running). It would also involve a commitment to revise it if it provided unanticipated externalities for these states, and to re-discuss it in the short to medium term.

[67] M Poiares Maduro, *We, the Court: The European Court of Justice & the European Economic Constitution* (Oxford: Hart Publishing, 1998), at 166–74; R Keohane, 'Global Governance and Democratic Accountability' in D Held and R Koenig-Archibugi, *Taming Globalisation: Frontiers of Governance* (Cambridge, Mass: Polity, 2003); J Scott, 'European Regulation of GMOs: Thinking about "Judicial Review" in the WTO', *Jean Monnet Working Paper 2004/4*.

The asymmetrical nature of global relations makes these requirements, paradoxically, much easier to fulfil. As globalisation centralises administrative power, it is a duty that does not fall upon everybody with the same weight, but principally upon the resource-endowed bureaucracies of the European Union and the United States. The duties imposed are not universalistic ones, but are owed only to those with whom they have entered into relationships.

IV.2 Effective Problem-solving

As a problem-solving process, global government acts, in part at least, in competition with other processes. Relative to national processes, it continually has to justify its worth both as a collective process and to individual participants. If a process is not felt to be useful generally, it will fall into disuse. If its solutions are felt to be inappropriate for individual states, in the absence of coercive pressures, it will not be applied. Some have argued that this very organisational competition will lead to its occurring only where it presents some added value.[68] This may sometimes be the case, but experience suggests the possibility of a number of pathologies which can hinder effective problem-solving, even when viewed on the most formal terms. One problem is co-option. International problem-solving often occurs where prior epistemic communities of specialists who push for a common approach have emerged. Even where this is not the case, there is the danger of the 'big tent' approach. The endless push and pull of negotiation and mutual accommodation leads to an endless process of incorporation of experts who were otherwise agnostic.[69] In this way, the competitive power of the market-place of ideas slowly becomes reduced and homogenised to the amorphous conceptions of the best argument. The other difficulty facing transnational processes is that of formalisation. Lack of mutual trust between states leads to high levels of formalisation in problem-solving and enforcement processes, as states seek higher levels of guarantee and transparency from other states.[70] This formalisation generates its own sclerosis, surrounding constituencies and path-dependencies, all of which act to service the *status quo*, rather than to search out new forms of knowledge.

Global government has developed various norms to counter this. The reluctance of national governments to relinquish control over what takes place on their territories to other bodies has led to the process of multiple

[68] A Stinchcombe, *When Formality Works: Authority and Abstraction in Law and Organisation* (Chicago, Ill: University of Chicago Press, 2001).

[69] J Trondal and F Veggeland, 'Access, Voice and Loyalty: The Representation of Domestic Civil Servants in the EU Committees', *ARENA Working Paper 00/8*.

[70] G Majone, *Mutual Trust, Credible Commitments and the Rules for the Evolution of a Single European Market*, Working Paper (1995, Fiesole, RSC 95/1).

testing and *de-territorialised multiple accountability*. Industry is to be responsible for its externalities to numerous regulators. This leads to increased demands on industry to explain itself. As different regulators pick up on different things, the level of justification is more multifaceted than a straightforward dialogue between a single regulator and industry. MNCs wishing to market products globally, for example, will want a single marketing strategy and pattern of industrial organisation, rather than one for the US, one for Mexico, one for Russia, etc. Whilst it is theoretically possible to develop one-by-one approaches, more often, they will listen to different regulators whilst negotiating with the regulator in their home state.

Secondly, regulators must justify their decisions to one another. Global government also involves a process of *mutual justification*. The Antiguan government must show that its regulatory structures on remote government meet US government concerns. Similar importing state objections, if they are to carry weight, must persuade other regulators. Otherwise, they will either launch their own enquiries or denounce practices as protectionist. The US government must provide convincing reasons why it is not convinced by the Antiguan regime. In particular, it will have to show that the practices of every state in the US are of a higher standard than that in Antigua. This will, in turn, commit it to a process of self-evaluation.

Thirdly, global government implies a faith in the reflexivity and co-ordinating power of knowledge. The European Communities' *Conditions for the Granting of Tariff Preferences to Developing Countries Report* suggests that any measure must be coherent, effective and based on empirical evidence. This knowledge would appear to be the only basis for measuring whether it is coherent and effective or not. Moreover, it is a dynamic process, as it commits regulatory processes to improve themselves as knowledge changes. In this, it assumes not only the capacity for self-improvement in the knowledge-generating process, but also assumes that this improvement will be sufficiently clear to all regulators and will convince them to align their expectations and understandings accordingly.

If these powerful norms are incipient in global government, there is a problem with the depth of their institutionalisation. As the European Union has discovered, a commitment to the formal effectiveness of problem-solving involves a commitment to continuing regulatory and institutional reform, as different problems tend to lend themselves to different institutional solutions. The institutional arrangements of global government are, in contrast, relatively fixed arrangements. The other difficulty is that, once established, the problem-solving processes of global government tend to be reactive rather than strategic processes. There is little overarching intelligence which can align strategy, co-ordinate debates and put in place the appropriate rules of the game that will structure decision-making between regulators. In my work on the regulation of GMOs in Europe, I found that, even within the EU, the absence of this led to industry being still able to

capture regulators. There was a blizzard of science in which a high number of opinions were offered, but a selective few scrutinised, and, finally, there were highly rigid path-dependencies in which a particular model of reasoning acquired mystical significance.[71]

IV.3 The Distortion of Local Democracy

The most pressing problem posed by global government is that it actively disenfranchises many constituencies in both rich and poor states across the world. It does this by amplifying the difficulties associated with problem-solving as a political process by extending both its reach and its scale.

One difficulty is that the phenomenon of communities of practice illustrates how problem-solving is a highly exclusive and asymmetric political exercise. The finitude of knowledge is not merely a limit on how many problems can be solved, but actually enables problem solution in the first place. Internationalisation is synonymous with the increasing specialisation of knowledge. Inevitably, the knowledge used will be exclusive and difficult to acquire, and will ignore many other forms of knowledge. Research has suggested that transnational problem-solving leads to communities of practice marked by specialisation, unrepresentativeness and strong internal bonds of mutual justification.[72] Global government will, therefore, address tasks that will not have much meaning for many of the constituents or will actively disempower them. Forms of meaning that appear stridently hegemonic and insensitive to local forms of knowledge will be developed. It thereby creates the paradoxical situation whereby the more effective and the more extensive the machinery for problem-solving, the more contentious and exclusionary it becomes.

Another difficulty is the usurpation of other forms of politics. Managerialism and belief in the force of the best argument removes questions from other forms of politics, such as the negotiation of questions of political community or elite contestation. This not only disempowers élites committed to these other forms of politics, but it also leads to a reduction in competition between these forms of politics. Much of the protests at the EU, the WTO, the IMF, with their trenchant arguments about 'local democracy', is, in reality, a criticism of this transformation of the public sphere. Other forms of politics are being curtailed with the corresponding resort to 'ante-politics' and civil protest by those who find themselves

[71] D Chalmers, 'Risk, Anxiety and the European Mediation of the Politics of Life' (2005) 30 *European Law Review* 649.

[72] C Joerges and J Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Case of Comitology' (1997) 3 *European Law Journal* 273; J Neyer, 'The Comitology Challenge to Analytical Integration Theory' and C Joerges, '"Good Governance" Through Comitology' in C Joerges and E Vos (eds), *EU Committees: Social Regulation, Law and Politics*, (Oxford: Hart Publishing, 1999).

marginalised by this. Finally, there is the danger of 'infra-nationalism'.[73] Mobile élites flicker and forum-shop between global and local venues, using each to circumvent and undermine the other. This works not only as a practice, but also as a threat, with decision-making in each being aligned to beliefs about the shadow of the other.

One way of seeking to accommodate these concerns, the one which is most prevalent in debates about world civil society, is an integrationist approach. It argues that these asymmetries can be avoided through international arrangements which foster local self-government. Individuals should be able to participate and deliberate in these political arrangements either through centralised processes or through localised procedures that then feed into centralised decision. Even if one ignores concerns that there is no theory of collective decision-making in such arrangements and practical questions about how to co-ordinate such processes in an even-handed manner, the experience of direct democracy is so overwhelmingly negative in other *fora* that such an approach, it is submitted, should be rejected.

Deliberation has proved to be singularly ineffective at generating political agreement where there is a heterogeneity of viewpoints amongst participants. The empirical literature is very clear that it is most likely to be successful, in contrast, in settings which are insulated, within groups in which the majority of those present feel themselves to be insiders, and where the debate is not highly ideologised.[74] Heterogeneous settings involving a broader spectrum of groups tend to produce more mean-spirited decisions. A series of analyses shows that, as group recognition and membership are central to individual self-esteem, nearly all individuals extend a lower quality of treatment to persons not from their group than to members of their group.[75] Sunstein, for one, has noted that, when faced with dialogue, individuals tend to visit sites that reinforce and confirm their views. They are less inclined to participate in venues that challenge their views or with which they do not affiliate.[76] Not only does it silence those with 'low status' views, but it also leads to low levels of participation. The impressive study by Verba suggests that asymmetries of power are carried over into the political sphere, rather than the latter acting as a counterweight to these, so that economic resources, family income, education, recruitment networks and political engagement were the central variables to *who* would participate in discussions.[77] Direct deliberation narratives

[73] First noted in the EU in J de Areilza, Sovereignty or Management: The Dual Character of European Supranationalism Revisited', *Jean Monnet Working Paper 95/2*.

[74] J Checkel , 'Taking Deliberation Seriously', *ARENA Working Papers 01/14*.

[75] A review of the literature is contained in H Smith *et al*., 'The Self-relevant Implications of the Group Value Model: Group Membership, Self Worth, and Treatment Quality' (1998) 34 *Journal of Experimental & Social Psychology* 470.

[76] C Sunstein, 'The Daily We: Is the Internet really a blessing for democracy?', *Boston Review*, available at http://bostonreview. mit.edu (accessed 6 August 2001).

[77] S Verba *et al*., *Voice and Equality: Civic Voluntarism in American Politics* (Cambridge, Mass: Harvard UP, 1995), at 461–508.

ignore, in other words, the central point of the political sphere, which is that meant to civilise and tame society's excesses, not reflect and fetishise them.

An alternative approach accepts these oppositionalities as both inevitable and desirable (instrumental rationality versus life world; market versus public goods, executive versus civil society, administration versus parliament, universalism versus particularism, risk versus anxiety, and labour versus capital). This is because these oppositionalities are necessary to develop, balance and counteract the pathologies of their counterparts. To accept that both must be accommodated within any process is not to argue that both must be incorporated into a single line of logic. The terms of each are incompatible with the terms of the other. At best, they form a dialectic in which each responds positively to the challenges of the other.

The role of political institutions is not, therefore, one of assimilation. Instead, it is to secure mediation, whereby each set of politics comes to terms with the politics of the other. In this respect, the recent work of Etienne Balibar is particularly instructive.[78] Whilst his work is directed at the imminent potential of the European Union, it can be applied with equal force to the nature of the global. He argues that, as the nature of the European Union (or global) is qualitatively different from that of traditional political communities and institutions, it is uniquely positioned to engage in the politics of mediation. The power of the nation-state, its sovereignty, is something that predates its action. Its resides in its taken-for-granted sovereignty. By contrast, European global power comes from its bringing into play new constellations of existing actors and institutions. It is not something pre-existing but comes from the production of new relations. It emerges only where other actors come together to achieve international solutions.

The basis for this co-operation, according to Balibar, comes from the nature of these oppositionalities. Recognition emerges that, whilst conflicting interests and identities cannot be dissolved, the possibility of conflict can be itself productive, in that it is this which provides the possibility and the reasons for co-operation. Mediation is the process of realising this co-operation in such a way that the new regime consists of a 'superimposition of heterogeneous relations to other histories and cultures, which are reproduced within its own history and culture'.[79] The beauty of the global sphere is that this mediation can be placed at the interface of the space/place relationship that constitutes the core of global politics. It should be remembered that places are practised spaces. A street becomes a street by virtue of our walking along it. The only forms of space that exist in a

[78] E Balibar, 'Europe: Vanishing Mediator' (2003) 10 *Constellations* 312. This is also published in E Balibar, *We, Citizens of Europe?* (Princeton, NJ: University of Princeton, 2004), Chap 11.

[79] Ibid., at 322.

physical or material sense are places where we carry out our practices. The global sphere is no more than an abstraction, a 'representation of space'. It does not exist in any corporeal sense; it cannot be found in any location. However, spatialities are necessary to make sense of where we are. Concepts such as London, the world, etc, allow individuals to position themselves against broader processes. The global sphere is, therefore, an invitation to individuals to locate their daily practices against broader horizons—be they functional, ethical or epistemic.[80] Any 'global' practice is therefore a local practice that frames itself in terms of broader external transnational implications. At its heart, it depends upon a permanent interaction between the local and the global sphere that derives from their being opposing counterparts.

This would suggest that a systemic primacy be given to local determinations because:

> they refer to the specific historical and geographical roots of the conflict, which are also dialectically the premises of its solution and because they allow us to assign responsibilities and make concrete forces accountable for their actions.[81]

However, mediation requires that these local actors should not be isolated. In taking any decision, they should be accountable to outsiders, who, in turn, in Balibar's vision, should be re-accountable to local actors. The terms of accountability are important. Accountability to the other implies not that one becomes the other, but that one explains oneself in terms of the politics and interests of the other. A decision taken to recover capital, for example, must explain how it does not damage, or at least seeks to minimise damage to, public goods. A decision to ban the marketing of a GMO on the ground of the politics of anxiety within a territory must explain itself in the language of the terms of risk—why it considered the views of science to be insufficient.

To choose a counter-intuitive example, private creditors litigating for the loss of their investments following the Argentinian crash of 2001 should, if they are the US investors who lodged these investments with US banks, be able to sue in US courts. It is, for them, a very local event. They have been deprived of their pensions, savings, etc, by a far-off event. Events for them have crystallised in New York, Baltimore, etc. However, the US court should not decide the matter exclusively on the basis of US contract law. It should take account of the fact that the crash devastated the wealth basis and welfare state of that society, and that to demand full repayment would take no account of this. Any decision would have to balance these interests, which involve providing not only some accommodation, but giving

[80] D Harvey, *Justice, Nature and the Geography of Difference* (Oxford: Blackwell, 1996), at 291–328.

[81] E Balibar, n 78 above, at 328.

Argentinean officials the possibility of explaining the consequences of particular rulings for Argentina.

V. CONCLUSION

If the above analysis is correct, it suggests that global government, as it develops, is quickly acquiring normative structures that act as powerful sources of legitimation and emancipation. Opposition to globalisation or global government is counter-productive not simply because it obscures the possible benefits and is politically naïve. It also fails to develop the emerging incipient public sphere and the structures of public law. Left untended, these become corrupted and undeveloped, with the consequence that, as global government grows, it not only becomes more hegemonic, but increasingly mirrors the demonology of its detractors. There is also a second suggestion, which is that there is a poverty of imagination in much of the critique of global government. The presence or absence of the unitary state is taken as the starting point. It becomes either a retreat from reality into the utopian visions of cosmopolitanism, or a sacralised haven of a village style of self-government. This is bizarre. Courses on public law or democratic theory do not treat it in such terms. Instead, it is seen as an important abstraction which allows us to make sense of complex interactions and micro-processes, but does not do away with the need to study the latter. A global public law would have similar sociological and political prescience. It would spend more time piercing the veil of the state by examining the particular administrative processes that generate new constellations of insiders and outsiders, new forms of belief and value, and new mechanisms of accountability and representation.

Section II.2

The TBT Agreement and International Standardisation

13

A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and 'International Standards'

ROBERT HOWSE*

I. INTRODUCTION

THIS CHAPTER EXAMINES an extraordinary mechanism for the creation of new international legal norms that is contained in the WTO Technical Barriers to Trade (TBT) Agreement.

As interpreted by the Appellate Body—the WTO's highest judicial instance—the TBT Agreement applies to a very wide range of domestic regulations, arguably excluding only the measures that deal with certain aspects of food and agricultural health, and the safety regulations that are defined as falling within the exclusive province of the WTO Agreement on Sanitary and Phytosanitary Measures (SPS). One of the key disciplines of the TBT Agreement is the obligation for WTO members to use 'international standards' as a 'basis' for their technical regulations, unless the international standards are ineffective or inappropriate (Article 2(4)). However, international standards themselves are mainly of a voluntary nature and, in most cases, do not result in binding treaty commitments; quite a few of these standards are the creation of non-governmental bodies, or private/public partnerships in which industry is the driving force. By virtue of Article 2(4) of the TBT Agreement, as interpreted in WTO dispute settlement,

* This chapter is a very small piece of a very large project, a commentary on the TBT Agreement that I am writing with my colleague Don Regan, as part of the Oxford University Press WTO Commentary series. The good ideas in this chapter should be attributed to my collaboration with Don; the errors, and normative assertions, are mine alone. Versions of this essay were presented at Harvard Law School and NYU Law School and I am grateful for comments and suggestions by attendees at those presentations.

a very broad range of normative material, including privately generated norms in some cases, is converted or transformed into international legal obligation.

The incorporation of treaty norms from other regimes into the WTO—such as the main WIPO conventions on intellectual property rights—has been widely commented on; such incorporation inevitably changes the nature and implications of the obligations in question, by virtue of attaching them to a trade-driven system of dispute settlement and enforcement. But the TBT Agreement is different; it does not incorporate or transform existing international law, but instead turns a mass of normative material that *never before* had the status of international law into international legal obligation.

While most of the chapter sketches how this automatic law-making mechanism functions in the context of the TBT Agreement as a whole, the conclusion considers the implications for 'progressive' regulatory democracy.

I.1 The Obligation to use International Standards as Interpreted by the WTO AB: The Sardines Ruling

It is not necessarily the case that to use international standards as a 'basis' for regulations confers legal force on the standards themselves. As Henrik Horn and Joseph Weiler have argued, the treaty language is open to a procedural interpretation: international standards must be a focus of the regulatory process—namely, the deliberation involved in deciding on regulations. On such a reading, however, the substantive regulatory outcomes of WTO members may differ radically from what is implicit or explicit in the international standards in question. There is no requirement of correspondence between the *outcomes* and the international standards, provided that the international standards have been taken into account in the regulatory process.[1]

Alternatively, the obligation to use international standards as a 'basis' might be interpreted as an *aspirational* obligation, one which WTO members are expected to meet progressively, over a considerable period of time. While such an obligation would nevertheless confer some legal force on the substance of the standards themselves, this would be attenuated by the progressive, 'best efforts' nature of the obligation to use the standards as a basis.

It was precisely in this manner that, in the *EC—Hormones* case,[2] the WTO Appellate Body viewed an obligation in the SPS Agreement to

[1] H Horn and JHH Weiler, 'European Communities—Trade Description of Sardines: Textualism and its Discontent' in H Horn and PC Marroidis (eds), *The WTO Case Law of 2002* (Cambridge: CUP, 2005), 248–75.

[2] Report of the Appellate Body, WT/DS 26 & 48/AB/R, adopted 16 Jan 1998 and 13 Feb 1998.

harmonise domestic regulations by basing them on international standards. In *Hormones*, the Panel below, the first instance, had taken a procedural approach to this SPS obligation: the major motivation for the Appellate Body's rejection of the panel interpretation was a concern with retroactivity. The SPS Agreement applied to regulations that were already in existence at the time it came into force, and therefore, on a procedural reading, a regulation could fall foul of the SPS Agreement on account of a failure to do something in a regulatory process that had occurred prior to its entry into force—hence, the retroactivity. In fairness to the Appellate Body, the Panel below did not have a good answer to the retroactivity problem; on the other hand, the Appellate Body *could* have solved the problem by 'reading down' this particular provision so that it did not apply retroactively to the regulatory process that brought into existence measures already in place when the SPS Agreement came into force. It could have done so, while giving full force to the application of other SPS provisions to existing measures; in other words, the AB could have simply held that the parties to SPS had not contracted out of the retroactivity principle, and so it should be presumed to govern the scope of application of the provisions in the Agreement.

In any event, when the panel in the *Sardines*[3] case applied the requirement in the TBT Agreement to use international standards as a 'basis' for regulations, it apparently never even considered the possibility of a procedural approach. In fact, although the meaning of the obligation to use international standards as a 'basis' for technical regulations was an issue of first impression, the panel did not attempt to elaborate explicitly its understanding of the kind of relationship between international standards and a domestic technical regulation that is required by this obligation.[4] Instead, the Panel passed the international standard as if it were the governing *law* of the dispute, assuming that what Article 2(4) TBT required it to do was to determine the substantive consistency or conformity of the EC's regulation with the international standard in question.

In an *amicus curiae* brief to the Appellate Body in *Sardines,* I argued that the Panel had erred in law in assuming that the correct reading of Article 2(4) TBT was that its mandate was to determine the conformity of the EC's measure with international standards; given the lack of textual guidance in Article 2(4) TBT itself as to the kind of relationship intended by the language 'use … as a basis for', I suggested that it was appropriate to understand the requirement in terms of reasonableness; there must be a reasonable relationship between the international standard and the domestic regulation. The notion of a reasonable relationship is able to encompass

[3] *EC—Trade Description of Sardines*, Report of the Appellate Body, DS 231/AB/R, 26 Sept 2002.

[4] For a criticism of the panel in this regard, see R Howse, 'The Sardines Panel and AB Rulings: Some Preliminary Reactions' [2002] *Legal Issues of Economic Integration,* 250.

both procedural and substantive elements; it may be appropriate to consider the way in which the international standard might have been used in the domestic regulatory process, or whether it was ignored, and, if so, why; it could, in some contexts, also be appropriate to examine whether the regulation itself is consistent with the purposes or aims of the international standards regime in question. A reasonable relationship test leaves a great deal to context, in recognition of the wide variety of normative material, and the many different purposes entailed in the broad notion of international standards or standardisation; it also allows judgments to be made about the relative legitimacy of different kinds of standards, or their suitability for shaping domestic regulation in various ways. This approach may well entail the Panel seeking the expert views of those in the relevant standardisation community concerning the nature of the particular international standard in question and its intended relationship to domestic regulation.

In oral argument before the Appellate Body, the EC pursued the notion of a rational connection or nexus test for the term 'based on'; the Appellate Body responded that there was no textual foundation for any such interpretation (even though the AB itself had suggested, in interpreting the SPS Agreement in *Hormones*, that the obligation to base one's measures on a risk assessment meant that there must be a rational relationship or connection between the risk assessment and the regulation—equally without an explicit textual foundation!). In *Sardines*, the Appellate Body, having rejected the notion of rational relationship, went on to hold that, on the facts, it need not dispose of the issue of how close a connection was implied in the language 'use … as a basis for', since the EC regulation at issue actually *contradicted* the international standard in question, and a regulation that contradicts an international standard could not possibly have that standard as a basis. Then, in *dicta*, the Appellate Body speculated that 'use … as a basis for' probably suggested a 'very strong and substantial relationship' between a member's regulation and the substance of the international standard in question. Needless to say, a test of 'very strong and substantial relationship' has no more textual foundation in the actual words of Article 2(4) TBT than a test of 'rational relationship'.

At the same time, contrary to what the Appellate Body suggests, it is entirely possible that a domestic regulation that contradicts an international standard may, nevertheless, have some kind of rational relationship to that standard. For example, an international standard may provide a default norm or specification while, at the same time, indicating that this norm or specification is for use only where a regulating authority does not see the need to adopt its own specification. In that case, the normative message of the international standard is something like 'here is a default that you can use if you decide not to consume domestic administrative resources in crafting your own standard, but the default is not being held out as a desideratum on its own merits—i.e., the standard does not aspire to

harmonisation'. In such an instance, a distinctive domestic specification that is entirely different from, or contradicts, the *default* in no way conflicts with the *normative message* of the international standard taken as a whole in the light of its object and purpose. Such a specification might well be found to be rationally related to the international standard, in that the international standard endorses, or at least attaches no disapprobium to, *deviation* from the default.

Be that as it may, by opining in *dicta* that a 'very strong and substantial' relationship may be required between domestic regulations and international standards under Article 2(4) TBT, the Appellate Body has clearly suggested that international standards have considerable, automatic legal force in the WTO.

By automatic, what I mean here is that the Appellate Body does not, apparently, consider it to be of any importance to take into account the intentions or practice of the standard-setting regime in question; it is unconcerned with the intentions of the standard-setting regime or its participants, and uninterested in the practice of that regime. The Appellate Body is quite prepared to confer legal force on international standards without any consideration of the institutional context in which the standards arise.

Other aspects of the *Sardines* ruling as well as other provisions of the TBT Agreement have to be taken into account in order to understand just how broad an automatic law-making mechanism the Appellate Body may have created by its interpretation (again, largely in *dicta*) of Article 2(4) SPS.

First of all, a major qualification on the requirement to use international standards as a 'basis' for domestic regulations is that they need not be used where 'ineffective' or 'inappropriate'. It is arguable that this qualification essentially makes Article 2(4) no more intrusive in domestic regulation than the requirement in Article 2(2) of the TBT Agreement that a measure be the least trade restrictive available to achieve a member's legitimate objective, taking into a account a range of factors. If a member can show that it has adopted the least trade restrictive means of achieving its legitimate ends, then it almost necessarily follows that any alternative standard would not be adequate to the reach those ends, i.e., would be 'ineffective' or 'inappropriate'.[5] This view is reinforced, to some extent, by Article 2(5) of the TBT, which creates a rebuttable presumption that measures 'in accordance' with international standards are consistent with the least-trade-restrictiveness requirement of Article 2(2) TBT. The presumption in Article 2(5) suggests that Article 2(4) is intended to serve a similar function to Article 2(5), i.e., to limit trade-restrictiveness in domestic regulations, not to impose the normativity of international standards as such.

[5] I am grateful to my colleague Don Regan for suggesting this possibility.

However, matters are not so simple. According to the Appellate Body in *Sardines*, the burden of proof of showing that international standards are 'ineffective' or 'inappropriate' is on the defending member; in contrast, the burden of proof of showing that the defending member's measure is more trade restrictive than necessary under Article 2(2) is on the complaining member, by virtue of the fact that Article 2(2) is not an exception, unlike Article XX of the GATT, but an additional positive obligation. By requiring that the defending member show the 'ineffective' or 'inappropriate' nature of the international standards, the Appellate Body has, in fact, bifurcated Article 2(4) into a *sui generis* positive obligation to use international standards as a 'basis' and an exception to this obligation, where the defending member can prove that the international standards are 'ineffective' or 'inappropriate'. Moreover, while there is a rebuttable presumption that where a measure is in accordance with international standards the least-trade-restrictiveness test is met, this does *not* mean that the TBT Agreement conceives the role of international standards primarily or exclusively as insuring least trade-restrictiveness. If such were the case, then, the TBT Agreement would logically contain a mirror provision to that of Article 2(5), namely, a provision that would allow a member to dispense with the requirement of proving the 'ineffective' or 'inappropriate' exception, where the member can show its measure is the least trade-restrictive necessary to achieve its goal. This would make least-trade-restrictiveness a defence or an exception to the requirement to use international standards as a basis for one's measure. The fact is that Article 2(4) requires the use of international standards as a basis for regulations even if the international standards in question are as trade restrictive as as any alternative domestic measure. Indeed, international standards *could* be *more* trade restrictive than alternative measures to achieve the same objective, even though the clear intent of the TBT Agreement is to ensure the avoidance of unnecessary trade restrictiveness in international standards themselves; hence, to allow for the possibility that implementing international standards could be more trade restrictive than alternative measures, Article 2(5) creates a presumption that, when international standards are complied with, a measure is compliant with the least-trade-restrictiveness requirement of Article 2(2). This presumption ensures that there is no legal conflict between the requirement to use international standards in Article 2(4) and the requirement of least-trade-restrictiveness in Article 2(2). Only where the complaining member can show that the international standard itself is more trade restrictive than *necessary* will the presumption in favour of the international standard be overcome. In other words, the TBT Agreement *presumes* that where international standards are more trade restrictive than alternative measures, this trade restrictiveness is justifiable. Since the *general* burden of proof is anyhow on the complainant in the case of Article 2(2), the notion of a 'rebuttable presumption' suggests that rebutting the presumption requires

a degree of proof *above and beyond* the general burden on the complainant. In summary, a careful examination of the relationship of Article 2(4) and (2) shows the priority that the TBT Agreement places on the normativity of international standards and that this normativity is not *subordinate* to the inquiry into least-trade-restrictiveness in the choice of domestic regulations.

In *Sardines*, the Appellate Body held—in what I believe was a misreading of the TBT text—that Article 2(4) applied even to international standards not in existence at the time at which a member's regulation was adopted in domestic law. Thus, let us say that, when the United States adopted its current regulations on widgets, there was no international widget standard; according to the Appellate Body, if, several years later, an international widget standard has come into being that differs from the regulatory approach of the US, the United States is in non-conformity with Article 2(4) TBT if it does not amend its domestic regulation so that the international standard becomes the basis for the regulation. Thus, on the Appellate Body's approach, one could even use international standard-setting strategically, in order to create *new* standards that impugn a WTO member's *existing* regulations.

Such possibilities gain in significance on account of a further aspect of the Appellate Body ruling in *Sardines*: in order to acquire legal force through Article 2(4) TBT, a standard need not be adopted by consensus in the relevant international standard-setting body. Thus, a WTO member may be bound to apply an international standard that it even voted against as a voluntary norm! Here, the Appellate Body was interpreting Annex 1(2) of the TBT Agreement, which stipulates, *inter alia*, that:

> Standards prepared by the international standardisation community are based on consensus. This Agreement covers also documents which are not based on consensus.

The Appellate Body considered the second sentence here fundamentally, to modify the first sentence suggesting that there could be international standards which are not based on consensus but which, nevertheless, do have legal force under Article 2(4) TBT. Such a reading would be both grammatically and logically possible if the Appellate Body were dealing with international standards that had *not* been prepared by the international standardisation community. In other words, Article 2(4) TBT might, under the terms of the Annex, be considered to cover standards prepared by the international standardisation community (consensus-based) as well as standards that are international, but promulgated in *fora* or regimes different from standardisation regimes, and, in the latter case, the standards do not have to be consensus-based in order to be given legal force under Article 2(4) TBT.

The concept of 'international standards' in Article 2(4) TBT is arguably broader than the concept of the standards created by what are traditionally

viewed as organisations in the business of international standardisation, and extends to norms that are standards even if they are not the products of a *standardisation* regime, but are instead some other kind of international regime (for example, an environmental treaty such as the Biosafety Protocol). Article 1(1) of the TBT Agreement stipulates:

> General terms for standardisation and procedures for assessment of conformity shall *normally* have the meaning given to them by definitions adopted within the United Nations system and by international standardising bodies taking into account their context and in the light of the object and purpose of this Agreement. [emphasis added].

The qualification 'normally' is of great importance here: Annex 1 to the TBT Agreement contains an explicit definition of 'standard' applicable to the TBT Agreement, which prevails over the more general definitions of standardisation-related terms referred to in Article 1(1). According to Annex 1, a standard is a:

> Document approved by a recognised body that provides for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

The concept of recognised body, while not explicitly defined in Annex 1, is explained, in the case of international standards, by the definition of an international body or system as one open to the bodies of at least all WTO members. This is the only defining or limiting provision with respect to the meaning of *international* standards to be found in the TBT Agreement. As a *lex specialis* of the TBT Agreement, this broad conception of an international standardisation body or system prevails, again, over the standard definitions and terms referred to in Article 1(1) TBT.

In the *Sardines* case, the Appellate Body was dealing with a standard from the Codex Alimentarius, which is at the core of the 'international standardisation community'. Thus, whatever *other* documents might be included within the meaning for international standards by virtue of Annex 1(2), *this* document was of the kind covered by the first sentence, which refers to standards based on consensus.

But the best interpretation of the second sentence of Annex 1(2) is that it was intended to address municipal standard-setting systems, which are *disciplined* by the TBT Agreement. Just as one might want to exclude international standards not decided by consensus from the legal force granted by Article 2(4) TBT, one might very well want to *discipline* domestic standard-setting exercises that allow standards to be made without consensus. For instance, non-consensual decision-making might create additional risks of capture by concentrated interests, thus making it inappropriate to have such international standards as legally binding through Article 2(4) TBT,

while also making it important to apply transparency and due process disciplines in the TBT Agreement to such domestic standards. In summary, the two sentences at issue in Annex 1(2) both make sense as attempts to address the *downside* of non-consensus decision-making.

Now, however, that, after the Appellate Body ruling in *Sardines*, international standards are binding through Article 2(4) TBT, regardless of whether they are made by consensus, and also even if they are documents that are not the product of the international standardisation community.

Nowhere does the TBT Agreement define international standards, nor does it attempt to list the international regimes that qualify to promulgate international standards within the meaning of Article 2(4) TBT.

The *reductio ad absurdum* that follows from these *lacunae*, when combined with the TBT interpretation of the Appellate Body in *Sardines*, is that any combination of public and private actors from different countries with an interest in imposing a global regulatory approach in some issue area could come together, emit a self-declared 'international standard' and, with regard to WTO membership, the material in question would automatically acquire the force of international law,[6] would be binding on states which did not participate in the process, as well as on those which did, but objected to the standard. It is true that Article 2(6) TBT states that WTO members:

> shall play a full part, within the limits of their resources, in the preparation by appropriate international standardising bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations.

But it is also true that Article 2(6) TBT begs the question of what is an 'appropriate' international standardising body; for a wide variety of WTO members, the resources issue is a decisive one, and many developing countries, even if participation in a standards regime is, in principle, open to them, do not have domestic standards systems or networks, which are the fundamental premise or precondition of full participation in most international standards regimes. Furthermore, the *Code of Good Practice* in the TBT Agreement explicitly applies only to national or sub-national standard-setting bodies, whether they be public or private or public/private partnerships (TBT, Annex IIIB). Annex 1, paragraph 5, defines an 'international body or system' as a 'body or system whose membership is open to the relevant bodies of at least all WTO members'. This does suggest that, for their standards to be considered as international standards under the TBT Agreement, international bodies cannot *exclude* a particular WTO

[6] It must always be remembered that members do not have to use international standards when they are ineffective or inappropriate. But, to the extent that it has been the subject of judicial interpretation, the AB seems to have adopted a rather narrow and technical meaning to this qualification.

member or members. But it remains that there is no *minimum* threshold for participation by WTO members. Thus, in theory, an international standard devised by a regime in which only a small minority of WTO members are active participants would still acquire normative force through Article 2(4).

II. TBT AND INTERNATIONAL REGULATORY COMPETITION

The absence of a defining list of international standard-setting bodies in TBT[7] raises the question of contestation or competition between different international standard-setting bodies. In a number of areas, including corporate social responsibility and some aspects of the environment, it has been observed that standard-setting regimes have multiplied; regulatory competition at international level may not be such a bad thing, for the same reasons that, subject to constraints on races to the bottom, regulatory competition may well generate superior outcomes at domestic level. Nor is regulatory competition necessarily at odds with the harmonisation goal of international standardisation; one could well expect 'winners' to emerge from the competition.

But how is one to deal with the existence of multiple international standards covering the same regulatory field under Article 2(4) TBT? The interpretation that is most in conformity with respect for regulatory autonomy would be that the obligation to use international standards as a 'basis' for regulations is fulfilled by choosing the international standard which a member prefers. It is not inconceivable, however, that the WTO dispute settlement organs would attempt to conduct their own 'beauty contest' among international standards regimes, based on the notion that international standards must be 'effective' and 'appropriate'—thereby taking treaty language that apparently confers a measure of 'subsidiarity' on domestic regulators and using it to impose an additional constraint on regulatory autonomy.

II.1 The TBT Committee Decision on Principles for International Standardisation: The WTO Attempts to Hegemonise the International Standardisation TBT in the Name of 'Undistorted Markets' and 'Technological Development'

This possibility is adumbrated by developments that have already occurred in the TBT Committee, the diplomatic body at the WTO charged with

[7] It should be noted that the SPS is different in this regard; in an Annex to the SPS, the standardisation regimes to which SPS obligations on international standards apply are defined in most cases, with a residual clause that includes other regimes where the matter in question has not been a subject of standard-making in the preferred listed regimes.

administering and reviewing the TBT regime. The Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement[8] attempts to shape and constrain international standard-setting in the light of the norms and priorities of 'Geneva'—the trade insider community. Parts of this Decision reflect concerns about participation, democracy and openness that are laudable. But the Decision goes on to attempt to impose a free trade, anti-regulatory agenda on international standard-setting bodies. Thus, international standards must respond, *inter alia*, to 'market needs'.

> They should not distort the global market, have adverse effects on fair competition, or stifle innovation and technological development.

However, it is clear that many standards are precisely and rightly intended to distort the 'global market'—altering the outcomes that would be otherwise produced by an 'undistorted global market' in the name of diverse human values. In any event, it is revealing to see that not only the 'undistorted market' but also 'technological development' remain gods for 'Geneva'.

And the one kind of competition that 'Geneva' will not stand for is *regulatory* competition! (After all, it might produce a new space for policy contestation and diversity.) Thus, the Decision seeks 'Coherence', and exhorts each standard-setting body to avoid 'duplication of, or overlap with, the work of other international standardisation bodies'.

Could the Decision be a basis for rejecting as 'international standards' those standards that are considered by the WTO dispute settlement organs not to be in conformity with the letter or spirit of the Decision? While Palmeter and Mavroidis do not list Committee Decisions as a source of WTO law in their authoritative treatise,[9] at least one Panel has treated such committee work as an applicable legal norm to fill a gap in the treaty itself.[10]

It should be recalled that there is an additional role that international standards play in the TBT Agreement: a measure that is 'in accordance with international standards' (note the language here is different from that of Article 2(4) TBT) will be 'rebuttably presumed' not to constitute an 'unnecessary obstacle to trade' (Article 2(5) TBT). Thus, following international standards could provide some added protection for domestic regulatory autonomy against the frequently anti-regulatory bias discernable in

[8] Reproduced in 'Decisions and Recommendations Adopted by the Committee since 1 January 1995', WTO Committee on Technical Barriers to Trade, G/TBT/1/Rev. 8, 23 May 2002.

[9] D Palmeter and PC Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (2nd edn., Cambridge: CUP, 2004).

[10] *European Communities—Antidumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WTO Doc. WT/DS219/R, 7 Mar 2003, 7.321.

WTO panel rulings on whether measures are the 'least-trade-restrictive'. (A bias which the Appellate Body, as it was then, tried to correct in its approach to this kind of test in the context of the GATT Treaty: see the *EC—Asbestos* ruling.)

The Committee Decision could be seen as an attempt to erode this feature of Article 2(5) TBT, and to give a WTO panel a basis upon which to refuse to entertain the presumption of conformity with least-trade-restrictiveness unless the international standard itself is the least-trade-restrictive in the opinion of the panel!

III. CONCLUSION

At first glance, Article 2(4) TBT, as interpreted by the Appellate Body, appears as a mechanism that constrains democratic regulatory space by bootstrapping into binding law norms that have been created by bodies and institutions which are not subject to direct democratic control or scrutiny, even where the norms have not been consented to by the state bound. When one considers that many of these norms are essentially the product of concentrated private interests, the picture looks even darker, from the perspective of participatory regulatory democracy.

In fact, matters are somewhat more complex. John Braithwaite has pointed to the defects of many domestic standard-setting and regulatory processes from a progressive democratic perspective. Braithwaite suggests that international regulatory processes may actually enhance democracy, where they are open to a wider variety of stakeholders than many domestic processes, and where they allow for more open contestation of policies.[11] A comparison of the policies for NGO participation in international standard-setting bodies such as the ISO and the Codex Alimentarius,[12] however imperfect they may be, reveals much greater openness in the standard-setting bodies, generally speaking, than in the WTO itself. The outcomes in these bodies, while, in some cases in the past, exemplifying industry capture, have, at least in principle, some chance of being influenced by the participation of broader social interests, and this seems to be the case (again, albeit imperfectly) for the Codex biotech negotiations, for example.

Furthermore, it is an important, albeit largely unobserved, feature of the TBT Agreement that the requirement to use international standards as a 'basis', while it might have been considered by 'Geneva' as being primarily

[11] 'Prospects for Win-Win International Rapprochement of Regulation' in S Jacolds (ed), *Regulatory Cooperation for an Interdependent World* (Paris: OECD, PUMA, 1994).

[12] For an examination of some of these policies, see Ecologia, 'Increasing the Effectiveness of NGO Participation in ISLO TC207', ISO/TC207/NGO TG N25; see, also, FAO, 'Principles Concerning the Participation of International Non-Governmental Organizations in the Work of the Codes Alimentarius Commission', available at www.doexalimentarius.net/web/ngo_participation.jsp.

a means of disciplining the regulatory diversity that results in more *stringent* regulations, is not qualified anywhere in TBT Agreement by the notion that one is entitled to regulate less strictly than that which is implied in international standards.

Thus, by virtue of Article 2(4) TBT, and also the Appellate Body's broad interpretation of a 'technical regulation', WTO members are, arguably, required to ensure that their entire domestic regulatory landscape (as it applies to products and their related process and production methods) bears a close relationship to emerging environmental and labour standards, even where the standards themselves are contained in codes or other instruments that are themselves voluntary, non-binding or 'soft law'. Indeed, Article 2(4) TBT provides a complete refutation to the 'Geneva' orthodoxy that labour and human rights are 'outside' the WTO; this is because these are clearly 'international standards', and, in as much as these rights are relevant to domestic regulation, they have normative force by virtue of Article 2(4) TBT. If one believes that 'democracy', in the relevant sense, will be enhanced by the domestic regulatory state following basic labour and other human rights norms, then the democratic potential of Article 2(4) TBT is considerable.

The trick now is to avoid the erosion of this potential by allowing 'Geneva' to attempt to shape the nature of international standards and standard-setting bodies further for TBT purposes, according to its 'insider' trade *über Alles* perspective. This requires activism both in the WTO forum itself and also in the relevant international standard-setting regimes.

14

The Empire's Drains: Sources of Legal Recognition of Private Standardisation Under the TBT Agreement

HARM SCHEPEL

Imagine the Mother of Parliaments sitting down to discuss the Empire's drains![1]

I. INTRODUCTION

THERE IS PLENTY of room for disagreement and debate on the exact meaning of the words of Article 2(4) TBT and its associated provisions, especially now that the Appellate Body has delivered its own depressing interpretation of the scope and extent of the obligations of members as regards international standards in *Sardines*.[2] This chapter will stay clear of that debate as far as is feasible; it would be difficult to add anything to Robert Howse's lucid analysis.[3] Instead, my concern here is with a number of widespread, if largely unarticulated, assumptions that inform both the legalistic quibbles over semantics and the broader normative debate over the legitimacy of the role of standards in international trade law. Just as the Appellate Body has severed the category of 'international standards' from international trade law by effectively categorising them as mere fact, so critics of the TBT arrangement separate the realm of domestic regulatory

[1] LL Jaffe, 'An Essay on Delegation of Legislative Power I' (1947) 47 *Columbia Law Review* 359, at 363.

[2] *European Communities—Trade Description of Sardines*, Report of the Appellate Body, 26 Sept 2002, WT/DS231/AB/R.

[3] Howse, in this volume. See R Howse, 'The Sardines Panel and AB Rulings—Some Preliminary Reactions', (2002) 29 *Legal Issues of Economic Integration* 247, and H Horn and JHH Weiler, 'European Communities—Trade Description of Sardines: Textualism and its Discontents' in H Horn and P Mavroidis (eds), *The WTO Case Law of 2002* (Cambridge: CUP, 2005), 248.

democracy entirely from the sphere of international standardisation. These exercises in the art of separation rest on a series of dichotomies—between public and private rule-making, between the national and international spheres, between facts and norms—which, I would argue, are analytically problematic and normatively disastrous.

II. A SLOW MOTION COUP D'ETAT?

Just before the Panel's report in *Sardines* was circulated, Lori Wallach lamented the lack of awareness about the way that trade law was affecting a 'slow motion *coup d'état* against accountable, democratic governance' by way of 'the international harmonisation of standards through international commercial agreements'.[4] Contrasting the 'industry-only standard-setting institutions that are closed to government or public participation or outside scrutiny or input' with the marvels of domestic regulatory decision-making under the Administrative Procedure Act, her criticism was not just that the WTO agreements accord the same status to the former as to the latter, but that the pernicious influence of international trade law is such that it reduces the level of citizen and public interest involvement in national public regulatory action.

This kind of analysis suffers from several blind-spots, in my view. The harmonisation of standards is hardly something that happens *through* international trade law: it is the process of economic globalisation itself that creates a demand for global standards. To be sure, the TBT Agreement adds incentives and credibility to the process of harmonising standards internationally, but the fact remains that international standards exist because the market needs them and because industry is willing to invest in their production.[5] The question is not so much one of how international trade law should create international standards but one of whether, and under which conditions, it incorporates them. Secondly, very few domestic regulatory standards are written by public agencies under administrative procedure: they usually draw extensively on private standards.[6] This is mainly a matter of convenience and of lack of public resources and

[4] LM Wallach, 'Accountable Governance in the Era of Globalization: the WTO, NAFTA, and International Harmonisation of Standards' (2002) 50 *University of Kansas Law Review* 823, 826. See, also, e.g., M Shapiro, 'International Trade Agreements, Regulatory Protection, and Public Accountability' (2002) 54 *Administrative Law Review* 435, and S Piciotto, 'Private Rights vs. Public Standards in the WTO' (2003) 10 *Review of International Political Economy* 377.

[5] See, e.g., N Brunsson, B Jacobsson *et al*., *A World of Standards* (Oxford: OUP, 2000), and A Casella, 'Product Standards and International Trade: Harmonization Through Private Coalitions?' (2001) 54 *Kyklos* 243.

[6] See, generally, RE Cheit, *Setting Safety Standards—Regulation in the Public and Private Sectors* (Berkeley: University of California Press 1990), and J Freeman, 'The Private Role in Public Governance' (2000) 75 *New York, University Law Review* 543.

expertise. However, it should be remembered that it has been stated US federal policy for decades to use 'voluntary consensus standards' in place of government-only standards in regulatory activities,[7] and that the European internal market was established in large part through the policy of relying on standards.[8] And so the question is not whether we substitute private international standardisation for public rule-making, but whether we substitute private international standardisation for private national standardisation. And in that case, the normative case against the use of international standards becomes hard to distinguish from objections against the incorporation of national private governance regimes in regulatory frameworks: legal formalism coupled with xenophobia is not a very attractive combination.[9] Thirdly, and most importantly, to categorise private standardisation as closed to diffuse and public-interest input and scrutiny is wrong as a matter of formal procedure, debatable as a matter of empirical reality and, above all, runs the risk of dismissing any potential of the law to regulate private rule-making in such a way as to produce 'public-regarding' decision-making.[10]

Standards bodies the world over have procedures in place for balanced interest representation both in policy-making organs and in technical committees; for public comment to be solicited widely and to be taken into account, and for decisions to be taken not by mere majority vote, but by consensus. Indeed, compared to the tomes containing the internal procedures and regulations of most standardisation organisations, the Administrative Procedure Act is a primitive affair.[11] *Per se*, the fact that formal procedures are in place to provide for the meaningful participation of representatives of diffuse interests does nothing, of course, to detract from the suspicion that most standards bodies are dominated by industry and act

[7] See RW Hamilton, 'Prospects for the Nongovernmental Development of Regulatory Standards' (1983) 33 *American University Law Review* 455. Current policy is laid down in 15 USC 272 note (Supp IV 1998) (Utilisation of Consensus Technical Standards by Federal Agencies).

[8] See, e.g., M Egan, *Constructing a European Market—Standards, Regulation, and Governance* (Oxford: OUP, 2001).

[9] The Wisconsin Supreme Court pulled this off in striking down a state version of the National Industrial Recovery Act, the prime example of New Deal corporatism. See *Gibson Auto v. Finnegan,* 259 NW 420, 423 (Wis 1935) ('It is conceivable at least that a code might be proposed under the terms of the act by persons not citizens of the United States, which would, when approved by the Governor, become the law of the land').

[10] The term was coined by Mashaw, 'Constitutional De-regulation: Notes Toward a Public, Public Law' (1980) 54 *Tulane Law Review* 849.

[11] See, e.g., ISO/IEC Guide 59 and ISO/IEC Directives Part 1: Procedures; American National Standards Institute, Procedures for the Development and Co-ordination of American National Standards; Standards Council of Canada, CAN-P-2E Criteria and Procedures for the Preparation and Approval of National Standards of Canada; the European Standardisation Committee, CEN/Cenelec Internal Regulations Pt 2: Common Rules for Standards Work; DIN 820 and BS 0, the 'standardisation standards' of the German and British standards bodies respectively, and the 'Standardisation Guides' of Standards Australia and Standards New Zealand.

accordingly. But standards do not exist in a vacuum; for them to be useful, they need both to be widely accepted in the market-place and to be embedded in regulatory frameworks.[12] And independently of whether their power stems from private or public sources, they will fall under judicial scrutiny, be it under private or public law. Treble damages in antitrust and Samaritan liability in tort are tremendously effective incentives for the procedural integrity of US standards.[13] And in the United Kingdom, where courts are willing to extend judicial review to 'private' bodies,[14] the British Standards Institute knows very well what this implies:

> It has been held by the courts that the decisions of a private organisation engaged in activities that may affect the rights of persons and are of a public nature are subject to judicial review. The integrity of British Standards relies on compliance with the procedures to underpin it.[15]

The internal procedures and regulations of standards bodies have not come about by chance or by a spontaneous civic awakening of industry: they have come about as a response to interactions with legal systems. And it is these legal interventions—or at least the threat they cast over private proceedings—that stand the best chance of success in ensuring adherence to professed rules and regulations. They do certainly not constitute grounds for the blind acceptance by legal systems of standards as legitimate: what they do is provide a set of validation criteria according to which legal systems can exercise judgement over standards.[16] In the absence of these criteria, law can either blindly dismiss standards or blindly accept standards. In either case, law will have lost its potential to generate and nurture legitimate private regulatory decision-making. This, of course, is exactly what happened in *Sardines*. Instead of inscribing the TBT Agreement in the larger normative fabric of law's demands on private governance, the Appellate Body completely severed the TBT Agreement from the decision-making procedures and institutional context of standardisation by refusing to put any procedural requirement on the production of 'international standards'. After concluding that the TBT does not require 'consensus', the AB stated:

> We emphasise, however, that this conclusion is relevant only for purposes of the TBT Agreement. It is not intended to affect, in any way, the internal requirements

[12] See H Spruyt, 'The Supply and Demand of Governance in Standard-setting: Insight from the Past' (2001) 8 *Journal of European Public Policy* 371.

[13] See, in antitrust, e.g., *American Society of Mechanical Engineers v Hydrolevel*, 456 US 556 (1982), and *Allied Tube v Indian Head* 486 US 492 (1988). See C Sagers, 'Antitrust Immunity and Standard-setting Organisations: A Case Study in the Public–Private Distinction' (2004) 25 *Cardozo Law Review* 1393. In tort, see, e.g., *Snyder v American Association of Blood Banks* 676 A 2d 1036 (NJ 1996), and *Meneely v Smith*, 5 P 3d 49 (Wash App 2000).

[14] The leading case is *R v Panel on Take-Overs and Mergers, ex parte Datafin* [1987] QB 815. See, e.g., Black, 'Constitutionalising Self-Regulation' (1996) 59 *Modern Law Review* 24.

[15] BSI, *British Standards and the Law: Statement of Principles*, unpublished policy paper, Nov 2000.

[16] I hope the argument is made better in H Schepel, *The Constitution of Private Governance* (Oxford: Hart Publishing, 2005).

> that international standard-setting bodies may establish for themselves for the adoption of standards within their respective operations. In other words, the fact that we find that the TBT Agreement does not require approval by consensus for standards adopted by the international standardisation community should not be interpreted to mean that we believe an international standardisation body should not require consensus for the adoption of its standards. That is not for us to decide.[17]

In isolation, the dictum is merely depressing. Seen in conjunction with the interpretation of the Appellate Body, again in dictum, of the requirement of members to 'use' international standards 'as a basis' for their technical regulations,[18] it is rather worse than that. It is not so much an error *in* law; it is the abdication of law's role in structuring legitimate private governance.

III. PUBLIC AND PRIVATE INTERGOVERNMENTALISM

Part of the problem for the Appellate Body, one has to assume, was the influence of the arrangement concerning international standards established by the SPS Agreement. At issue in *Sardines*, after all, was the decision-making process in the Codex Alimentarius, a body whose standards, more often and more obviously, are of relevance under the SPS Agreement than under the TBT Agreement. And if it is debatable whether the TBT Agreement requires 'consensus', the SPS Agreement certainly does not. The Appellate Body, then, was faced with the danger of requiring different procedural guarantees under the two Agreements of one and the same organisation, potentially even regarding one and the same standard.

The argument is not, I think, as strong as it may seem. The two Agreements cover different areas of regulation and reflect entirely different logics of delegation to international standards bodies. However, there is, as far as I can see, no necessary connection between these two differences: it just happens to be the case that standardisation in the SPS field is largely a matter for public organisations, whereas product safety standards are overwhelmingly private. To argue otherwise would be to maintain that there is a reason, in the nature of things, why the regulation of bottled mineral water would require public involvement, whereas the safety of machine presses can be left to the self-regulation of industry. But if this much is true, then there is no reason why Codex standards, when applied under the TBT, cannot be legitimised under the—public—logic of the SPS while still requiring that private organisations need to fulfil the procedural requirement

[17] *EC—Sardines*, n 2 above, para 227.

[18] See Howse, in this volume. See, also, J Scott, 'International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO' (2004) 15 *European Journal of International Law* 307, at 325 ff.

of consensus. In order to make this plausible, however, it may be useful to explore the symmetry between the two Agreements.

The TBT and SPS Agreements have the same basic structure: harmonisation of domestic regulations is the chosen means of lifting trade restrictions, and 'international standards' are the chosen means of achieving harmonisation. To this end, members have two complementary obligations: on the one hand, to 'play a full part' in the preparation of international standards in specialised bodies outside the framework of the WTO, and, on the other, to use these standards in their regulations. The differences between the two arrangements are, however, more revealing than their similarities. The SPS Agreement defines the category of 'international standards' with reference to specific organisations, granting them a *de facto* monopoly in their respective fields of activity: the Codex, the International Office for Epizootics, and the Interim Commission for Phytosanitary Measures. For matters not covered by these three, standards from other relevant international organisations, 'open for membership by all members', will be considered only after the SPS Committee has 'identified' them.[19] These three are, of course, all public international organisations operating on the basis of national representation and intergovernmental decision-making. Members are thus expected to accept 'international standards' for the very reason that they themselves compose the bodies that issue them. This is not so much delegation as it is a horizontal division of labour. It is mainly on the basis of this political acceptability that the SPS Agreement then goes on to endow 'international standards' with far more epistemic authority than they could possibly bear: if members 'conform' to these standards, then their measures are deemed to be 'necessary to protect human, animal plant life or health' and presumed to be consistent with both the SPS Agreement and GATT 1994. If, on the contrary, members wish to pursue a higher level of protection than that implied in international standards, they need to provide a scientific justification and/or evidence of having gone through the risk assessment procedures of Article 5 SPS.[20]

On the face of it, international standards carry much less weight under the TBT Agreement. Members that enact technical regulations 'in accordance with' international standards enjoy only a rebuttable presumption of not creating 'unnecessary barriers to international trade'. They can, moreover, decline to pay any attention to them if they judge international standards to be an 'ineffective or inappropriate means for the fulfilment of legitimate objectives pursued'.[21] The lesser force can be explained by the fact that members have far less control of international standards bodies

[19] Art 3, Annex A, SPS Agreement.

[20] See the attempt to make sense of the language of Art 3(3) SPS in *EC—Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, 13 Feb 1998, WT/DS26, 48/AB/R, para 174 ff.

[21] Art 2(5) and (4) TBT Agreement, respectively.

here than they do under the SPS Agreement. The TBT Agreement conspicuously fails to 'appoint' a relevant international body. The most obvious candidate for the job, the International Standards Organisation, looms large over the TBT mainly because of the way it is officially ignored. The reason for this *seems* fairly obvious: the ISO is a private organisation which brings together national standards bodies, the most important of which are, in turn, private organisations. And it could well be reasoned that the negotiating parties were reluctant to grant a private organisation the same kind of normative competence that they delegated to public organisations under the SPS. But if that was indeed the case, then the consequences are perverse: as it stands, the category of 'international standards' could very well be thought to cover documents elaborated by organisations that are far less representative and less 'public' than the ISO.

The TBT Agreement tries hard to bridge the public/private divide by setting up a system of 'private intergovernmentalism'. The primary vehicle for this is the *Code of Good Practice for the Preparation, Adoption and Application of Standards* annexed to the TBT.[22] The *Code* is basically an adapted version of the TBT Agreement itself, extending the obligations that the TBT Agreement puts on members to standards bodies. Thus, the *Code* requires national standards bodies to 'use' international standards 'as a basis' for the standards they develop. The *Code* also requires them to 'play a full part' in the preparation of international standards by 'relevant' international standards bodies. Preferably, different standards bodies within the territory of a member are to do so through one 'delegation'.[23]

Members are to ensure that 'central government standardising bodies' accept and comply with the *Code*. In the case of non-governmental bodies, members shall take 'such reasonable measures as may be available to them' to ensure that these accept the *Code* as well. In any case, members 'shall not take any measures which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the *Code*'.[24] The reward for standards bodies is an 'acknowledgement' by the members that they comply with 'the principles of' the Agreement.[25]

Thus far, the TBT Agreement clearly seems to envisage 'international standards' as being developed in exactly the way that the ISO operates: through a system of national representation, a system, if you will, of private intergovernmentalism. An 'international body or system' is defined as one whose membership is open to 'the relevant bodies of at least all members'.[26]

[22] Annex 3, TBT Agreement.

[23] Arts F and G, Annex 3, TBT Agreement. Note how Art 2(6) TBT requires members themselves to 'play a full part' in the preparation of international standards by 'appropriate' international standardising bodies.

[24] Art 4(1), TBT Agreement.

[25] Art 4, TBT Agreement.

[26] Art 4, Annex 1, TBT Agreement.

The theme of national representation can be followed through in national legislation and policy. Even the United States, the country with the proudest and strongest tradition of private standardisation without public interference when it comes to its internal policies, does not hesitate to legislate for nationalisation when it comes to the activities of standards bodies abroad. The Trade Agreement Act charges whichever 'private person' is recognised by an international standards organisation as a member with the task of representing US interests.[27] The Act also provides for a mechanism by which the Secretary of Commerce can make 'appropriate arrangements' to remedy a situation in which he has 'reason to believe' that US interests are 'inadequately' represented in international organisations, if need be, 'through' the private member if the international organisation requires representation by that member.[28] The European Commission, once the champion of cutting off ties between private standards bodies and Member States, has suffered from the same regression. In its 1996 *Communication on External Trade Policy and Standards*, the Commission expressed its unease with the fact that, because of the TBT Agreement, 'in several fields it has become difficult to deviate from internationally developed rules and standards even where there may be technical reasons for doing so'. And so:

> it would be desirable to consider whether, and in which circumstances, the Community should be involved more closely in the work of such international bodies, so as to ensure continued consistency between internationally established rules and standards, Community rule-making and our WTO obligations'.[29]

[27] 19 US 2543(2) provides that 'the representation of US interests before any private international standards organisation shall be carried out by the organisation member'. 19 US 2543(1) defines 'organisation member' as the 'private person who holds membership in a private international standards organisation' and 'private international standards organisation' as 'any international standards organisation before which the interests of the United States are represented by a private person who is officially recognised by that organisation for such purpose.'

[28] 19 US 2543(3), (4) and (5). The Secretary is to notify the US member of his misgivings; the member then has 90 days to demonstrate its 'willingness and ability to represent adequately United States interests before the private international standards organisation'. 'Appropriate arrangements through the appropriate organization member' cannot mean anything very different from US public officials in some way 'taking over' power in a private organisation such as ANSI.

[29] *Commission Communication on Community External Trade Policy in the Field of Standards and Conformity Assessment*, COM(96)564 final, para 19. This amounts, of course, not just to an intrusion in the independence of the private European standards bodies, but, diagonally, in the independence of national standards bodies and in the relations between Member States and their national standards bodies. The Council slapped the Commission's wrists in Council Conclusions of 26 June 1997 on the *Communication on Community External Trade Policy in the Field of Standards and Conformity Assessment*, belatedly published in (2001) OJ C8/1 ('When considering whether, and in which circumstances, the Community should be more closely involved in the work of international rule-making/standards bodies, the Council invites the Commission to study the practical impact from the angle of the division of competencies between national and European bodies').

So far, then, the omission of the ISO in the TBT Agreement itself seems purely formal, unable to detract from the obvious conclusion that 'international standards' *are* ISO standards. The ISO brings together national standards bodies under a logic of national representation, in much the same way as the Codex brings together national delegations. The problem of *private* bodies is solved by the way that the *Code of Good Practice* brings national private bodies into the sphere of the TBT Agreement, and by the way that members may choose to reassert their sovereignty in their domestic relations with their standards bodies. The symmetry with the SPS Agreement is preserved.

But the text of the TBT Agreement not only ignores the ISO, it also creates a gap in the definition of 'international standards'. On the one hand, it defines a 'standard' as a document 'approved by a recognised body'. It defines an 'international body or system' as one that is 'open to the relevant bodies of at least all members'. But nowhere does it state that '*international* standards' are standards that emanate from 'international bodies'. And thus the TBT Agreement leaves open the possibility of 'international standards' being developed by organisations that do not operate on the logic of national representation. But if it is not by virtue of their participation—however indirect—in the organisations that produce them, why should members be expected to accept 'international standards'?

IV. THE MANY FACES OF 'CONSENSUS'

On the face of it, it is paradoxical that the European Community should have been the one arguing for 'consensus' in *Sardines*. For one thing, European legislation does not actually require 'consensus' for standards; the guiding piece of legislation, the Information Directive, defines an 'international standard' merely as being 'adopted by an international standards organisation and made available to the public'.[30] The omission is barely made up for by repeated insistence on consensus in Council resolutions.[31] For another, the European Community has long argued effectively for a monopoly of the ISO. In its submissions to the TBT Committee in 1999, it made the point that 'objectivity requires that standardisation bodies cannot claim two different levels of status (national, regional or international) at the same time'. Furthermore, it emphasised that a proliferation of competing international bodies should be avoided. Next, it argued that

[30] Art 1(4), Dir 98/34/EC [1998] OJ L204/37, requires adoption by a 'recognised' body and voluntary application.

[31] Council Resolution of 28 Oct 1999 on the role of standardisation in Europe (2000) OJ C141/1, para 11: 'standardisation is a voluntary, consensus-driven activity, carried out by and for the interested parties themselves, based on openness and transparency, within independent and recognised standards organisations'. See Council Resolution of 18 June 1992 (1992) OJ C173/1.

international standards should be the product of 'global consensus', and that participation should be open 'without discrimination on grounds of nationality', preferably 'through one delegation representing all relevant standardisation bodies in a country'.[32] The European Community evidently does not see 'consensus' as an alternative to private intergovernmentalism, but as the purest expression of it. The United States holds exactly the opposite position. For reasons both ideological and economic, it opposes a *de facto* monopoly for the ISO. Indeed, the American stance has consistently been to privilege both market acceptance and technological excellence over what is perceived as the 'political' compromise that produces the ISO standards.[33] The federal government has prompted the WTO Trade Committee to 'clarify' the relationship of members' obligations arising out of the TBT Agreement to 'standards that are outdated, scientifically or technically flawed', or the result of 'unfair (non-transparent, non-consensus) procedures', a barely concealed stab at the ISO. Moreover, it noted that 'arguably, bodies which operate with open and transparent procedures which afford an opportunity for consensus among all interested parties will result in standards which are relevant on a global basis and prevent unnecessary barriers to trade',[34] a remark obviously made in support of the claims of certain American standards bodies that they are better situated to issue 'international standards' for TBT purposes than is the ISO. For the United States, then, 'consensus' is a procedural norm which is quite independent from the logic of national representation; in other words, it is an alternative source of legitimation to private intergovernmentalism.

On the occasion of the second triennial review in 2000, the TBT Committee adopted a Decision enunciating 'principles' for the development of international standards. A blatant agreement to disagree between the major trading partners, the Decision does little but add ambiguity to the process. This is how the Committee itself describes the Decision:

> In order for international standards to make a maximum contribution to the achievement of the trade facilitating objectives of the Agreement, it was important that all members had the opportunity to participate in the elaboration and adoption of international standards. Adverse trade effects might arise from standards emanating from international bodies as defined in the Agreement which had no procedures for soliciting input from a wide range of interests. Bodies

[32] *On the Grounds for the Acceptance and Use of International Standards in the Context of the WTO Technical Barriers to Trade Agreement*, Note from the European Community, G/TBT/W/87/Rev.1, 30 Sept 1999.

[33] Actually, Japan has gone furthest along this track. See *Issues Concerning International Standards and International Standardisation Bodies*—Submission from Japan, G/TBT/W/113, 15 June 1999. There, it proposes to amend the TBT Agreement in such a fashion as to exclude from the Agreement's presumption of conformity those standards that (1) do not adequately reflect 'the status of existing technologies', and (2) 'do not have substantial share in the global market of like products in terms of consumption'. They even propose market share to be expressed in percentage points, without, however, venturing to give a number.

[34] US Paper on the First Triennial Review, G/TBT/W/40, 25 Apr 1997.

> operating with open, impartial and transparent procedures, that afforded an opportunity for consensus among all interested parties in the territories of at least all members, were seen as more likely to develop standards which were effective and relevant on a global basis and would thereby contribute to the goal of the Agreement to prevent unnecessary obstacles to trade. In order to improve the quality of international standards and to ensure the effective application of the Agreement, the Committee agreed that there was a need to develop principles concerning transparency, openness, impartiality and consensus, relevance and effectiveness, coherence and developing country interests that would clarify and strengthen the concept of international standards under the Agreement and contribute to the advancement of its objectives. In this regard, the Committee adopted a decision containing a set of principles it considered important for international standards development (Annex 4). (-) The dissemination of such principles by members and standardising bodies in their territories would encourage the various international bodies to clarify and strengthen their rules and procedures on standards development, thus further contributing to the advancement of the objectives of the Agreement'.[35]

By focusing on both membership of national standards bodies *and* procedural safeguards, the Decision in Annex 4 does nothing to solve the disagreement; it merely brings it into sharper focus. Thus, the American National Standards Institute sees itself obliged to repeat the position that 'the determination of international standards status, and thus favoured treatment under the TBT Agreement, should be based on procedural elements of the standards development process and global relevance of the standards in question'. With dismay, it takes notice of the 'membership' criteria in Annex 4:

> This is important because experience to date has shown that some nations and some regions have interpreted the term 'international standards' as excluding standards developed by the US voluntary consensus standards organisations that by criteria of process, quality, use, and acceptance clearly embody the other Annex 4 criteria and meet global needs. Some sectors in the US continue to be concerned that too much emphasis is being placed on the formal structure and membership of an organisation, rather than the process under which a standard is developed and whether the development process is responsive to safety and regulatory considerations, global market forces, and the need for balance in technical expertise regardless of technical origin.
>
> The US private and public sectors should continue to support the principles of standards development on both a national and international level and continue to oppose attempts to exclude standards simply on the grounds of organisational name and structure.[36]

[35] Committee on Technical Barriers to Trade, *Second Triennial Review on the Operation and Implementation of the Agreement on Technical Barriers to trade*, G/TBT/9, 13 Nov 2000, para 20. See Annex 4, Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2(5) and Annex 3 of the Agreement.

[36] ANSI, Paper on International Standards Development and Use, Approved by the Board of Directors on 30 Jan 2002.

The European Commission, on the other hand, is clearly suffering from procedure fatigue:

> The principles adopted in relation to the WTO TBT are in line with European thinking on international standards, and they are consistent with the basic principles respected by the European standards bodies and their national members. However, from a European perspective, not only the standards development process, but also the constitution of the bodies developing international standards plays an important role if public authorities were to use international standards as a basis for regulation.[37]

It was, presumably, with some relief that the Panel in *Sardines* could dismiss the Decision as a mere 'policy statement of preference'.[38] But such formalism will not make the problem go away. It may well be thought that national representation is neither sufficient nor necessary for 'consensus', and that we will be able to substitute pure procedural legitimacy for such notions. Either way, the TBT Agreement has too great a stake in 'international standards' just to ignore the issue.

V. CONCLUSION

It may be useful to remind ourselves of the definition of 'standard' in the TBT Agreement:

> Document approved by a recognised body that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory.[39]

The explanatory note then adds, in relevant part:

> Standards prepared by the international standardisation community are based on consensus. This agreement covers also documents that are not based on consensus.

As Robert Howse argues, it is perfectly plausible to suggest that the explanatory note should be understood as referring to *local* government bodies issuing standards.[40] It may also be thought that the explanatory note was meant to put yet more air between the TBT Agreement and the ISO: after all, the explanatory note merely explains the differences between the definitions of the TBT Agreement and ISO/IEC Guide 2: if the TBT

[37] European Commission, *European Policy Principles on International Standardisation*, G/TBT/W/170, Communication of 8 Oct 2001, para 16.

[38] *EC—Sardines*, above n2, para 7.91. See Marceau and Trachtmann, n 17 above, 840 (bizarrely describing the purpose of the Decision 'not to dictate to other international organizations how they should proceed but rather to encourage the participation of Members in the law-making (standard-setting) bodies to which the TBT seems to have lent certain quasi-legislative authority').

[39] Art 2, Annex 1, TBT Agreement.

[40] Howse, in this volume.

Agreement had taken over the ISO's definition of a standard, it would not only have taken over 'consensus' as a constitutive element of standards but also the meaning given to 'consensus' within the ISO. And, in this case, the TBT Agreement would have effectively adopted ISO standards as 'international standards' under the exclusion of all other candidates. Be that as it may, we are now left with a trade agreement obliging members to 'use as a basis' normative material upon which the agreement sets no institutional, representational or procedural requirements whatsoever. And this, surely, cannot be right. The correct interpretation, I would argue, is that the TBT Agreement contemplates that several types of standards are of relevance under the Agreement—including local government bodies and even the Codex. Some of these bodies operate on the basis of legitimation sources other than consensus—hierarchical political control or horizontal national representation. But the TBT Agreement does recognise that 'the international standardising community' consists of a globally interlocked system of standards bodies which operates on the basis of consensus, a procedural norm born from interaction with legal systems at various levels and in various ways. The TBT Agreement could even be argued to acknowledge the necessary link between 'consensus' on the private level and the use of standards by public authorities by including the otherwise unintelligible qualifier '*recognised*' body. The Appellate Body should inscribe the TBT Agreement and itself in the normative global order that sustains and nurtures legitimate private regulatory decision-making. As Louis Jaffe wrote so long ago:

> We must not take lightly the objection to indiscriminate and ill-defined delegation. It expresses a fundamental democratic concern. But neither should we insist that 'law-making' as such is the exclusive province of the legislature … [W]e should demand no more than that in the total process we achieve government by consent.[41]

No more, perhaps. But certainly not less.

[41] Jaffe, n 1 above, at 360.

Section III

The WTO and Transnational Environmental Governance

15

Global Environmental Governance and the WTO: Emerging Rules through Evolving Practice: The CBD-Bonn Guidelines

CHRISTINE GODT

I. GLOBAL ENVIRONMENTAL GOVERNANCE AND THE WTO

THE LINK BETWEEN trade and environmental policies is a relationship fraught with tension. Although the General Agreement on Tariffs and Trade of 1947 (GATT 47) provided for a general exception for national policies protecting human, animal and plant life, health, and the conservation of exhaustible natural resources[1] from multilateral free trade disciplines, environmental regulation has been perceived as a barrier to trade. Reinforcing this impression, the World Trade Organisation (WTO) has defended itself as not being an environmental organisation. Thus, it gave impetus to the fierce debate about 'trade and environment' during the 1990s. The reluctance of WTO entities to deal with environmental issues, as demonstrated by the debate about observer status to secretariats of Multilateral Environmental Agreements (MEAs) in WTO organs,[2] is seen as a blockade against the integration of environmental policies into trade policies, which caters one-sidedly for business interests. In the same vein, the establishment and the ineffective work of the Commission for Trade and Environment (CTE) have been qualified as symbolic politics.[3]

This chapter reitierates the description of the WTO as a mere trade organisation and the observation of non-integration. Its core is the analysis of the conflict between the Council administering the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (the TRIPS Council)

[1] Art. XX GATT 47.

[2] S Charnovitz, 'WTO and the Doha Agenda: Reform of Trade and Environmental Mechanisms and Rules', GETS-e-version, available at http://www.gets.org/pages/steve.charnovitz.cfm (last visited Jan 2006).

[3] See U Ehling in the volume.

and the Secretariat of the Convention on Biological Diversity (the CBD Secretariat). Ironically, it is the aim of the CBD to integrate economic and environmental policies by using economic measures for environmental policy goals. It is precisely these measures that have encountered the most outspoken criticism as not being in line with trade disciplines. It will be shown that the political stalemate that has occurred between these two organisations has not blocked the political process which took place beyond intergovernmental politics. We will see that classical forms of public international law have been superseded by new kinds of law which are to be qualified as not legally binding and which address private parties directly under the cover of an apparently intergovernmental arrangement.[4] This evolution has taken two forms. On the one hand, a new additional type of public international law has emerged which gives credit to internationally active private entities; on the other hand, these new forms push for the relegalisation of the phenomena that have developed, both nationally and internationally.

The hypothesis is twofold. First, as trade and environmental policies are mutually intertwined, political processes dealing with this relationship can be slowed down by blockages in international organisations, but ultimately they cannot be prevented. Secondly, a blockage in one forum sometimes paradoxically accelerates developments in others. Normative conclusions can be drawn from this. In order to perceive these phenomena in the first place and to understand them subsequently, we need to turn to the observation of regimes, in this case regime complexes,[5] and to governance theory. In the interplay of the various *fora*, political pressure is built up, the integration of environmental and economic policies occurs, and changes in the fabric of economic institutions take place. The discussion about mandatory geographical indications in patent application procedures will serve as an example (Section III). Before that, how the WTO has dealt with the challenges of environmental policy will be reviewed, and the emerging patterns will be described in broad terms (Section II). After the analysis of the CBD–TRIPS conflict, the chapter will expose the tensions in WTO governance patterns in the light of modern regime theory and global environmental governance literature (Section IV). It will close with some reflections on what the debate about environmental governance may contribute to the overall debate about the 'constitutionalisation' of the WTO and international trade policy (Section V).

[4] Two other contributions in this volume analyse the same phenomenon: see Perez in respect of environmental regulation of industry through internal rules of international finance sector, and Pauwelyn in respect of how the WTO rules respond to these developments.

[5] The expression was coined by K Raustiala and DG Victor, 'The Regime Complex for Plant Genetic Resources' (2004) 58 *International Organization* 277.

II. WTO ENVIRONMENTAL POLICY

The pattern of how the WTO deals with environmental policy is determined by general rules of vertical and horizontal policy segregation. Burdened with the sharp-edged reports of the GATT Panel in the *Tuna—Dolphin* dispute of 1991, which petrified the artificial and, at that time, already outmoded distinction between product and process measures, a more responsive approach came about only in 1998, when the Appellate Body issued its *Shrimps—Turtle* report.

II.1 The Principle of Vertical Policy Segregation

The conceptual centre of the trade and environment interface is Article XX GATT. It has served as a blueprint for WTO norms such as Article XIV GATS. These norms provide for an exception from international trade disciplines for protective national regulation. They serve a double function. One the one hand, they cushion regulatory sovereignty against trade disciplines. On the other, they relegate public policy from international trade organisations to the level of the nation-state. According to these norms, social regulation can be democratically embedded only at national level. The distinction between internationally convened product norms and nationally accountable process norms is rooted in this principle. However, even in the 1980s, the idea of a clear-cut division of labour between GATT and nation-states had already shifted from one of mutual exclusiveness to one of mutual supportiveness. As a result, various integration clauses were not only negotiated in the constitutive treaties of the WTO in 1994, but were also introduced into the Preamble to the WTO Agreement.[6] A special environmental division in the WTO Secretariat and a Committee for Trade and Environment (CTE), both of which report to the Council of Ministers, were established.[7] The Doha Agenda of 2001 reinforced the mantra of mutual supportiveness of trade and environmental policies. For a critical account of these two bodies, refer to Ulrike Ehling's chapter in this volume.

II.2 The Principle of Horizontal Policy Segregation

More important for the trade and environment debate in general, and for the relationship between TRIPS and the CBD in particular, is the principle

[6] Preamble to the WTO Agreement; also read Arts 7 and 8 TRIPS, the Preamble to SPS, the Preamble to TBT.

[7] Decision on Trade and Environment adopted by the Ministerial Conference in 1994: 'That there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multi-lateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other'.

of horizontal policy segregation in international relations, which demands non-co-ordination.[8] It serves a double function: an administrative and a normative one.

With regard to the administration of treaties, the principle requires that secretariats restrict their communication with others to a minimum, and that they do not convene integrative policies on their own. Horizontal policy integration which aims at balancing competing policy interests is supposed to be restricted to the national realm, where institutions are legitimised (at best democratically).[9] International organisations must pursue their defined mandate and co-ordinate national policies only by a process of continuous consultation. Consequently, international organisations with different mandates hesitate to co-ordinate their policies. Thus, the argument that the WTO should adhere to its mission to promote free trade[10] is fully in line with this basic principle.

Attempts to overcome this alignment have had little success. A classical instrument for facilitating information exchange is the granting of observer status.[11] Whereas historical UN sibling organisations to GATT, such as the World Bank and the International Monetary Fund, enjoy observer status in various WTO organs,[12] the observer status of Multilateral Environmental Organisations is both contested and limited. After a fierce debate about observer status, prior to and at the WTO Ministerial Conference in Seattle in 1999, the discussion on criteria has been mandated by Paragraph 31(ii) DD see p 477.[13] Just four MEA Secretariats[14] and the United Nations Environmental Programme (UNEP)[15] were granted observer status to the CTE

[8] T Gehring, 'Schutzstandards in der WTO?' in M Jachtenfuchs and M Knodt (eds), *Regieren in internationalen Institutionen* (Opladen: Leske & Budrich, 2002).

[9] For a problematical argument with regard to the minor influence of national parliaments on international policy arrangements, see C Godt, 'IPRs and Environmental Protection after Cancun' in Conference Proceedings, Moving forward from Cancun, Berlin, 2003, available at http://www.ecologic-events.de/Cat-E/en/presentations.htm, last visited Jan 2006, at 12.

[10] For an academic account of this position as exemplified in describing the tasks of the Dispute Settlement Body, see J Trachtman, 'The Domain of WTO-Dispute Resolution' (1999) 44 *Harvard International Law Journal* 333.

[11] Although the position of 'observer' is restricted mainly to receiving documents: see K von Moltke, 'Information Exchange and Observer Status: The World Trade Organisation and Multilateral Environmental Agreements. Paragraph 31 (ii) of the Doha Ministerial Declaration', available at www.iisd.org/pdf/2003/trade_wto_meas_21.pdf (posted 2003, last visited 1 Feb 2006). The intra-organisational alternative of the participation of CTE delegates at TRIPS, SPS and TBT sessions is even less fruitful, as delegates are mainly the same, and the informational value is limited because the CTE delegates are either diplomats or sent by trade ministries.

[12] For a complete list of observers to WTO Councils and Committees, see http://www.wto.org/english/thewto_e/igo_obs_e.htm#sps.

[13] For an account of the status of discussions, see CTESS Summary Report TN/TE/R/7 (1 Aug 2003).

[14] CBD, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the International Commission for the Conservation of Atlantic Tuna (ICCAT) and the United Nations Framework Convention on Climate Change (UNFCCC).

[15] With regard to UNEP, it confirms the Co-operation Arrangement between WTO and UNEP from Nov. 1999 (TN/TE/S/2, 2).

Regular Session in 2001.[16] *Ad hoc* special invitee status (not full observer status) to the CTE Special Sessions was granted to six MEAs[17] and UNEP in February 2003.[18] Applications of MEA Secretariats[19] and UNEP[20] for observer status in other WTO bodies, such as the TRIPS Council, the SPS and TBT Committees, the Committee on Trade and Development[21] and the Committee on Agriculture, have been denied. The reasons for denying observer status are different for each WTO body. Observer status in CTE Special Sessions was opposed by developing countries-in other bodies, for example, the TRIPS Council, it was opposed by industrialised countries.[22] Thus, the question of observer status has become a bargaining chip in highlighting strategic interests which result in the sacrificing of information exchange.[23] Policy integration seems to be sacrificed to strategic intergovernmental bargaining in a manner which amounts to forum shopping.[24] The opportunistic move of discussions from one international organisation to the other is structurally due to the segregation principle.

With regard to normative content, the horizontal segregation principle predetermines the ultimate conflict rules between conflicting treaties. Although international law generally presumes that international treaties are consistent and non-contradictory, in cases of conflict judges turn to conflict rules such as the *lex posterior* or the *lex specialis* rule.[25] Both predetermine 'either or' answers and gear the trade and environmental debate. The rule of *lex posterior derogat lex anterior* tends to give WTO rules

[16] With regard to this decision, the WTO repeatedly refers to Document WT/CTE/W/41/Rev. 8 of 19 Sept 2001. However, the document lists only those IO which were granted observer status. Since then, the number of MEAs among the IOs has not changed (WT/CTE/INF/6, 2004). The request of the International Tropical Timber Organisation (ITTO) is still pending. For the full (actual) list of IOs at CTE, see http://www.wto.org/english/tratop_e/envir_e/envir_background_e/c9s1_e.htm.

[17] Ibid, plus ITTO and Montreal Protocol.

[18] TN/TE/R/5. The ad hoc status was renewed in the following Sessions: see TN/TE/R/6, para 44 ff. (12 June 2003); TN/TE/R/7, para. 15 ff. (1 Aug. 2003). The EC advocates CTESS observer status for around 13 MEAs listed in TN/TE/S/2, para 11.

[19] The CBD request is pending for the Committee on Agriculture and the TRIPS Council.

[20] The UNEP request is pending for the General Council and the TRIPS Council.

[21] Here, UNEP enjoys observer status: TN/TE/S/2, 8.

[22] Although the EC adapted a comparatively 'soft' stance, see European Commission, DD (see p 416) para 31(ii)-MEAs: information exchange and observer status-EC submission to the WTO, Ref. 44/02-Rev. 2 (10 Oct 2002), at 6 (para 19).

[23] The way to approximation has turned out to be stony. The CBD has repeatedly invited the WTO to participate and engage in information exchange. Whatever the reasons have been (may also be the participation of WTO employees), delegates to the 7th CBD Conference of Parties (COP) in Kuala Lumpur, 2004, uncomfortably felt that 'trade permeates biodiversity talks': see BRIDGES Trade BioRes, Vol. 4 No. 3, 20 Feb 2004.

[24] C Godt, n 9 above, and Raustiala and Victor n 5 above, at 299.

[25] For a critical discussion, see C Godt, 'International Economic and Environmental Law—Exercises in Untangling the Dogmatic Conundrum' in L Kraemer (ed), *Recht und Um-Welt. Essays in Honour of Prof. Dr. Gerd Winter* (Groningen: Europa Law Publishing, 2003), at 238 ff.; J Pauwelyn, 'The Nature of WTO Obligations', *Jean Monnet Working Papers* 1/2002, at 71.

priority over environmental conventions.[26] Its counterpart is the *lex specialis derogat lex generalis* rule, which usually advocates the priority of the MEAs.[27] Hitherto, the Dispute Settlement Body has not yet ruled explicitly on the WTO-MEA relationship.

Due to this fundamental conflict, the CTE Regular and Special Sessions are mandated to clarify the relationship between the WTO Agreements and the MEAs. However, negotiations have been diffuse. Several competing proposals were submitted.[28] Unexpectedly, the UNEP argued against a clear-cut rule and favoured a case-by-case approach.[29] Some advocated for the inclusion of the MEAs in Article XX GATT[30]—leaving the relationship with the other WTO Treaties such as SPS, TBT, TRIPS and GATS unresolved. Others argued in favour of a general clause modelled on NAFTA.[31] Consensus is not within reach.[32]

II.3 The WTO Dispute Settlement

The WTO Dispute Settlement deserves special consideration as its rulings calibrate the delimitations of horizontal and vertical segregation. As long as the GATT panel was in charge, the rulings were still narrowly determined by the concepts of horizontal and vertical segregation. It is in this concept that the fundamental distinction between process and production measures (PPMs) and product rules is rooted. PPMs are not to be governed by trade rules. They deal only with effects inside a given sovereign country. Product rules, however, 'travel with' the product across borders and affect

[26] As TM Spranger explicitly argued for the relation of TRIPS and CBD in 'Der Zugriff auf pflanzliche Genressourcen im internationalen Regelungsgeflecht' (2002) 40 *Archiv des Voelkerrechts* 64 at 78.

[27] For an early account of this argument, see J Cameron and J Robinson, 'The Use of Trade Provisions in International Environmental Agreements and Their Compatability with the GATT' (1991) 2 *Yearbook of International Environmental Law* 3.

[28] For an academic discussion, see P-T Stoll, 'How to Overcome the Dichotomy Between WTO-Rules and MEAs?' (2003) 63 *Zeitschrift fuer auslaendisches und oeffentliches Recht und Voelkerrecht* 439.

[29] WT/CTE/W/213 (12 June 2002).

[30] Guided by the principle of mutual supportiveness: see the Submission by the European Communities, TN/TE/W/39 (24 Mar 2004).

[31] I.e., the submission of New Zealand (WT/CTE/W/20). The introduction of a clause similar to Art 104 NAFTA is proposed, applicable when both parties are contracting parties to the MEA in question.

[32] Charnovitz comments: 'In conclusion, it is not possible to imagine the WTO agreeing to a broader MEA mandate now, or at the end of the [Doha] Round. Considering the issue in the round is the wrong forum, with wrong negotiationg dynamics. Writing articles about the problem or holding new symposia isn't going to make a difference': S Charnovitz, 'Expanding the MEA Mandate in the Doha Agenda', GETS-e-version (2003), available at http://www.gets.org/pages/steve.charnovitz.cfm (last visited Jan 2006). Charnovitz proposed a procedural approach: before a dispute involving MEA regulation may be carried to the DSU, the specific dispute settlement in the MEA, if it exists, must be exhausted. The DSU panel shall seek the advice of the Parties to the MEA upon request before interpreting the law and shall secure necessary expertise modelled on para 4 GATS Annex on Financial Services.

importing states. Thus, on the basis of the sovereign right of states to regulate, product rules underlie multinational trade disciplines. The *Tuna–Dolphin* rulings[33] were at the time perceived as strengthening the PPM distinction as the dominant 'conflict rule' for these diagonal conflicts[34]—and asserting the priority of international trade law over national social regulations.

Today, these rulings are interpreted in the light of the *Shrimps–Turtle* report of the WTO Appellate Body[35] which broke with this clear-cut distinction. The discussion about trade and environment is less determined by the allocation decision on which rule prevails than by what the measures are that determine legitimacy.[36] Comparable to the yardsticks spelled out in the *Hormones* case in the food sector,[37] the *Shrimps–Turtle* ruling smoothed crude public international conflict rules and elaborated on the value of both multilateralism and sovereignty. By interpreting the *chapeau* of Article XX GATT, the Appellate Body encouraged members to engage seriously in negotiations with trading partners before instituting regulations with extraterritorial, trade-restrictive effects. Three consequences result. All touch on the legitimacy of multilateral negotiations. First, the likelihood that Article XX GATT will apply is greater in a case where a national measure complies with a Multilateral Environmental Agreement than where it is unilaterally applied and is not multilaterally convened.[38] Secondly, even if there is no agreement in the end, the serious attempt to reach consensus may give the national environmental measure priority over the trade verdict—as the norm evidently was not intended to be protectionist. Thirdly, although the *Shrimps–Turtle* report is ambiguous, the wording suggests that the Appellate Body may regard a national environmental

[33] US Restrictions on Imports of Tuna, 3 Sept. 1991, not adopted, [1991] ILM 1594; US Restrictions on Imports of Tuna, 16 June 1994, not adapted, GATT Doc DS29/R and ILM [1994], 842. For a concise summary and analysis, see N Notario, *Judicial Approaches to Trade and Environment: The EC and the WTO* (London: Cameron & May, 2003), at 143-151, esp. at 144.

[34] The term 'diagonal conflicts' was coined by C Joerges, 'The Impact of European Integration on Private Law: Reductionist Perspectives, True Conflicts and a New Constitutional Perspective' (1997) 3 *European Law Journal* 378, and C. Schmid, 'Vertical and Diagonal Conflicts in the Europeanisation Process' in C Joerges and O Gerstenberg (eds), *Private Governance, Democratic Constitutionalism and Supranationalism* (Luxemburg: Office for Official Publications of the EC, 1998), 185.

[35] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body, WT/DS 58/AB/R (12 Oct 1998), interpreting the chapeau of Art XX GATT; for a concise description and further literature, see N Notario, (n 33 above), at 187 ff.

[36] See D Driesen, 'What is Free Trade? The Real Issue behind the Trade and Environment Debate' (2001) 41 *Virginia Journal of International Law* 270, at 308.

[37] WT/DS 26 und 48/AB/R (16 Jan 1998), for further analysis see C Godt, 'Der Bericht des Appellate Body der WTO zum EG-Einfuhrverbot von Hormonfleisch—Regulierung im Weltmarkt' [1998] *Europaeisches Wirtschafts- und Steuerrecht* 202.

[38] D Wirth, 'Multilateral Environmental Agreements in the Trade and Environment Debate, Annex to the Submission of the European Communities to the CTE' (TN/TE/W/39, 24 Mar 2004), leaving the problem of non-parties aside.

measure that is consistent with multilaterally agreed environmental standards as trade law-consistent even if the affected country is not a member of the environmental agreement in question.[39]

Moreover, with regard to the concept of proportionality, the Appellate Body took a step forward. On the basis of the *Hormones* case,[40] it refined the concept by dropping the measure of least-restrictedness in respect of Article XX(g) GATT (exhaustible natural resources).[41] The Appellate Body clarified that it was ready to devise ways to use its 'creative room for manœuvre'[42] and better to define the relationship between the WTO Agreement and environmental norms-without falling back on a bipolar scheme.[43]

II.4 Conclusion

Overall, the pattern of WTO environmental governance can still not be characterised as integrative. WTO bodies are reluctant to deal with environmental policies. Members fence off the WTO either by referring to national sovereignty or by deviating discussions to other *fora* as being 'more competent'.[44] Even if the Dispute Settlement Bodies have become more responsive to environmental concerns, the integration of trade and environmental policies—in the sense that trade policies are questioned in the light of their environmental effects and that integrative policies are deliberated—has not come about in the WTO.

III. INTERNATIONAL GOVERNANCE OF THE TRANSFER OF GENETIC RESOURCES

However, inactivity in one international organisation does not dissolve pressing problems. The lack of international integrative policies merely

[39] J Scott, 'International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO' (2004) 15 *European Journal International Law* 307, at 346 ff.

[40] J Scott, *On Kith and Kine (and crustaceans): Trade and Environment in the EU and WTO, Harvard Jean Monnet Working Paper 3/1999,* available at http:/www.law.harvard.edu/Programs/JeanMonnet/papers/99/990301.html, at 13; G Godt, n 37 above, at 207.

[41] See Notario, n 33 above, at 242.

[42] Scott, n 39 above, at 346 ff.

[43] Ibid. *Amicus curiae* briefs may become instrumental in qualifying a national measure as either being protectionist or environmental in nature in the future. In the *Shrimps–Turtle* Appellate Body Report, n 35 above, they were first held to be legitimately considered by the Appellate Body autonomously—without being submitted by one of the parties. In a wider sense, the question of who may bring facts legitimately to the attention of the Dispute Settlement Body may eventually change the nature of the actual procedure: see R Howse, 'Membership and its Privileges: the WTO, Civil Sciety, and the *Amicus* Brief Controversy' (2003) 9 *European Law Journal* 496.

[44] For a critical account of the sovereignty argument, see K Raustiala, 'Rethinking the Sovereignty Debate in International Economic Law' (2003) 6 *Journal of International Economic Law* 841; for a critical account of the regulation to other fora, see Raustiala and Victor, n 5 above, for the latter.

shifts the centre of activity back to nation–states and private actors. As regime theory has taught us, practical solutions are invented which reconcile economic and environmental policies.[45] One example of this is the international transfer of genetic and biological material.

III.1 The TRIPS–CBD Conflict

The issue of integrating trade and the environment in the international transfer of biological material became crystalised as a question of inconsistency between the TRIPS and the CBD.[46] TRIPS sets minimum standards for national patent regulation. It is part of the constitutive body of multilateral agreements that a country signs when acceding to the WTO. The CBD was the only legally binding instrument which countries had agreed upon at the UN Conference on Environment and Development in Rio (UNCED) in 1992. It is a convention with almost global membership. 188 countries have signed it, as compared to 147 for the WTO and 191 for the UN. It was amended by the Cartagena Protocol on Biosafety in 2000 and the Bonn Guidelines in 2002. However, one important country has not yet ratified the CBD: the US.[47] Initially, the US even refused to sign it—arguing that the CBD violates general principles of patent law.[48] After TRIPS came into force, the dominant argument shifted to the dogmatic argument that TRIPS would override the CBD.

In contrast to its name, the CBD is not a pure convention for environmental protection. The global loss of species propelled activities of both economic and environmental communities. Without this unusual coalition, the CBD would not have come into being. As an offspring of the UNCED Conference, the convention aims at 'sustainable development', geared to the integration of environmental and economic policies. It builds on the realisation of their mutual dependency and instrumentalises both: economic instruments for environmental policy goals and, *vice versa*, environmental

[45] The following are ground-breaking: RO Koehane, 'The Demand for International Regimes' (1982) 36 *International Organizations* 3, and S Krasner (ed), *International Regimes* (Ithaca, NY: Cornell UP, 1983). For an overview of environmental regimes, see T Gehring and S Oberthuer, *Internationale Umweltregime* (Opladen: Leske & Budrich, 1997).

[46] Although in most accounts, the conflict is reduced to a redistribution issue. The environmental dimension is omitted. For an analysis of these two dimensions, see C Godt, 'Von der Biopiraterie zum Biodiversitaetsregime—Die sog. Bonner Leitlinien als Zwischenschritt zu einem CBD-Regime ueber Zugang und Vorteilsausgleich' [2004] *Zeitschrift fuer Umweltrecht* 202 at 208 ff.

[47] Neither, e.g., did Thailand, thus giving rise to the ubiquitous debate on the relation between WTO law, MEAs and national regulation on countries that are not members of MEAs: see Scott, n 39 above.

[48] President Bush stated on 12 June 1992 that the treaty 'threatened to retard biotechnology and undermine the protection of ideas': AE Boyle, 'The Rio Convention on Biological Diversity' in M Bowman and C. Redgewell (eds), *International Law and the Conservation of Biological Diversity* (London: The Hague, Boston: Kluwer, 1996), 33 at 36. Under the Clinton Administration, the CBD was signed on 4 June 1993.

protection for economic prosperity—an uneasy marriage. A central contentious issue is the benefit-sharing duty. As an overarching goal, it is spelled out in Article 1 CBD, and as a concrete duty in Article 15(7) CBD. It demands that each contracting party take measures 'with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilisation of genetic resources'. The clause rests on the economic rationale that only a person who has an incentive to protect the environment will do so.[49]

In the beginning, the main argument was about the inconsistencies between these two treaties. The developing countries claimed that the CBD prescribed benefit-sharing which resulted from the use of biological resources. As the TRIPS Agreement allocates all profits to the holder of the property right, they argued that it violated the CBD.[50] Consequently, they demanded that it be amended.[51] Conversely, the industrialised countries claimed that the CBD violated the TRIPS Agreement for the same reason.[52] Distributive policies would not be in line with this mission. From this standpoint, the industrialised countries opposed rules which would provide for the retraceability of material as being solely distributive, such as the disclosure rule in patent application procedures.[53] They would violate Articles 27, 29 and 30 TRIPS, because the TRIPS Agreement ruled out additional patentability requirements.[54] This conflict blocked deliberations for years in various *fora*, including the CTE, the TRIPS Council, the CBD and the World Intellectual Property Organisation.[55] Even high-level negotiations about this question at the WTO Ministerial Meeting in Hong Kong in December 2005 could not bring about any approximation.[56]

[49] Thus, the CBD is not confined to redistributional purposes: see Godt, n 46 above, at 208.

[50] This position has been repeated ever since; see the submission to the TRIPS Council of Brazil, China, Cuba, Dominican Republic, Ecuador, India, Pakistan, Thailand, Venezuela, Zambia and Zimbabwe, IP/C/W/356 (24 June 2002).

[51] A demand that became channelled into the claim to amend either Art 27 or Art 30 TRIPS with a mandatory rule to disclose source and/or origin as a patentability requirement.

[52] Academically spelled out by J Straus, 'Biodiversity and Intellectual Property' (1998) 9 *AIPPI Yearbook*, 99, and Spranger, n 26 above, at 75 ff.

[53] For an analysis of its twofold function, see Godt, n 46 above, at 208 ff. However, it was the fear of the US that the developing countries would use the CBD to circumvent their Uruguay Round commitments; see K Raustiala, 'Domestic Institutions and International Regulatory Cooperation—Comparative Responses to the Convention on Biological Diversity' (1997) 49 *World Politics* 482 at 491.

[54] NP d. Carvalho, 'Requiring Disclosure of the Origin of Genetic Resources and Prior Informed Consent in Patent Applications without Infringing the TRIPS Agreement: The Problem and the Solution' (2000) 2 *Washington University Journal of Law and Policy* 371; NP d. Carvalho, 'From the Shaman's Hut to the Patent Office: In Search of Effective Protection for Traditional Knowledge' in C McManis (ed), *Proceedings of the Conference on Biodiversity, Biotechnology and the Protection of Traditional Knowledge* (St. Louis, Miss: 2003): available at http://law.wustl.edu/centeris/Confpapers/index.html (last visited Jan 2006).

[55] Godt, n 9, above.

[56] Discussions continue in the CBD; a draft proposal on an Access and Benefit-Sharing Regime was tabled at a meeting of the CBD Ad Hoc Open-Ended Working Group on Access

III.2 Bonn Guidelines of 2002

However, irrespectively of this stalemate, things did develop in practice. Various industries active in the development of cosmetics, biotechnology, food, pharmaceuticals and crops are not autarkic but depend on access to genetic and biological resources in biodiversity-rich countries. After national sovereignty over genetic resources was internationally acknowledged by the CBD in 1992, biodiversity-rich countries issued regulations making access conditional on permits and benefit-sharing. The stalemate in the TRIPS Council instigated strict access regulation in biodiversity-rich countries (mainly in the developing world), thus impeding bio-prospecting.[57] At the same time, industry, institutions and jurisdictions in biodiversity-rich countries started to experiment with benefit-sharing arrangements.[58] Notwithstanding the allegations of developed countries that mandatory disclosure rules were in violation of TRIPS, some developing countries instituted these rules as patentability conditions.[59] Industry embarked on contractual arrangements.[60] Ironically, the US National Institute of Health (NIH) became a forerunner in supporting complex contractual experiments which aimed at using genetic resources and attributing benefits to the country and to the local communities where the resource was found.[61] A typical feature of these multipolar contracts is the inclusion of both, commercial and non-commercial entities such as research institutions, universities and botanical

and Benefit Sharing in Granada, Spain, 1 Feb 2006. The text was sent to the 8th Conference of Parties to be held in Curitiba, Brazil, in Mar 2006.

[57] G Henne *et al*., 'Access and Benefit-Sharing (ABS): An Instrument for Poverty Alleviation—Proposals for an International ABS Regime' (Bonn: German Development Institute, 2003).

[58] A concise collection of case studies is to be found at http://www.biodiv.org/programmes/socio-eco/benefit/cs.aspx.

[59] See, for the examples of Costa Rica, Peru, and Bolivia, CM Correa, 'Establishing a Disclosure of Origin Obligation in the TRIPS Agreement', Buenos Aires, Quaker United Nations Office (2003), available at www.quno.org, also, in a moderate form in Denmark: for an overview, see C Godt, *Eigentum an Information—Der Funktionswandel des Patentschutzes in der Wissensgesellschaft-Die genetische Information als Beispiel* (Tbingen: Mohr Siebeck, 2006, forthcoming), Chap 5.

[60] An overview of various industrial branches provided by K ten Kate and SA Laird, *The Commercial Use of Biodiversity* (London: Earthscan, 2000). For different varieties of disclosure rules, see Correa, above n 59.

[61] The Programme launched the so-called International Co-operative Biodiversity Groups (ICBG). An introduction is provided by JP Rosenthal, 'Equitable Sharing of Biodiversity Benefits: Agreements on Genetic Resources' in OECD (ed), *Investing in Biological Diversity—The Cairns Conference*, (Paris: OECD, 1997); for a comprehensive overview, see http://www.fic.nih.gov/programs/icbg.html (last visited Sept 2004). The US National Cancer Institute embodied a comparable policy of benefit-sharing: K ten Kate and A Wells 'The Access and Benefit-Sharing Policies of the US-National Cancer Institute: A Comparative account of the discovery and development of the Drugs Canaloide and Topocetan' (1998, available at http://www.biodiv.org/doc/case-studies/abs/cs-abs-nci.pdf (last visited Jan 2006). For a comparative analysis of US and UK domestic biodiversity politics, see Raustiala, n 53 above. He highlights the fact that US actors and US NGOs were instrumental in starting CBD negotiations in the first place.

gardens. The inclusion of commercial partners is to ensure actual and future benefit-sharing. 'Intermediaries', such as universities and research institutions, have an important structural function as a buffer zone between competing interests. Their task is to filter and secure information about where and with which method the resource was found (i.e. by random screening or by conveyed traditional knowledge), and to provide a shield against unauthorised disclosure of information that is deemed to be sacred. The ultimate goal of these arrangements is to channel benefits back into the communities. However, they also provide a reasonable basis for the calculation of future shares and (by discriminating between different knowledge types) for preventing commercial partners from escaping into a neighbouring country, thus foregoing their contractual duties. With the passing of time, access permits and benefit-sharing have become a standard for industrial and academic bio-prospectors. Field researchers risk future funding, their reputation and the commercial development of their research results; industrial partners, on their part, fear non-patentability and being publicly blamed for bio-piracy if they do not adhere to their moral obligation.

These developments put pressure on governments to come up with rules which could contain potential free-riders and ultimately improve access.[62] Rules were sought that could provide for more transparency and build up consensus about equity in benefit-sharing contracts. Thus, the CBD invited 'case studies', and, in 1998, a Panel of Experts on Access and Benefit-Sharing was set up. This body finally submitted draft guidelines which were presented in Bonn in November 2001 and approved by the CBD Conference of Parties as the 'Bonn Guidelines' in 2002.[63] On the one hand, they provide guidance for drafting access regulation. For example, one national focal point is to be established from which a bio-prospector will be provided with all relevant information,[64] and the rules of access have to be simple and transparent.[65] On the other hand, the Bonn Guidelines provide guidance for drafting benefit-sharing arrangements. Addressees are not only governments, but 'providers' and 'recipients' in general—broken down into provider and recipient states, and private providers and recipients.[66] Part IV of the Bonn Guidelines guide contract parties through the process. They must first devise a mutual, overarching strategy and then define their intermediate goals.[67] A list of principles is to guide contracting partners in drafting their texts and in addressing their mutual or concurrent interests.[68] This

[62] Regime Building Through Implementation': see Raustiala and Victor, n 5 above, at 302.
[63] CBD-COP-6 decision No. VI/24 (UNEP/CBD/COP/6/20, 253 ff). For in-depth description and analysis, see Godt, n 46 above.
[64] Nr. 13 Bonn Guidelines, Decision VI/24.
[65] Nr. 16 a Bonn Guidelines.
[66] Nr. 16 a–d Bonn Guidelines.
[67] Part IV. A and B Bonn Guidelines.
[68] Nr. 42–50 Bonn Guidelines.

includes a concise check-list of contract clauses for benefit-sharing arrangements that condense prior experiences.[69] They also call for compliance with environmental access rules as a precondition to patentability—thus combining environmental and economic policy instruments.[70] The Bonn Guidelines are perceived as a first step to a more consolidated regime. In September 2002, the World Summit on Sustainable Development[71] called on the CBD to create an 'international regime'-a call which the parties to the CBD Conference of Parties (COP) followed by establishing a working group in February 2004 mandating it with negotiations for a draft proposal,[72] which it submitted in February 2006.

III.3 Emerging Rules through Evolving Practice

Whether a legally binding protocol on the transfer of genetic resources will ultimately be agreed upon is an open question for now. Whereas the atmosphere in the TRIPS Council has cooled down, tensions have risen at CBD meetings where discussions have become more diffuse. The change of atmosphere in the TRIPS Council may be partly due to a change in the position of the EC,[73] and/or partly due to a proceduralisation of discussions as the mega-diverse countries transformed their former demand of the 'tripod'[74] into a 'checklist'.[75] As the CBD moves to tackle technical questions, questions on benefit-sharing still seem to be very much contested.[76]

[69] Nr. 44–45 Bonn Guidelines.

[70] Nr. 16 b (iv) Bonn Guidelines , see examples for national legislation in Correa, n 59 above, and CM Correa, 'The Access Regime and the Implementation of the FAO International Treaty on Plant Genetic Resources for Food and Agriculture in the Andean Group Countries' (2003) 6 *Journal of World Intellectual Property* 795.

[71] This summit was essentially a global meeting of national environmental ministers, see http://www.un.org/jsummit/html/basic_info/basicinfo.html.

[72] Decision VII/19/D, 7th Conference of Parties to the CBD (Feb. 2004), UNEP/CBD/COP/VII/21.

[73] The EC deems disclosure rules 'possible': COM(2003)821 final of 23 Dec 2003 and its subsequent press release of 7 Jan 2004 (IP/04/21).

[74] (1) Disclosure of source and origin, (2) prior informed consent by providers and (3) a fair and equitable benefit sharing arrangement, submission to the TRIPS Council of Brazil, India, China, Cuba, Dominican Republic, Ecuador, Pakistan, Thailand, Venezuela, Zambia and Zimbabwe, IP/C/356, 24 June 2002.

[75] IP/C/W/420 and IP/C/W/420/Add. 1 of 2 Mar 2004. The single reports were submitted in Sept 2004 (disclosure of source and origin), Dec 2004 (prior informed consent) and Mar 2005 (benefit-sharing).

[76] What is key to the disclosure rule, the provider person or the country? Which legal effects shall the rule imply (only reduced patent application fees in case of disclosure or denial of the issue of the patent in case of non-disclosure)? Does the duty to share benefits (also arise in respect of derivatives)? The tense atmosphere is mirrored by the summary of a preparatory workshop in Paris (Second Paris Roundtable on Practicality, Feasibility, and Cost of Certificates of Origin, 9 and 10 Nov 2004, available at http://www.iddri.org/iddri/telecharge/biodiv/workshop-abs.pdf) and the debates on the 3rd Meeting of the CBD Workgroup on Access and Benefit-Sharing in Bangkok, Feb 2005: see Report UNEP/CBD/WG-ABS/3/7 of 3 Mar 2005.

Discussions revolve around certification schemes. However, these discussions are not necessarily connected with the 'tripod' claim, as this is usually considered to be patentability-related.[77] Nor has the relationship been cleared between the redistributive and the environmental function of benefit-sharing.[78]

However, whatever the outcome will be, it seems that benefit-sharing arrangements have made their way into practice. Patents are no longer the key to the remuneration discourse and have become just one form of benefit-sharing. Benefit-sharing as such has became a social norm in the Weberian sense that bio-prospection is legitimate ('deserves recognition') only when 'prior informed consent' was asked for and was provided (concurrently as a state permit and/or a private consent by indigenous communities) and a benefit-sharing arrangement was made.

IV. PATTERNS OF ENVIRONMENTAL GOVERNANCE

These findings are consistent with various streams of thoughts in political science. In the next section, they will be reviewed in brief.

IV.1 Regime-building

First, these findings seem consistent with regime theory. Regime theory seeks to reach beyond the clear-cut instruments of public international law. Krasner defines regimes as 'implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge'.[79] To regime theorists, it is 'not prescription but prediction' that makes regime-building emerge.[80] The dictum pinpoints the relative importance of legally binding law and principles in international policy-making, and insinuates that the ideas and the vision of key players can be more important than rules and principles. It also implies that open adaptive processes of rule-making may be more solid, as the system may more easily react to the

[77] S Louafi and J-F Morin, 'Certificates of Origin, Transboundary Movements of Genetic Resources, and International Trade Law' (2005) *5 Les Documents de Travail de l'Iddre*, tackle certificates only as import requirements; L Glowka, 'Towards a Certification System for Bioprospecting Activities' [2001] *Schweizer Staatssekretariat fuer Wirtschaft*, understands certificates as certification of bioprospectors: available at http://www.biodiv.org/doc/meetings/cop/cop-06/other/cop-06-ch-rpt-en.pdf.

[78] See as just one example the account of the environmental NGO Institut du Dveloppement Durable et des Relations Internationales IDDRI, by S Louafi and Morin, n 77 above, who (in contrast to the authors' opinions) deny the environmental function of certificates and question their WTO compliance.

[79] Krasner, n 45 above, at 2.

[80] J Brunne and SJ Toope, 'Environmental Security and Freshwater Resources: Ecosystem Regime Building' (1997) 91 *American Journal of International Law* 26 at 30.

changes and adapt to the developments that emerge and deserve to be reinforced. Two aspects seem to converge in regime theory.

On the one hand, regimes integrate various policies that typically cut across the mandates of various 'single issue' organisations, thus giving rise to the more recent term of 'Open-Architecture Integrated Governance'.[81] The formation of a regime is typically accompanied by innovative stategies. Most prominently, the consensus principle, both as a key principle to international negotiations and as a major instrument to obstruct policies, is complemented by majority rules, [82] time-lines, drop-out options and differentiated duties. Political science has identified issue density as the key for the development of international regimes.[83] With regard to its cross-cutting nature, the CBD has been described as a 'regime' from very early on.[84] A more recent account focussing on the organisations involved coined the term 'regime complex',[85] which describes more accurately the international landscape in which the CBD talks take place.

On the other hand, regime theory points to institutional changes that are geared by normative changes—and *vice versa*. By now, there is social consensus that benefit-sharing is a duty when using genetic resources. The prevailing notion is that the duty primarily arises when the resource was found in a country that is not the one where the resource is used or marketed (transnational transfer). The Bonn Guidelines react to this change in social norms, although they do not yet amount to political consensus and governments still struggle to formulate rules. Yet, in their subtlety, the Bonn Guidelines overcome the stalemate between the TRIPS Council and the CBD.

[81] FM Abbott, 'Distributed Governance at the WTO–WIPO: An Evolving Model for Open-Architecture Integrated Governance' in MCEJ Bronckers and R Quick (eds), *New Directions in International Law-Essays in Honour of John H Jackson*, (The Hague, London & Boston: Kluwer, 2002), at 15; M Jachtenfuchs and M Knodt (eds), *Regieren in internationalen Institutionen* (Opladen: Leske & Budrich, 2002); A-M Slaughter, 'Networks of Governments' in M Byers (ed), *The Role of International Law in International Politics* (Oxford: OUP, 2000), at 177.

[82] E.g. Art 2 (9) of the Montreal Protocol permits the adoption of decisions on the basis of a two-thirds majority—and is binding on all parties.

[83] Koehane, n 42 above; JG Ruggie, 'International Regimes, Transactions, and Change: Enbedded Liberalism in the Postwar Economic Order' (1982) 36 *International Organisation* 379; Krasner, n 4 above, OR Young, *International Co-operation: Building Regimes for Natural Ressource and Environment* (Ithaca, NY: Cornell UP, 1989); T Gehring, *Dynamic International Regimes* (Frankfurt aM: Lang, 1994); Gehring and Oberthr, n 45 above.

[84] For prior accounts of the regime interpretation of the CBD, see KG Rosendal, *The Convention on Biological Diversity and Developing Countries* (Dordrecht/Boston & London: Kluwer, 2000), at 141 ff, G Henne and S Fakir, 'The Regime Building of the Convention on Biological Diversity on the Road of Nairobi' (1999)3 *Max Planck UN Year Book* 315; for a regime interpretation of the CBD-TRIPS interface, see Raustiala and Victor, n 5 above, at 295.

[85] Ibid; earlier described as 'linkage-bargain diplomacy' by MP Ryan, 'The Function-Specific and Linkage-Bargain Diplomacy of International Intellectual Property Lawmaking' (1998) 19 *University of Pennsylvania Journal of International Law* 535.

IV.2 Global Governance

The second stream of thought with which the Bonn Guidelines seem to be consistent is that governance literature which revolves around policy-making is not confined to governments. Schuppert describes governance theory as a modern strand of regulation theory. He understands it as a reaction to the interventionist failure and as the development of policy networks and the inclusion of private actors.[86] Governance arrangements react to public policy needs without resorting to regulation. They gain legitimacy by effectively integrating diverse and competing interests, bolstered by participation and transparency. Governance regimes have responded to both regulatory and democratic failures,[87] and the social functionality of markets.[88] However, one important insight of modern governance theory seems to be that these new inclusive governance arrangements cannot do without law. As much as they thrive to escape the traditional set-up of legal regulation, they still depend on those functions of law that stabilise communication and provide legitimacy, thus contributing to re-legalisation.

In this sense, the Bonn Guidelines provide a prime example of a governance regime in both aspects. First, they not only address governments. They stick to the intergovernmental paradigm only as far as access regulation is concerned. However, their policy centres are contract principles and clauses that shape the normative idea about the equity of benefit-sharing arrangements. The Bonn Guidelines reach beyond governments to private actors and are geared to governing contracts, both private–public relationships and contracts between private actors. Thus, the Bonn Guidelines react to the modern private–public mix that has been described as being at the centre of the turn from government to governance. Secondly, as much as they contribute to forming these new arrangements beyond traditional law, they also exert pressure on nation states to conceive an internationally binding regime and to provide effective national regulation in support of the newly emerging governance arrangements.

IV.3 Global Environmental Governance

A subset of the global governance theory is the literature that deals with the special features of global environmental governance. It revolves around two centres: the public-good character of 'the environment' and its cross-cutting nature. Public goods are internationalistic in nature and only inefficiently dealt with by territorial regulation. Some of them are 'public

[86] GF Schuppert, *Governance im Spiegel der Wissenschaftsdisziplinen* (Berlin: Wissenschaftskolleg, Typescript, 2004), at 8.

[87] J Bohmann, 'Constitution Making and Democratic Innovation' (2003) 3 *European Journal of Political Theory* 315 at 316; see, also, Schuppert, n 86 above.

[88] C Joerges in this volume.

goods' in the very sense of the term's meaning in economic theory, such as the ozone layer, the oceans and their beds, the Arctic and Antarctica.[89] Others are situated inside territorial boundaries, although their conservation depends on international co-operation, such as the protection of migratory species or the regulation of the trade in hazardous wastes and substances. Because of its cross-cutting nature, which makes the assignment of regulation to just one organisation difficult, the principle of horizontal segregation is put into question. This is especially the case for trade measures and economic incentives which integrate environmental and economic policies. As the problem cannot be territorially confined, sovereignty and, thus, the mode of horizontal policy segregation are put into question. These features challenge traditional concepts of vertical and horizontal order in policy-making. And so does the CBD.

(a) Policy Integration I: Trade Measures in MEAs

As Multilateral Environmental Agreements (MEAs) deal with 'international' problems, they typically enshrine instruments that react to international activities such as cross-border trade.[90] The oldest example is CITES,[91] which contains an outright ban on trade in listed species. A more modern version is the Basle Convention,[92] which establishes a closed transfer regime between member states. A trade measure in the CBD is Article 8(h), which calls on member states 'to prevent the introduction of alien species which threaten ecosystems'. It echoes the import bans on protected species in CITES. The relationships of these trade restrictions and GATT disciplines have always been fraught with tension. They challenge the very idea of horizontal policy segregation. However, there seems to be consensus that they are functional and justified in pursuing a goal which concurs with trade liberalisation. Implementation and adjudication rest with the MEA secretariats and the International Court of Justice.[93] Despite the endless talk in WTO committees about the relationship between WTO law and

[89] A synonym is the common heritage of mankind; see, e.g., K Baslar, *The Concept of Common Heritage of Mankind* (The Hague, London & Boston: Martinus Nijhoff, 1998); and M Jagels-Sprenger, 'Der Grundsatz 'gemeinsames Erbe der Menschheit' im internationalen Vertragsrecht zum Schutz der natrlüichen Ressourcen, Diskussionspapier 5/91 (Bremen: Zentrum fuer Europaeische Rechtspolitik an der Universitaet Bremen, 1991).

[90] See the Matrix on Trade Measures Pursuant to Selected Multilateral Environmental Agreements, available at http://www.wto.org/english/tratop_e/envir_e/mea_database_e.htm (2003).

[91] Convention on International Trade in Endangered Species of Wild Flora and Fauna of 1973, available at www.cites.org/eng/disc/text.shtml.

[92] Basle Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 1989, available at www.basel.int/text/documents.html.

[93] Note, however, for open questions in respect to the dispute settlement, see G Winter, 'The GATT and Environmental Protection: Problems of Construction' (2003) 15 Enviro*nmental Law Journal* 113 at 137.

MEAs,[94] legally, their priority on trade disciplines has not been challenged. Even though there is as yet no consensus on the technical inclusion as a 'window' or 'waiver', it cannot be argued that trade measures are not accepted as integrated environmental policy instruments.

(b) Policy Integration II: Economic Incentives as Environmental Policy Instruments

The principle of horizontal policy segregation is equally challenged by the mirror-image constellation of trade-enhancing instruments for environmental policy purposes. A sibling to the CBD mechanism is trading in greenhouse gas allowances.[95] Its system is administered by the respective environmental administrations. Here, too, compatibility with GATT principles has been questioned. However, its consistency with GATT has not been seriously put into question. These evolutions have made it clear that environmental policy is intrinsically intertwined with economic policies and cannot be separated from them.

The CBD created property rights in genetic resources and traditional knowledge for the sake of better management of the environment. Its goal is to institute a contract-based transfer of these goods, thus making benefit-sharing possible as a means of providing people with incentives for conserving natural resources. The contract-based transfer of resources was functionally conceived so as to achieve both benefit-sharing and conservation.

(c) Sovereignty Revisited

Environmental cross-cutting policies are as challenging to the principle of horizontal segregation as the public-good character is to the traditional concepts of sovereignty. Accordingly, any country must regulate its own problems inside its own territory. The boundaries of this concept have been tackled by various MEAs, most prominently by the Kyoto and the Montreal Protocols.[96] The CBD continues in the same vein. It protects biological .diversity as a common concern of humankind,[97] while at the same time

[94] U Ehling, 'CTE-Agenda Zusammenfassung Item 1 & 5: "The Relationship between Provisions of the Multilateral Trading System and Trade Measures for Environmental Purposes, including those Pursuant to Multilateral Environmental Agreements" (Item 1) and the "Relationship between the Dispute Settlement Mechanism in the Multilateral Trading System and those Found in Multilateral Environmental Agreements"' (Item 5), typescript, Jan 2004, on file with the author.

[95] The European emission allowance trading scheme is regulated by EC Dir 2003/87/EC [2003] OJ, 275, 23; EC Dir 2004/101/EC [2004], OJ 338, 18.

[96] The Kyoto Protocol (1997/2005) supplements and strengthens the UNFCCC (1992, greenhouse gases). The Montreal Protocol on Substances that Deplete the Ozone Layer (adopted in 1987) is based on the Vienna Convention (1985).

[97] Third recital of the CBD Preamble.

reaffirming the national sovereignty of biological resources.[98] The inherent tension of common concern and sovereignty is mirrored in various Articles of the Convention—and yet it is ultimately unresolved. A lot of conflicts between developed and developing countries in the CBD can be described along these lines. Developing countries are eager to regulate their access rules autonomously and to pursue their policies of benefit-sharing. Developed countries reject claims for disclosure rules, not least because they oppose a mechanism that could demand the recognition of an international act or an act of a foreign state (access permit, benefit-sharing arrangement, certificate) as a precondition for their own governmental acts—here, the issuing of a patent.[99]

V. CONCLUSION FOR THE OVERALL DEBATE ON CONSTITUTIONALISM

What do these findings contribute to the overall debate on constitutionalisation? This last section surveys the broad debate about constitutionalisation, and identifies the relationship between this debate and environmental governance. From there, it sets out concrete conclusions for the WTO constitutionalisation debate.

V.1 Constitutionalism—a Broad Claim on Legitimacy

The terms 'constitutionalism' or 'constitutionalisation' have become buzzwords. They evoke assumptions about legitimacy being at the heart of every constitution and referring to a 'good order'. The quest for legitimacy is their driving force and the *sujet* of the overall globalisation process (the 'post-national constellation'). The terms touch on a broad range of topics, from the relationship between the individual and the state (human rights,[100] rule of law in the continental Prussian sense enshrined in the idea of *Gesetzesvorbehalt*, judicial review[101]), to the relationship between law and politics (rule of law in the Anglo-American sense, understood as the relationship between parliament and the executive, and the separation of

[98] Fourth recital of the CBD Preamble.

[99] For further reading, see C Godt, n 46 above.

[100] Having 'one unitary entity' to which power is ascribed is perceived as an achievement of the enlightenment: D Grimm, *Die Verfassung im Prozess der Entstaatlichung* (Bremen: Collaborative Research Centre, 2004), availablea at http://www.sfb597.uni-bremen.de.

[101] Human Rights as safeguards for individual (economic) freedom; see E-U Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law: International and Domestic Foreign Trade Law and Foreign Trade Policy in the United States, the European Community and Switzerland* (Fribourg: UP [ff], 1991), or his counterparts, R Howse and K Nicolaidis, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step too Far' in RB Porter *et al*. (eds), *Efficency, Equity and Legitimacy: The Multilateral Trading System at the Millenium* (Washington, DC: Brookings Institution Press, 2000), 227, and P Alston, 'Resisting Merger and Aquisition of Human Rights by Trade Law: A Reply to Petersmann', (2002) 13 *European Journal of International Law* 815.

powers[102]), to the transformation of the nature of states[103] and their tasks.[104] Other assumptions allude to the internal organisation (the relationship between territorial entities, supremacy, and subsidiarity[105]) and the relationship between markets and the state.[106] Another strand puts the democratic, non-state-centric quest at the centre of reasoning.[107] All raise questions of good governance (*gute Herrschaft*) which have emerged since regulation has become internationalised, thus escaping from the confines of the nation-state for which all the concepts have been coined.

Here, the focus is policy co-ordination (synonymous with policy integration). It has become a prerequisite of legitimate modern rule, and thus a constitutional norm in the twentieth century. In order to rule legitimately, the state has to take into account and to provide structures and procedures that guarantee the inclusion of[108] all aspects of a negotiated policy. Economic interests do not deserve priority *per se*. This idea has been coined by constitutional law theory as 'practical concordance', in German '*Praktische Konkordanz*'.[109] So far, the constitutional debate about environmental policy in international trade law has revolved around national

[102] For a comparison between the rule of law in the Anglo-American and Continental traditions, see KP Sommermann, *Das Bonner Grundgesetz* (2000), ii, (Arts 20–78), Art 20/3), no. 233 ff; see also C Möllers, *Gewaltengliederuug: Legitimation und Dogmatik in nationalen und internationalen Rechtsvergleich* (Tübingen: Mohr, 2005).

[103] Bounded sovereignty through ever-increasing numbers of conventions on the one hand and increasing emergence of soft law regimes (non-binding instruments, private governance regimes), see Pauwelyn in this volume; for sovereignty as embedded in a multi-layered system, see C Schmid, *A Theoretical Reconstruction of WTO Constitutionalism and its Implications for the Relationship with the EC* (Fiesole-Florence, European University Institute, 2001), Dep. of Law, EUI-Working Paper LAW No. 2001/5.

[104] Social security and risk regulation.

[105] This line of thought links 'the constitution' to the achievements of the nation-state (especially the concentration of all power in the nation-state) referring to prerequisites of sovereignty and autonomy; see Grimm, n 100 above; N Walker, 'The EU and the WTO: Constitutionalism in a New Key' in G de Burca and J Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (Oxford: Hart Publishing, 2001), 33; see, also, Scott, n 39 above, at 62; DJ Elazar, *Constitutionalionalizing Globalization* (Lanham, Mtd, Boulder, New York & Oxford: Rowman & Littlefield, 1998).

[106] 'Wirtschaftsverfassung' or 'regulated markets'?

[107] G Teubner, 'Societal Constitutionalism: Alternatives to State-centred Constitutional Theory? in: C. Joerges, I-J Sand and G Teubner (eds), *Transnational Governance and Constitutionalism* (Oxford & Portland Ore: Hart, 2004), at 3; C Joerges, 'Constitutionalism and Transnational Governance: Exploring the Magic Triangle' in Ibid, at 339.

[108] For the modern perspective on governmental accountability and involvement in private governance regimes, see H Schepel, *The Constitution of Private Governance–Product Standards in the Regulation of Integrating Markets*, (Oxford: Hart Publishing, 2005).

[109] Advocated internationally by T Cottier, E Tuerk and M Panizzon, 'Handel und Umwelt im Recht der WTO: Auf dem Wege zur praktischen Konkordanz' [2003] *Zeitschrift fuer Umweltrecht*, 155, and M Hilf and S Puth, 'The Principle of Proportionality on its Way into WTO/GATT law' in A von Bogdandy, P Mavroidis and Y Meny (eds), *European Integration and International Cooperation. Studies in Honour of Claus-Peter Ehlermann* (The Hague: Kluwer International Law, 2002), at 199. He was criticised, however, as 'non-liberal' by K-H Ladeur, *Kritik der Abwaegung in der Grundrechtsdogmatik—Plaedoyer für die Erneuerung der liberalen Grundrechtstheorie* (Tuebingen: Mohr Siebeck, 2004).

governmental activity (vertical segregation). Whereas national regulation is supposed to secure basic rights with regard to the execution of economic rights by others,[110] and international economic law subjects national public policy to trade disciplines, national regulation is *a priori* perceived as a barrier to trade. Thus, hitherto, the debate about trade and environment has been very much dominated by national sovereignty as the key constitutional norm.[111]

V.2 Global Environmental Governance and Constitutionalism

Oren Perez was the first to argue that environmental governance theory could contribute to the constitutionalisation debate. It would provide for a more 'pragmatic and contextual readiness to live with polycentric constitutionalisation'.[112] He referred to divergent rationalities that could enhance the responsiveness of international actors. His example was the IMF. Key to his reasoning is integration. However, while Perez' analysis is empirical in nature, the argument here complements his findings in conceptual terms. Global environmental governance enriches the current debate on constitutionalism, as it refines the idea of sovereignty and its safeguarding of legal sub-structures. The impetus is threefold. First, it shows that most global problems are not efficiently dealt with within the national realm. The most successful regimes have curtailed sovereignty. Secondly, global environmental problems have to be tackled as international economic problems. Thirdly, effective regimes depend on the inclusion of private actors. Thus, environmental governance theory challenges the central concepts of intergovernmental policy which are conceived to safeguard (democratic) sovereignty. The principles of vertical and horizontal segregation turn out to obstruct constructive problem-solving.

Dwelling on the given example of genetic resources, the conclusion has to be drawn that economic institutions such as private property cannot be confined either to the TRIPS Council or to the CBD Secretariat. The Bonn Guidelines have transformed the notion of intellectual property that the WTO aspires to uphold.[113] The case of the international transfer of genetic resources shows that solutions emerge in practice where environmental and economic concerns are reconciled, even if institutions such as the TRIPS

[110] Thus clearly put by D Wirth in 'Multilateral Environmental Agreements in the Trade and Environmental Debate', Annex to the Submission by the European Communities to the WTO-CTE (TN/TE/W/39), 24 Mar 2004.

[111] See, e.g., R Howse and D Regan, 'The Product/Process Distinction. An Illusionary Basis for Disciplining "Unilateralism" in Trade Policy' (2000) 11 *European Journal of International Law* 249; Howse and Nicolaidis, n 101 above; criticising this strand as democratically flawed: Raustiala, n 44 above.

[112] See O Perez, 'The Many Faces of the Trade-Environment Conflict: Some Lessons for the Constitutionalisation Project' in Joerges, Sand and Teubner (eds), n 107 above, at 233.

[113] Argument elaborated in Godt, n 9 above.

Council resist taking this development into account. We face the paradox that diverting the problem-solving process to other institutions results in accepting the transformation of economic institutions that is driven by non-purely economic organisations.[114] The Bonn Guidelines and the actual contractual arrangements on benefit-sharing are an example of the fact that the segregation principle of international relations as a constitutional norm is *de facto* being undermined.

V.3 Components of WTO Constitutionalisation

If it is true that the erosion of the principle of horizontal segregation is consistent with a modern perception of the legitimacy of international politics, then it follows that the rhetoric of the WTO 'being a single-issue organisation' is not legitimate. By responding to environmental claims the WTO will not turn into an environmental organisation. In fact, it will not influence environmental policies any more than by pursuing its strict policy of negative trade integration. The state of the art is that it interferes with both national and international environmental policies by constantly claiming that anything but negative integrating policies is inconsistent with WTO law. Vice versa, legitimacy is not safeguarded when the WTO turns to positive integration. Positive or negative regulation is not at issue here.[115] With regard to the constitutional norm of policy integration, members act 'legitimately' if they use the WTO to react more responsibly to national and international quests of economic adaptation to the aims of environmental policy.

The current resistance to dealing with environmental issues foils the commitments made in the Doha Declaration of 2001.[116] Doha Declaration No 31 (DD) acknowledges the 'mutual supportiveness' of trade and environment. In No 31(i) DD, members committed themselves to negotiating the relationship between trade rules and MEAs. In No 31(ii) DD, they committed themselves to regular information exchange between the MEA Secretariat and the WTO committees. Article 32(ii) DD calls upon the CTE to negotiate the environmental provisions of TRIPS. Beyond entering into the required negotiations, one concrete undertaking to bring about policy integration is to secure environmental expertise in the CTE sessions.[117] Another one would be to grant observer status to requesting MEAs in all WTO committees and councils, especially to the CBD Secretariat in the

[114] An argument elaborated by the author earlier in ibid.

[115] This dimension is explored by J Scott, n 39 above.

[116] Irrespective of the precise legal status of the Declaration: see P Rott, 'The Doha Declaration on the TRIPS Agreement and Public Health and the Subsequent Process—Good News for Public Health?' [2003] *Intellectual Property Quarterly* 284, and S Charnovitz, 'The Legal Status of the Doha Declaration' (2002) *5 Journal for Internatioanl Economic Law* 207.

[117] See U Ehling in this volume.

TRIPS Council. Another one would be to enter into negotiations in the TRIPS Council on how to integrate a certification scheme that is consistent with the non-discrimination discipline. From the normative perspective, the current position of the members in the TRIPS Council to obstruct discussions about the shape of intellectual property lacks legitimacy.

16

Environmental Policies and the WTO Committee on Trade and Environment: A Record of Failure?

ULRIKE EHLING*

I. INTRODUCTION

THE CROSS-CUTTING nature of environmental issues—across national borders as well as across sectoral international regimes—and their subsequent relevance to a variety of institutions and actors has resulted in a heated debate among politicians as well as academics on how to reconcile trade and environmental regulation on a global scale.[1] Given the fact that health and environmental standards may—intentionally or unintentionally—act as barriers to free trade, and, hence, be regarded as non-tariff barriers to trade, they are increasingly dealt with in both regional and international trade institutions. At the same time, the trade-restrictive measures contained in multilateral environmental agreements (MEAs) have proven to be a successful tool to address transboundary ecological problems and to achieve environmental goals.[2] Hither to, there have been

* This chapter presents preliminary results — as of end 2004 — of a continuing research project on 'Social Regulation and World Trade' within the context of the Collaborative Research Centre 'Transformations of the State' at the University of Bremen. I gratefully acknowledge the financial support of the Deutsche Forschungsgemeinschaft (DFG). For helpful comments, I wish to thank in particular Markus Jachtenfuchs and Christian Joerges as well as the participants at the workshop on *Legal Patterns of Transnational Social Regulation and International Trade*, held in Florence in Sept 2004.

[1] For a selection of the academic discussion, see K Bosselmann and BJ Richardson (eds), *Environmental Justice and Market Mechanism: Key Challenges for Environmental Law and Policy*, (The Hague: Kluwer, 1999); S Pfahl, *Internationaler Handel und Umweltschutz. Zielkonflikte und Ansatzpunkte des Interessenausgleichs* (Berlin: Springer Verlag, 2000); KP Rao, *The World Trade Organization and the Environment* (Basingstoke, London & New York: Macmillan, 2000); TJ Schoenbaum, 'International Trade and Protection of the Environment: The Continuing Search for Reconciliation' (1997) 91 *American Journal of International Law* 2; RH Steinberg (ed), *The Greening of Trade Law: International Trade Organizations and Environmental Issues* (Lanham, Mid, New York & Oxford: Rowman & Littlefield, 2002).

[2] To name just one of the most successful MEAs—the Montreal Protocol—which imposes trade restrictions on its members (Nairobi, 2000).

several attempts, with little success, to co-ordinate the often competing objectives between trade and social regulation by means of integrating environmental objectives into international trade organisations or into international trade law. This analysis will focus on the former: the integration of environmental objectives into the *institutional* structure of the World Trade Organisation (WTO).

In general, there may be multiple ways of dealing with the interface institutionally. The European Union (EU), for example, has established a complex network of institutions and *fora*.[3] However, the European way of balancing competing objectives is different from what we are witnessing on the global scale: the emergence of a heterogeneous architecture of global regulatory regimes is giving rise to new types of conflicting situations in which trade rules seem to have the upper hand, and thereby increasingly appear to influence other policy areas at national, as well as at international, level. This interdependence between different regimes and different levels of decision-making is especially relevant, as the conclusion of the Uruguay Round in 1994 extended the scope of the influence of the WTO far beyond mere trade issues, to intellectual property rights and to public services, as well as to matters of social regulation, such as health and environment. Hence, although the world trading system is now confronted with the same set of problems as the EU, the WTO lacks a comparable and comprehensive institutional structure that is able to deal with the emerging need to balance different political objectives or to formulate its own standards in legislative bodies.

However, there was, and still is, a strong call for the political regulation of these linkage issues at global level, and thus there is the expressed need for either new institutions or new institutional set-ups to provide for a coherent regulatory framework. Whether competing objectives should, or even could, be dealt with within one single international institution or between separate international organisations (IOs), and whether either the integration of environmental standards into world trade law or the strengthening of other international regimes was to be the solution was called into question.[4] In this sense, the establishment of several *fora* on the

[3] See J Falke, 'Comitology: From Small Councils to Complex Networks' in M Andenas and A Türk (eds), *Delegated Legislation and the Role of Committees in the EC* (The Hague: Kluwer, 2001); C Joerges and J Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of comitology', (1997) 3 *European Law Journal* 3; RD Kelemen, 'The Politics of "Eurocratic" Structure and the New European Agencies' (2002) 25 *West European Politics* 4; A Kreher, 'Agencies in the European Community—A step towards Administrative Integration in Europe' (1997) 4 *Journal of European Public Policy* 2; AE Töller, *Komitologie: Theoretische Bedeutung und praktische Funktionsweise von Durchführungsausschüssen der Europäischen Union am Beispiel der Umweltpolitik* (Opladen: Leske & Budrich, 2002).

[4] See F Biermann and S Bauer (eds), *A World Environment Organisation: Solution or Threat for Effective International Environmental Governance?* (Aldershot: Ashgate, 2005); F Biermann and UE Simonis, 'Institutionelle Reform der ökologischen Weltordnungspolitik? Zur

linkage issue within the institutional framework of GATT 47 and the WTO respectively—an organisation that still considers itself to be a single-issue organisation, but which does, in fact, deal with overlapping rules and jurisdictions—can be seen as an institutional response[5] to the political and academic debates on 'governance beyond the nation-state'.[6]

Consequently, this study will focus on such an institutional response: the WTO Committee on Trade and Environment (CTE). The analysis will centre on the question of whether the CTE was designed to solve problems arising from the 'spill-over effects' of the political decisions that occur when WTO de-regulatory decisions affect environmental policies, or whether its establishment was a mere act of symbolic politics, with the committee not being endowed with problem-solving capacity from the very first. In order to answer this question, Section II takes a glance at the predecessors of the CTE under GATT 47 and the discussions during the Uruguay Round which resulted in the establishment of the committee. Section III will focus on the CTE's problem-solving capacities provided for by its mandate, its participants and its mode of discussion. Section IV then tries to explain why the CTE does not live up to expectations with regard to its decision-making and effective problem-solving capacity and thus cannot claim to be a driving force within an emerging global governance structure.

II. INSTITUTIONAL ACCOMPLISHMENTS: THE CTE, ITS PREDECESSORS AND THE SECRETARIAT'S ENVIRONMENT DIVISION

The WTO Agreements do acknowledge environmental concerns. They offer exception clauses for environmental safety and for the protection of resources,[7] and the Preamble to the WTO Agreement mentions sustainable

politischen Debatte um die Gründung einer Weltumweltorganisation' (2000) 7 *Zeitschrift für Internationale Beziehungen* 1; T Gehring and S Oberthür, 'Was bringt eine Weltumweltorganisation? Kooperationstheoretische Anmerkungen zur institutionellen Neuordnung der internationalen Umweltpolitik' (2000) 7 *Zeitschrift für Internationale Beziehungen* 1.

[5] See GP Sampson, 'Effective Multilateral Environment Agreements and Why the WTO Needs Them' (2001) 24 *World Economy* 9.

[6] M Jachtenfuchs, 'Regieren jenseits der Staatlichkeit' in G Hellmann, KD Wolf and M Zürn (eds), *Die neuen Internationalen Beziehungen: Forschungsstand und Perspektiven in Deutschland* (Baden-Baden: Nomos, 2003); M Zürn, *Regieren jenseits des Nationalstaates. Globalisierung und Denationalisierung als Chance* (Frankfurt a.M. Suhrkamp, 1998).

[7] See, e.g., the general exception clause Art. XX GATT:

> [s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: …
> (b) necessary to protect human, animal or plant life or health; …
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; …

development as an overarching objective.[8] However, there is no specific agreement on environmental matters. Thus, there is no institutional interaction between the WTO and multilateral environmental agreements (MEAs) *explicitly* provided for in any WTO Agreement, and it remains an open question—from a political as well as a legal point of view—how the different political objectives between trade and the environment can be balanced in the future, and how different international agreements with different political aims can be reconciled.

Consequently, at first sight, the institutionalisation of a specific committee on the trade and environment interface seems to be a high political accomplishment. In existing studies, the CTE is even treated as a potential core forum for the trade–environment debate at international level,[9] and is also perceived as a prospective element of an emerging global governance structure that may provide for new modes of problem-solving.[10] However, at the same time, the CTE is famed for both its internal stalemate and its record of failure.[11] How can such opposing perspectives be explained? In the following, I will review the history of the setting up of the CTE in order to make both positions comprehensible.

II.1 History

The negotiations on the establishment of a new international trade organisation (the Uruguay Round 1986–1994) were not conducted in isolation. They took place in a broader global setting of public discourse on global environmental protection and the promotion of sustainable development.[12] Against this setting, one can detect several triggering events that enhanced the integration of environmental matters into WTO law as well as into its newly set-up institutional framework:[13] first, the negotiations on

[8] WTO Agreement Preamble:

> 'Recognising that their field of trade and economics endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective need and concerns at different levels of economic development, …

[9] See J Cameron and K Campbell, 'A Reluctant Global Policy-maker', in Steinberg (ed), n 1 above, at 25.

[10] See K Woody, 'The World Trade Organization's Committee on Trade and Environment' (1996) 8 *Georgetown International Environmental Law Review* 459.

[11] See R Eckersley, 'The Big Chill: The WTO and Multilateral Environmental Agreements' (2004) 4 *Global Environmental Politics* 1.

[12] See J Schultz, 'The GATT/WTO Committee on Trade and the Environment: Towards Environmental Reform' (1995) 89 *American Journal of International Law* 423–425.

[13] See DC Esty, 'Economic Integration and the Environment' in NJ Vig and R Axelrod (eds), *The Global Environment: Institutions, Law, and Policy* (Washington, DC: CQ Press, 1999), at 190–3.

the establishment of the WTO were conducted in parallel to the negotiations on a free trade agreement between the USA, Canada, and Mexico (NAFTA). There was a great deal of pressure on NAFTA negotiators to incorporate a side agreement on environmental matters, including a special administrative unit to deal with the linkage issue. These developments did not go unnoticed in the World Trade talks. Secondly, the approaching UN Conference on Environment and Development in Rio (UNCED) in 1992 heightened public attention on the link between trade and the environment. Thirdly, the first prominent case on environmental matters was decided by the GATT Dispute Settlement Body (GATT DSB) in 1991, which made the environmental impact of the agreement visible to the broader public for the first time.[14]

Hence, there was a strong call for the institutionalisation of the trade and environment debate within the WTO from an economic, as well as an ecological, point of view:[15] as environmental measures and standards were on the rise globally, they were increasingly seen as potential means of protectionism and obstacles to international trade. At the same time, the growing success of environmental groups in the industrialised world forced policy-makers to react to public criticism of their perceived reluctance with regard to environmental policies. In particular, the US and the EU did not want to challenge the conclusions of the trade round. Consequently, trade–environment relations remained an issue on the negotiating agenda throughout the entire Uruguay Round. In the end, the members agreed on the incorporation of environmental matters into WTO contexts by establishing a separate Trade and Environment Division in the WTO Secretariat and a Committee on Trade and Environment (CTE) which is accountable to the Council. Both are supposed to contribute to the WTO's institutional capacity to find solutions to the trade and environment debate.

In this function, the CTE builds on former experiences with institutionally provided for deliberations on the linkage issue within the WTO predecessor, GATT 47. As early as 1971, the GATT Council of Representatives had decided on the establishment of a Group on Environmental Measures and International Trade (the EMIT Group).[16] The group's aim was to analyse (1) the relationship between the rules of the multilateral trading system and the trade provisions in multilateral environmental agreements (MEAs), (2) the effect of national environmental measures such as eco-labelling, and (3) the transparency of national environmental regulations that had an

[14] This was the famous *Tuna–Dolphin* case: see HL Thaggert, 'A closer look at the *Tuna–Dolphin* case: "Like Products" and "Extra-jurisdictionality" in the Trade and Environment Context' in J Cameron, P Demaret and D Geradin (eds), *Trade and the Environment: The Search for Balance*, (London: Cameron May, 1994).

[15] See GC Shaffer, 'The Nexus of Law and Politics: The WTO's Committee on Trade and Environment' in Steinberg (ed), n 1 above.

[16] Its establishment has to be understood against the background of the UN Stockholm Conference on Environment in 1972.

impact on international trade. However, the EMIT Group did not convene until 1991—in the middle of the Uruguay Round negotiations—when the EFTA states requested the activation of the Group. During the Uruguay Round, it then acted as a negotiating forum, preparing for the formation of the subsequently agreed upon CTE and identifying the relevant issues to be discussed in this future committee.[17] Nevertheless, after 20 years of silence,[18] the EMIT Group has contributed little either to the reconciliation of trade and environmental matters within WTO law, or to a global or transnational deliberation on the issue.

A similar fate can be ascribed to the Working Group on the Export of Domestically Prohibited Goods and Other Hazardous Substances (the DPG Working Group) established in 1989. It, too, acted as an institutional forum on the trade and environment topic during the Uruguay Round of negotiations, but was disbanded without having solved any problem attributed to DPGs. Originally, GATT members had decided to set up a notification procedure on the export of hazardous goods and substances as early as 1982, and obliged members to give notification of goods that were being exported from the country of origin but which were banned for sale in domestic markets for human health or safety reasons.[19] However, the Working Group neither defined what DPGs actually were, nor established a comprehensive and reliable notification system. Thus, in the end, DPGs were integrated as a central topic into the CTE working programme to be continuously discussed there. Here, CTE delegates again tried to build on earlier discussions from the Working Group's deliberations.[20]

In summary, discussions on the interface under GATT and the pressure from both environmental and economic interest groups increased the possibility of the institutionalisation of trade and environment deliberations within a specific WTO committee. In this respect, the establishment of the CTE by the 'Ministerial Decision on Trade and Environment' adopted in

[17] See Shaffer, n 15 above, at 84.

[18] This inactivity seems particularly surprising, considering that since the Tokyo Round of trade negotiations (1973–1979) technical regulations and standards—including environmental measures—have been officially classified as potential obstacles to trade.

[19] See GATT Doc, BISD 29S/19. The export of products that were seen as being unsuitable for industrialised markets but fit for the developing world was of special concern to developing countries which had only limited information and limited expertise to judge the implications of the importation of those products. The problem became especially relevant after Chernobyl (1986), when several European countries tried to export radioactively contaminated food to the developing world. Nigeria, in particular, underlined the relevance of an institutional forum for discussion and information exchange on trade in hazardous substances. According to its assessment, the WTO was a suitable organisation to deal with this genuine 'trade issue', especially since no other international agreement with almost global membership dealt with the export of hazardous consumer products: see WTO Doc WT/CTE/W/14, 27 Nov 1995. For the DPG Working Group in general, see Schultz, n 12 above, at 434.

[20] However, they have been able to agree neither upon a definition of DPG nor on an understanding of the general problem of exporting hazardous goods. For the peaks in discussions in the CTE, see WTO Docs WT/CTE/M/11, 24–25 July 1996, and WT/CTE/M/18, 10 Aug 1998.

1994 can be regarded as an institutional response to the persistent protests of civil society as well as to governmental and economic interests. However, the mere establishment of the committee did not result in the CTE being designed as a permanent *negotiating forum*. It was not until the Doha Ministerial Declaration (DD) of 2001 that the trade and environment link was integrated into negotiations of a trade round as an item for discussion. Only since then, have CTE Regular Sessions (CTE)—in which deliberations, but no negotiations, take place—been completed by CTE Special Sessions (CTESS) as a genuine negotiating forum.

II.2 Institutional Dimensions

Studies on how the WTO has addressed the trade and environment issue commonly concentrate on the WTO Dispute Settlement Body (WTO DSB) and its respective judicial decisions. This narrow focus is justified by the WTO's institutional dimensions, particularly the power structure between the organisation's different levels of decision-making:[21] since the institutional structure of the WTO has been altered substantially compared with GATT 47, the WTO is equipped with a strong dispute settlement system that can sanction unlawful behaviour.[22] Effectively, the WTO DSB could be regarded as a functional equivalent to the judiciary at national level (Article III (3) of the WTO Agreement).[23] It is the only body within the WTO with a genuine role in decision-making, as actual output is part of its procedure. In contrast to the supranational elements of this strong decision-making body, the ministerial conferences—a possible equivalent to the legislative body (Article III (2) of the WTO Agreement)—and the WTO committees are limited to consensus voting and intergovernmental bargaining. Hence, in negotiating *fora*, decision-making is rendered difficult and stalemate is likely.[24]

Nevertheless, the committees remain political WTO bodies whose outputs could lead to potentially higher sustainability and efficacy than judicial

[21] The nexus of law and politics among the WTO's institutions remains an interesting and demanding issue for further analysis: see A von Bogdandy, '*Chancen und Gefahren einer Konstitutionalisierung der WTO. Verfassungsrechtliche Dimensionen der WTO im Vergleich mit der EU*', (Berlin: Walter Hallstein-Institut für Europäisches Verfassungsrecht, 2002); F Roessler, 'The Institutional Balance between the Judicial and the Political Organs of the WTO' in M Bronckers and R Quick (eds), *New Directions in International Economic Law* (The Hague, London & Boston, Mass: Kluwer, 2000). It cannot be dealt with sufficiently in this study. But if one demands a re-politicisation over the judicialisation of international decision-making, the interplay between different organs of one organisation—in fact as well as in theory—remains crucial.

[22] See A Helmedach and B Zangl in this volume.

[23] For the argument of WTO bodies having the potential to be functional equivalents to the division of powers at the nation-state level, see von Bogdandy, n 21 above, at 13–15.

[24] For problems arising out of the WTO decision-making process, see JJ Schott and J Watal, 'Decision making in the WTO' in JJ Schott (ed), *The WTO after Seattle* (Washington, DC: Institute for International Economics, 2000).

decisions.[25] The CTE, in particular, is supposed to act as a forum for political deliberation. Like all councils and committees, it is a standing body which is open to all members.[26] It meets regularly between ministerial conferences and has the mandate to prepare decisions for the Council or to make recommendations on possible reforms of international trade rules to the ministerial conference.[27] Although it remains unclear what consequences CTE discussions *per se* can have on future WTO jurisdiction,[28] the CTE is—in contrast to the WTO DSB—not bound to the judicial principle of single-case justice, and thus has the potential to agree politically upon and to formulate generally accepted policies which go beyond the mere structuring effects of case law. From this perspective, it is somewhat remarkable that research so far seems to have neglected the work and discussions of the WTO committees.

Finally, neither the WTO Secretariat nor the committees have the power to implement WTO Agreements—they can merely administer them.[29] What this precisely means is that, although the WTO Secretariat's Trade and Environment Division has no genuine decision-making power, it does have the administrative authority to interact with other IOs. Members of the Trade and Environment Division hold side events at the MEA Conferences of the Parties (COP), or invite IOs to information exchange sessions at the WTO.[30] By providing background information on developments in other international *fora* or by summing up past CTE discussions, the Trade and

[25] S Shaw and R Schwartz, 'Trade and Environment in the WTO—State of Play' (2002) 36 *Journal of World Trade* 154.

[26] In the beginning, the CTE started as a committee whose work and terms of reference were to be reviewed by the first Ministerial Conference after the establishment of the WTO. At the Ministerial Conference in Singapore in 1996, the CTE became a standing WTO body.

[27] For the role of committees in the WTO's institutional structure, see R Blackhurst, 'The capacity of the WTO to Fulfill its Mandate' in AO Krueger (ed), *The WTO as an International Organization*, (Chicago, IU: University of Chicago Press, 1998), at 31–58; BM Hoekman and MM Kostecki, *The Political Economy of the World Trading System. The WTO and Beyond* (Oxford: OUP, 2001), at 50–6.

[28] See Roessler, n 21 above, at 336. The CTE Singapore Report is an example of the ambivalent use of CTE's 'outputs'. All parties involved in the famous Shrimp–Turtle dispute as well as the panel itself referred to the Singapore Report, using various interpretations to support their argument: see Shaffer, n 15 above, at 93. Thus, CTE discussions can influence decision-making via the DSB even without a procedural obligation or an institutional clarification of the relationship between the judicial and the political or the administrative arm of the WTO, but the extent and direction of that influence are hard to anticipate for its members.

[29] See Blackhurst, n 27 above, at 41–3. However, the CTE does not administer an agreement as there is no agreement on trade and environment. This also holds true for the Committee on Trade and Development. In a broader sense, both are dealing with questions of sustainable development, but their mandates are strongly differentiated. Some argue that it seems as if the mandates are deliberately kept apart in order not to merge to a strong forum of opposition on liberalising trade within the institutional framework of the WTO: see K von Moltke, 'Information Exchange and Observer Status: The World Trade Organisation and Multilateral Environmental Agreements. Paragraph 31 (ii) of the Doha Ministerial Declaration' (Berlin: Ecologic—Institute for International and European Environmental Policy, 2003) available at www.ecologic.de/download/verschiedenes/2003/documents/paper_moltke.pdf.

[30] See WTO Docs TN/TE/S/2, 10 June 2002 and WT/CTE/W/213, 12 June 2002.

Environment Division gives WTO members the opportunity to share an information base and to co-ordinate policies.

Thus, one can conclude that since the beginning of the Uruguay Round of negotiations there have been several institutional innovations which have targeted the trade-environment link: the establishment of the CTE as a discussion forum, the CTE Special Sessions as a negotiating forum, and the establishment of the Trade and Environment Division as part of the WTO Secretariat. Their set-up adds to the institutional integration of environmental matters into trade negotiations, and they can be regarded as a means of improving the preconditions to resolving at least some aspects of the trade and environment debate. In this regard, the Trade and Environment Division and its corresponding committee *could* be seen as part of an emerging international governance structure which guarantees knowledge-transfer and information-exchange between different international actors. Nevertheless, in empirical terms, these institutional renewals do not guarantee a successful integration process, as further analysis will show.

III. THE WORK OF THE CTE: ASSIGNMENT, PARTICIPANTS AND ACCOMPLISHMENT

The following section will elaborate on the CTE mandate, which will be juxtaposed with the actual outcome of the committee's work. For this purpose, reports to CTE sessions and the submissions of WTO members as well as of other IOs were analysed and interviews with WTO personnel and national delegates were conducted in Geneva and Berlin in 2003 and 2004. Additionally, insights will be drawn from already existing assessments of the committee's work in the literature. Thus, the following remarks will be the foundation for answering questions on the committee's capacity to 'resolve' the trade and environment conflict or to at least identify the substance and scope of the linkage issue.

III.1 Assignment: Mandate and Work Programme

The 'Decision on Trade and Environment' adopted by the Ministerial Conference in 1994, which established the CTE, is based upon explicit presumptions mentioned in the document itself:

— 'WTO members considered that there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other.
— WTO members also explicitly expressed the desire to co-ordinate the policies in the field of trade and environment, and this without

exceeding the competence of the multilateral trading system, which is limited to trade policies and those trade-related aspects of environmental policies which may result in significant trade effects for its members.'

Within this passage, the WTO decision clearly formulates a practical political goal—the co-ordination of policies—and a theoretical political assumption on which the practical goal is founded, namely, that free trade and environmental protection are not opposites, but can support each other. The framework for CTE action is, therefore, defined by the aim to make 'international trade and environmental policies mutually supportive'.

More specifically, the CTE's mandate calls for the committee:

— 'to identify the relationship between trade measures and environmental measures, in order to promote sustainable development;
— to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system.'

In detail, the work programme suggests that 10 aspects of the trade and environment link be addressed, namely, the MEA–WTO relationship (item 1), including the relationship of their dispute settlement systems (item 5), the impact of environmental policies on the provisions of the multilateral trading system (item 2), environmental taxes and labelling requirements (item 3), questions of transparency of national measures (item 4), market access issues (item 6),[31] the issue of the export of domestically prohibited goods (item 7), the relevant provisions of the TRIPS Agreement (item 8), as well as the aspect of services and environment (item 9), and, last but not least, the relationship with other intergovernmental and non-governmental organisations referred to in Article V of the WTO Agreement (item 10).

Building upon the 1994 'Decision on Trade and Environment', the 2001 Doha Declaration calls for a deeper integration of environmental matters into WTO deliberations as well as into trade round negotiations. Particularly important is Paragraph 31 DD, which defines negotiating aspects within the trade and environment realm; Paragraph 31(i) DD instructs WTO members to negotiate on the relationship between WTO rules and trade obligations in MEAs; Paragraph 31(ii) does the same with regard to procedures for information exchange between MEAs and the relevant WTO committees, as well as the criteria for the granting of observer status in WTO Bodies. Paragraph 31(iii) also calls for negotiations on the reduction or elimination of tariff and non-tariff barriers to environmental goods

[31] This item is being discussed with concentration on specific aspects: agriculture, energy, fisheries, forestry, non-ferrous metals, textiles and clothing, leather and environmental services.

and services. By repeating part of the CTE's regular work programme in Paragraph 31 DD, debates shifted from CTE Regular Sessions to CTE Special Sessions.

In theory, the CTE mandate and its work programme are broad, and cover many different and important aspects of the trade and environment realm. In addition, the rules of procedure for CTE meetings[32] are flexible, offering possibilities for participation by member states experts as well as options for short-term reactions to real world developments. Hence, the work programmes of both committees are necessary preconditions for the effective integration of environmental matters into WTO deliberations. Moreover, the integration of environmental topics into the current trade round gives rise to hope for resolving important issues such as the WTO–MEA relationship or questions relating to the trade in environmental goods.[33]

III.2 Participants: National Delegates, Secretariat Personnel and IO Officials

Beyond the mandate, work programme and rules of procedure, it is also important to take the actual participants of CTE Regular Sessions and CTE Special Sessions into account in order to judge the CTE's general ability to face the problems of the trade and environment divide effectively. Here, I anticipate that continuity of expert participation will bring about different results from just the irregular participation of diplomats.[34]

On a descriptive level, three different groups of participants to CTE sessions can be identified:

— national delegates from capitals or Geneva-based offices;
— Secretariat members; and
— observers from other international organisations.

National delegates from capitals or Geneva-based offices are either diplomats or bureaucrats from national ministries. Blackhurst[35] has pointed out that, in general, there is an average of at least 11 meetings a week national delegates have to participate in at the WTO. Most are covered by

[32] See WTO Doc WT/CTE/W/13/Rev.1, 19 Feb 1997.

[33] However, as CTESS deliberations are part of the Doha Declaration, but not part of the single undertaking, a resolution on the items is not obligatory in order to bring the trade round to an end.

[34] Since there are insufficient data to analyse the participation at each meeting, it is not possible to draw conclusions about the fluctuation or persistence of the participation of individuals in the sessions. However, for the very limited number of lists of participants to CTE sessions from 1996, see WTO Doc WT/CTE/INF/1, 10 June 1998. Besides this documentation, this analysis draws on interviews with national delegates as well as the Secretariat staff in Berlin (2003/2004) and Geneva (2004).

[35] See Blackhurst, n 27 above, at 37.

Geneva-based staff. The meetings are on a variety of topics ranging from anti-dumping practices to trade in financial services. Delegates based in Geneva are, understandably, not experts in all of the topics of the meetings. Only for regular committee meetings are staff from national capitals—if affordable—sent to Geneva. Thus, the delegates to CTE sessions are also, for the most part, trade experts with little understanding of the effects of trade on environmental policy.[36] Only a few countries send additional staff from environmental offices or offer real expertise on particular questions of the linkage issue.

The rules of procedure for meetings of the CTE do, however, offer options for the broad participation of delegates at the sessions.[37] In general, any participant can be sent to CTE sessions as part of a national delegation. In actual fact, the participants act as state representatives, but do not need to be diplomats or bureaucrats from specified ministries. As long as one delegate in the delegation is an accredited representative to WTO consultations, each representative may bring as many advisors to the sessions as he or she requires. Neither their institutional nor their scholarly background is prescribed by the rules of procedure.[38]

Out of the group of national delegates, a chairperson to the committee is appointed on an annual base. The chair is usually a national delegate from a Geneva-based office, in order to have a permanent presence in Geneva. He works closely with the Secretariat personnel in preparing for and administering each meeting. Chairs are usually not from countries with high stakes and strong interests in the committee's major topics, but are chosen on the basis of the possibility of their neutrality. They can take an important role in the advancement of discussions or negotiations, and their influence should not be underestimated. A good chair-person to a meeting may be able to mediate between different points of view among members or is even able to offer draft declarations as a basis for decision-making.

The second group of participants is the Secretariat personnel. Most of the Trade and Environment Division's members have an economics or legal background and are thus not necessarily experts on environmental matters.[39] Their active participation in CTE sessions is very rare and usually focused on mere administrative issues. Of the 14 employees in the Trade and Environment Division, six provide support services such as documentation of CTE sessions; the other eight travel to member countries on technical assistance activities or to other IOs for information exchange, and prepare background papers for committee meetings or Secretariat publications for public relations activities. As noted above, the Secretariat is basically limited by its mandate to the provision of the background

[36] See Esty, n 13 above, at 200.
[37] See WTO Doc WT/CTE/W/13/Rev.1, 19 Feb 1997.
[38] See Rules of Procedure, Rule 9.
[39] Interview in the Trade and Environment Division in Geneva in June 2004.

information on relevant developments in specified MEAs,[40] or on GATT/WTO dispute settlement practices.[41] Most of its publications are prepared at the request of WTO members.

The inclusion of the third group of participants is a highly contentious issue: the question of observer status to other IOs.[42] In 1996, several international and intergovernmental organisations were granted observer status to CTE sessions following a decision by the General Council.[43] At present, there are four MEAs that have permanent observer status in CTE Regular sessions:

— the Convention on Biological Diversity (CBD);
— the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);
— the International Commission for the Conservation of Atlantic Tunas (ICCAT); and
— the United Framework Convention on Climate Change (UNFCCC).

Moreover, there are several other IOs that enjoy observer status to CTE sessions.[44] These include the Food and Agriculture Organisation (FAO), the United Nations Development Programme (UNDP), the United Nations Environment Programme (UNEP), the United Nations Conference on Trade and Development (UNCTAD) and the World Intellectual Property Organisation (WIPO).[45] However, several requests by IOs are still pending in several WTO committees, since political discussions in the General Council are deadlocked on the issue.[46]

In theory, the circle of participants also indicates that one cannot claim that the link between trade and environmental policies is not being dealt with in regular WTO discussions. In contrast, institutionalised discussions in the CTE meetings have—according to the official assignment—the potential to serve as a forum for identifying conflicts in the run-up to the generation of policies which integrate trade measures and environmental

[40] See WTO Docs WT/CTE/W/144, 19 June 2000, and WT/CTE/W/191, 6 June 2001.

[41] See WTO Docs WT/CTE/W/53/Rev.1, 26 Oct 1998, and WT/CTE/W/203, 8 Mar 2002.

[42] See von Moltke, n 29 above, at 21–24.

[43] See *Guidelines for Observer Status for International Intergovernmental Organisations in the WTO,* adopted by the General Council on 18 July 1996.

[44] Many argue that members should not only expand observer status to officials from other international intergovernmental organisations but should also open up to civil society experts who could, by their expertise, enhance the problem-solving capacity of the body. NGO participation within the WTO is so far limited to *amicus curiae* briefs in the DSB. Their participation in political negotiations and committees is not officially taken into consideration: see DC Esty, 'Non-governmental Organizations at the World Trade Organisation: Co-operation, Competition, or Exclusion' (1998) 1 *Journal of International Economic Law* 123.

[45] For a full list of the 25 observers to the CTE Regular, see WTO Doc WT/CTE/INF/6/Rev.1, 31 Aug 2004.

[46] Due to the deadlocked discussions in the General Council, observers from IOs to CTE Special Sessions are allowed to participate in meetings only on an *ad hoc* basis and only by explicit invitation.

policies. The participants may be able to help identify synergies between MEAs and the WTO, and aid in fact-finding as well as in building awareness by bringing together government and IO officials, and by sharpening their understanding of the linkage problem. However, reality seems to prove this expectation wrong.

III.3 Accomplishments: Results of CTE Discussions

For the first couple of years after the establishment of the CTE, hopes were raised with regard to the work of the committee. Civil society seemed, for the most part, optimistic that the CTE would not only identify the relationship between trade and environmental measures but would also make recommendations on how to modify the provisions of the trading system in order to promote sustainable development and to 'Green the WTO Agreements'.[47]

Contrary to what was promised by the institutionalisation of environmental matters into the administrative structure of the WTO, the CTE did not, and still does not, fulfil its mandate in reality.[48] Deliberations are trapped in deadlock between the incompatible interests of the members. So far, no substantial decision has been adopted, and negotiations seem to be without results on most issues. In particular, the CTE has not contributed to resolving the conflict on the WTO's 'chilling effect'[49] on MEAs, as WTO objectives might prevent the use of effective trade measures in future environmental agreements. Thus, the decisions actually made in CTE sessions remain on a procedural level: one of the few, for example, was the establishment of a WTO Environmental Database[50] which aims to improve the transparency of national environmental measures. Furthermore, the granting of observership to several IOs and MEAs as well as the formal consensus decision on the adoption of the Singapore Report can also be regarded as outcomes. However, the Singapore Report itself merely documents the committee's deadlock, as no recommendation to the Ministerial Conference on a modification of WTO Agreements could be agreed upon.[51] The same

[47] DC Esty, *Greening the GATT: Trade, Environment and the Future* (Harlow: Longman, 1994), and E Neumayer 'Greening the WTO Agreements: Can the Treaty Establishing the European Community be of Guidance?' (2001) 35 *Journal of World Trade* 1.

[48] Many authors were sceptical from the beginning, due to analysed output and implications of WTO law: see, e.g., Esty, n 13 above, at 190–3; RH Steinberg, 'Trade-environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development' (1997) 91 *American Journal of International Law* 239, RH Steinberg, 'Explaining Similarities and Differences across International Trade Organizations' in Steinberg (ed), n 1 above.

[49] See Eckersley, n 11 above.

[50] See, for the most recent one, WTO Doc. WT/CTE/EDB/2, 28 June 2005. The database efficiency seems, however, to be unclear, as there are several other notification systems in the WTO that also incorporate trade-related environmental measures (TREMs).

[51] See S Charnovitz, 'Critical Guide to the WTO's Report on Trade and Environment' (1997) 14 *Arizona Journal of International and Comparative Law* 2.

is true for the Cancún Report,[52] which set out the differences of opinion among members and their willingness to continue discussions, but which failed to include any recommendations for reform. Currently, however, there seems to be careful progress in CTESS discussions on items which deal with narrow questions of market access, such as fishery subsidies or trade in environmental goods. Agreement on these issues no longer seems completely out of sight.[53]

Concluding the analysis of the empirical data, the CTE has so far failed to make *any* proposals for a modification of international trade rules. Interaction between the CTE and other IOs is not, or is only very selectively, institutionalised. Not even technocratic ways of problem-solving can be detected. In view of this outcome, civil society actors and WTO delegates lowered their expectations on the outcome of CTE sessions accordingly: on the one hand, civil society organisations turned away disappointedly and now concentrate their efforts on a reconciliation of trade and environment elsewhere. On the other hand, delegates to CTE Regular Sessions reacted to the deadlock in the discussions by reducing the frequency of their meetings from every other month to three meetings per year.[54] The anticipated outcome of CTE Regular Sessions was reduced to merely *studying* the linkage instead of *negotiating* or agreeing on substantial or procedural reforms to international trade law.[55] In general, there are low expectations of the CTE's immediate problem-solving capacity among the delegates as well as the Secretariat personnel. Nevertheless, they regard the mere survival of the Committee as an unexpected accomplishment and have faith in the future potential of a forum that can bring officials from different backgrounds together at one negotiating table. Additionally, it remains to be seen whether the environment debate in CTE Special Sessions will make a substantial difference.[56] It cannot, however, be ruled out that, in the future, the CTE will follow its practical political goal of identifying the relationship between

[52] WTO Doc WT/CTE/8, 11 July 2003.

[53] Item 6 CTE Regular, Para 32(i) DD; interview in Geneva in June 2004.

[54] WTO Doc WT/CTE/1, 12 Nov 1996.

[55] See Shaffer, n 15 above, at 92.

[56] Some argue that the Doha Declaration establishes a potential internal balance between interests of the developing and interests of the developed world, and hence leaves out the environment as a bargaining chip. The possibility of an agreement on several aspects of the linkage issue increases: see S Charnovitz, 'The Environmental Significance of the Doha Declaration' (Global Environment & Trade Study: http://www.gets.org/library/admin/uploadedfiles/Environmental_Significance_of_the_Doha_Declara.doc, 27 July 2004); S Charnovitz, 'Expanding the MEA Mandate in the Doha Agenda', (Global Environment & Trade Study: http://www.gets.org/pages/harmony/Charnovitz1.doc, 27 July 2004). However, von Moltke, n 29 above, points out that it would be exaggerated to call CTESS discussions negotiations. He detects a high degree of frustration, especially among members of MEAs and other IOs. Thomas also sees only limited potential for the Doha Declaration to reconcile trade and environment. In fact, he sees a realistic threat of withdrawal of several actors from CTE sessions altogether: see UP Thomas, 'Trade and the Environment: Stuck in a Political Impasse at the WTO after the Doha and Cancún Ministerial Conferences' (2004) 4 *Global Environmental Politics* 3.

trade and the environment, and co-ordinating policies among members as well as between different multilateral agreements.

IV. THE CTE'S PROBLEM-SOLVING INCAPACITY

IV.1 Explaining factors

The former analysis hinted at the CTE's inability to solve problems. But why is this *in*capacity the case? In the following, the possible factors that may explain the gap between the CTE's assignment and its accomplishments will be identified.

First, WTO decision-making is bound to the consensus principle.[57] In general, reaching a consensus in WTO contexts is rendered difficult. In particular, in regulatory areas such as the balancing of competing political objectives, agreement among members hardly seems to be attainable. Hence, nitherto, the diffuse power and interest structure has made it nearly impossible to agree on a single item on the CTE agenda. It has even been argued that the attempt to do so would be premature.[58] This holds true as long as the CTE mandate remains vague on the committee's formal competences, and as long as no clarification on the future implications of the wording of CTE reports on other WTO decision-making bodies is found. This vagueness and uncertainty further complicates the already very challenging consensus-seeking procedure.[59]

Secondly, participants in CTE/CTESS meetings are, for the most part, trade experts with little understanding of the effects of trade on environmental policy.[60] Their predominance in CTE sessions is partly due to organisational constraints,[61] and partly due to intra-state interests:[62] the trade ministries are responsible for co-ordination at national level. Clearly, they intend to maintain their position in national decision-making concerning

[57] For a general analysis of consensus decision-making in the WTO, see RH Steinberg, 'In the Shadow of Law or Power? Consensus-based Bargaining and Outcomes in the GATT/WTO' (2002) 56 *International Organization* 339; for the trade and environment debate, see J Martinez, 'Building Consensus of the Issues of Trade & Environment' in A Fijalkowski and J Cameron (eds), *Trade and the Environment: Bridging the Gap* (London: Cameron & May, 1998), and Steinberg, n 48 above, at 240–4 and 266.

[58] See Shaw and Schwartz, n 25 above at 131.

[59] Steinberg even reaches the devastating conclusion that the WTO is marked by an 'organized hypocrisy of consensus decisionmaking'. He stresses the point that, even though there is the necessity of reaching a consensus in the absence of voting options, there is no real deliberation within the WTO. Instead, the consensus principle is used as an opportunity to enfold veto power within the decision making process: see Steinberg, n 48 above at 365. Thus, consensus is not regarded as a means that should be reached by communicative action.

[60] See DC Esty, 'The World Trade Organization's Legitimacy Crisis' (2002) 1 *World Trade Review* 125–7.

[61] See DC Esty, 'Environmental Governance at the WTO: Outreach to Civil Society' in GP Sampson and WB Chambers (eds), *Trade, Environment, and the Millennium* (Tokyo, New York & Paris: United Nations UP, 1999), at 126.

[62] See Shaffer, n 15 above at 95–6, and Thomas, n 56 above at 9.

issues of world trade. Thus, they either do not bring environmental policy expertise to international negotiating *fora*, or environmental policy-makers have limited say, as the trade ministry remains the leading agency in WTO contexts. Additionally, the sheer number of meetings, the wide range of topics to be covered and the weak financial capacities of poorer countries also set limits on sending several delegates with different political and educational backgrounds to Geneva.[63] From this point of view, the emphasis on trade experts who can attend several WTO committees is understandable.

However, this lack of expertise is not compensated for by other means. Although procedural rules do allow for it, the legitimacy of external experts in national delegations has been questioned, and the inclusion of the expertise of other IOs is impeded by the contentious issue of observer status. This resistance to opening up to external expertise has resulted in the threat by the MEA Secretariats and other IOs to withdraw from CTE sessions altogether and to move their resources elsewhere. Hence, in reality, expert participation is not well established.

Thirdly, the CTE's accomplishments are limited by the fact that really contentious issues within the trade and environment realm, especially those regarding questions of market access, are moved to other WTO *fora* and committees, such as the TRIPS Council or the SPS Committee.[64] Within the CTE, national interests among members are highly diverse. Developing countries remain suspicious that environmental policies may be a mere means of protectionism and unnecessarily trade restrictive. Developed countries, on the other hand, argue that there may be a race to the bottom if WTO jurisdiction leads to the adaptation of environmental policies at national level. In the end, the topics which remain on the CTE agenda are the possible bargaining chips: developing countries may offer a consensus on certain aspects of the debate in exchange for improved market access to, or technology transfer from, the developed world.[65] However, contentious issues that *have* to be solved are debated in other WTO *fora*.

Additionally, members argue that the CTE should not duplicate the work of other international *fora*. In this respect, before members seek solutions to CTE work items, they try to identify whether another WTO committee or another international forum might be better suited to deal with the matter. This then leads to procedural discussions on whether the issue should be discussed within the WTO at all. In the end, there is little or no deliberation on the actual substance of the work items. As a result, the formally broad perspective of the CTE work programme and the possibility of

[63] See Blackhurst, n 27 above, at 37.

[64] See Shaw and Schwartz, n 25 above at 132; Thomas, n 56 above at 16; and C Godt in this volume.

[65] See Steinberg, n 48 above, at 244.

amending the committee's agenda provided for by the Rules of Procedure is not put into practice.

Lastly, the CTE lacks administrative capacity. The WTO Secretariat provides support services, but it cannot table discussion papers. Its mandate is limited to providing background information on relevant developments. As the Secretariat lacks the authority to initiate proposals and to interpret WTO rules, it cannot circumvent this restriction via the CTE. Whereas the Secretariat could potentially play a more vital role—even without a corresponding mandate—by way of documentation or agenda-setting for CTE sessions,[66] its sheer lack of staff sets additional limits to what it can actually do.[67] Furthermore, its ability to provide policy advice is limited not only by the Secretariat's weak mandate, but also by the fact that its employees are not country experts and do not have the capacity or the necessary background information to give advice to WTO members that all have fundamentally differing environmental and trade policies.[68] The integration of the linkage issue into the WTO administration might, therefore, have accomplished some degree of information exchange between the MEAs and the WTO, but—as of now—substantial input on the political debate by the Trade and Environment Division cannot be expected.

IV.2 Implications

This incapacity to problem-solve does have obvious implications for the functioning of the WTO. In particular, the results imply the following: according to the CTE mandate and the interests behind its establishment, it seems quite apparent that the CTE is not a committee established to protect the environment unequivocally. Its aim *can only be* to find mutually supportive means between trade and environmental policies *with regard to the world trading system*. The Secretariat supports this view by repeatedly pointing to the fact that the WTO is 'no environmental protection agency'.[69] In certain respects, this it *cannot be*, as the participants at CTE sessions are not experts on environmental matters, and as there is a lack of a politically realisable operational regulatory goal that could lead to an adept balancing of trade and environmental matters. In other words, not only does a critical juncture of problem pressure not seem to have been reached yet, but there is no epistemic consensus on the trade and environment link among members.[70] In the end, discussions remain within the logic of free trade and are hardly ever opened up to other points of view. Hence, joint action on reconciling environmental policies and free trade is not to be expected in the near future.

[66] See Shaffer, n 15 above, at 98, and Steinberg, n 48 above, at 356.
[67] See Blackhurst, n 27 above, at 55.
[68] Interview conducted in May 2004 in Geneva.
[69] Trade and Environment Division, Trade and the Environment at the WTO (Geneva: WTO, 2004), at 6.
[70] See Cameron and Campbell, n 9 above, at 25.

For the WTO in general, the failure to deal with linkage issues—trade and environment being just one of the most obvious examples—which leads to a one-sided promotion of free trade, could result in a legitimacy crisis for the entire organisation. This crisis would refer back both to input problems and to output problems. Historically, the WTO and its predecessor, the GATT 47, based their legitimacy on the efficacy and effectiveness of their—expert-based—problem-solving capacities. In fact, GATT 47 and the WTO can both be seen as prime examples of political institutions which function as a 'Club Model' of experts that benefited from the belief that international trade raises highly technical questions and should be left to technocratic decision-making by qualified experts.[71] However, the downside to this expert orientation has become obvious throughout this analysis: dealing with linkage issues under the WTO requires different types of experts then tariff reduction under GATT 47.

To sum up, the CTE is basically just another institution of highly formalised discussions among the WTO members, and is not a forum of extraordinary expertise or of special democratic legitimacy. The WTO as a whole does not aim to include the input of civil society actors or other IOs. It thus denies the incorporation of additional resources of input legitimacy for its proposals and decisions.[72] Instead, the overall institutional setting within the WTO supports a concentration on the single-case logic of WTO DSB decisions. This affects the WTO's ability to co-ordinate policies and to balance competing political objectives. Thus, the institutional input problems of the CTE are accompanied by the further shortfalls on the output level: the CTE fails to generate legitimacy via output because it has neither sparked off public discourse nor adopted any material decisions.

V. CONCLUSION: A RECORD OF FAILURE OR AN ACT OF SYMBOLIC POLITICS?

This analysis has focused on the WTO's institutional responses to regulatory problems arising from the trade and environment linkage. It has

[71] See DC Esty, 'Bridging the Trade–Environment Divide', (2001) 15 *Journal of Economic Perspectives* 3; and RO Keohane and JS Nye, 'The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy' in RB Porter, P Sauvé, A Subramanian and AB Zampetti (eds), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (Washington, DC: Brookings Institution Press, 2001).

[72] For the legitimacy *problématique*, see A von Bogdandy, 'Legitimacy of International Economic Governance: Interpretative Approaches to WTO Law and the Prospects of its Proceduralization' in S Griller (ed), *International Economic Governance and Non-economic Concerns: New Challenges for the International Legal Order* (Vienna: Springer, 2003), M Krajewski, 'Democratic Legitimacy and Constitutional Perspectives of WTO Law' (2001) 35 *Journal of World Trade* 1; GC Shaffer, 'The World Trade Organisation under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters' (2001) 25 *Harvard Environmental Law Review* 1. See, also, J Steffek and C Kissling in this volume.

looked at the potential of CTE discussions to establish a new mode of problem-solving at global level. The findings suggest that the CTE does not live up to this expectation. The committee produces hardly any material output and, so far, has not even agreed on the definition of some of the most central terms of its work programme. Its action regarding the integration of environmental objectives into world trade law is extremely limited and its role in global governance is also to be contested. Hence, if the CTE was designed as a forum for effective output-oriented problem-solving, it has failed to fulfil its assignment. From a strictly output-oriented perspective, one could conclude that the CTE's work is a record of failure!

However, the analysis has made it clear that this failure is caused by institutional constraints. In the first place, the organisational preconditions to enabling the CTE to deliver effective problem-solving were not met. Thus, besides the asymmetrical power and interest structure among WTO members, the institutional limits predetermined both the deadlock within the committee's discussions, and its inability to decide on any of the matters covered by its own agenda.

In the end, the overall analysis hints at an explanation which argues that the CTE has failed because it was supposed to. The meagre accomplishments of the CTE's work give support to an interpretation of the committee as having been designed as a means of symbolic politics. It was needed to uphold the impression of providing the institutional provisions to balance the different regulatory logics within an international trade organisation that overlap with the interests of other regulatory regimes.

Interpreting the CTE's establishment as an act of symbolic politics leaves room for speculation, however. In general, institutions and their establishment rest on strong symbolic structures. By their mere existence, they 'embody' ideas and ideals in a symbolic way.[73] So does the CTE with regard to the emerging linkage issue of trade and environment. But while we expect the symbol to relate to corresponding political action, it is also possible that the symbol relates to nothing but the anticipated results of its public reception. Symbolic politics are capable of exploiting the sheer power of the symbolism of institutional orders in order to create deceptive appearances.

Following this argument, the CTE's establishment serves no cause other than to build the impression that the WTO and its members are concerned with the linkage issue. National incapacity to solve the problem alone, the need for multilateral activity, the perceived growing success of

[73] See K-S Rehberg, 'Institutionen als symbolische Ordnungen. Leitfragen und Grundkategorien zur Theorie und Analyse institutioneller Mechanismen' in G Göhler (ed), *Die Eigenart der Institutionen. Zum Profil politischer Institutionentheorie* (Baden-Baden: Nomos 1994). The term 'symbolic politics' was introduced by M.Edelman, *The Symbolic Uses of Politics* (Urbana, ILL: University of Illinois Press, 1964). For an application in legal studies, see M Neves, *Symbolische Konstitutionalisierung* (Berlin: Duncker & Humblot, 1998).

environmental groups as well as the disputes on the matter before the WTO Dispute Settlement Body all, undoubtedly, served to increase the pressure on national delegates to act on the issue in some way—including within the institutional framework of the GATT/WTO. But effectively, WTO members did not, and may still not, have any material interest in finding answers to the question of balancing trade and environmental interests.

This may change some day in the future, as institutional orders come up with their own interior logic and gain independence from the intentions of their founders. Hence, even if the CTE was established to serve a symbolic purpose, it still has—theoretically speaking—the potential to develop the capacity for reaching legitimate and effective political agreements. At present, it is simply impossible to predict whether or not the CTE will serve as such a forum of deliberative exchange among its members at some time in the future. Maybe the committee will evolve as a functional equivalent of the 'deliberative supranationalism' which Joerges and Neyer[74] detected in the EU. However, bar their findings, in the WTO at the moment this would be no more than Utopia.

[74] Joerges and Neyer, n 3 above.

17

Facing the Global Hydra: Ecological Transformation at the Global Financial Frontier: The Ambitious Case of the Global Reporting Initiative

OREN PEREZ

'The rational man of economics is a maximizer, who will settle for nothing less than the best.' Herbert Simon.[1]

THE STUDY OF 'globalisation' is full of traps. One of the most treacherous is the unwarranted discovery of unification or convergence: of themes, power, institutions and communication paths. Observing the globalisation process through the themes of unification and convergence can be highly misleading, both in general and in the specific context of international economic law. This cognitive frame overlooks the still deeply fragmented nature of the global society and its legal forms. In thinking about global economic governance, we need a better metaphor, one which is sensitive to this fragmented actuality. The *Hydra*—the ancient Greek monster—provides, I think, an interesting and insightful alternative. The *Hydra*, which lived in the swamps near Lake Lerna in the region of Argos, was a terrifying monster, which had the body of a snake and many heads (there are many versions which run from five to 100).[2] One of the heads could never be harmed by any weapon, and, if any of the other heads was severed, another would grow in its place. In studying global governance, one has a similar experience: a legal web with many heads and an

[1] Quoted in D McFadden, 'Rationality for Economists' (1999) 19 *Journal of Risk and Uncertainty* 73, at 73.

[2] For exposition, see the 'Lernaean Hydra' at http://en.wikipedia.org/wiki/Lernaean_Hydra.

immeasurable capacity to reproduce. The legal *Hydra* is even more threatening since, in the case of global law, one has to deal not just with multiple heads, but with multiple bodies. In confronting the *Hydra*, one at least had the assurance of facing a single body: a singular focal point, from which the beast's multiple heads could be observed and acted upon. This assurance is lacking in the case of global law, the increasing fragmentation of which makes it difficult to analyse it as a whole.[3]

Anti-globalisation activists and scholars of globalisation seem to share, therefore, a common dilemma: a quest for an Archimedean point from which the global *Hydra* may be observed and confronted. This chapter utilises two focal points to study the transnational economic system—the narrative of *homo economicus* and the theme of *environmental protection*. These narratives will be used to observe, and then to criticise, the global *Hydra* (focusing on only some of its heads—those relating to the financial domain). Whether the focal points that I have chosen succeed in giving a useful portrait of the international system of economic law is a question to which I cannot give a definite answer. It requires the postulation of a competitive point of view (a task which I leave to the other chapters in this volume).

Let me start by delimiting my field of inquiry—by pointing to the heads of the *Hydra* on which I intend to focus. My interest in this chapter is limited to the field of international financial law—setting aside other elements of the international web of economic laws (for example, the WTO). The increasing integration of the global financial markets justifies, I believe, such a particularistic inquiry.[4] Studying the field of international financial law requires that I first distinguish the subject matter of this regulatory field. The global financial system covers 'all types of cross-border portfolio-type transactions or flows'.[5] It thus encompasses equity investment, loans, currency transactions and short-term investment (for example, in bonds or bank deposits).

International financial law is constituted by a complex web of national and transnational laws, which all play a role in the regulation of the global financial system. The normative ambitions of this global legal web are far-reaching. It targets—through its manifold sub-systems—both the basic

[3] This pluralistic point of view should, I believe, guide the discussion of the trade–environment conflict. Within the legal community, this discussion has tended to focus on the WTO, disregarding the manifestations of this conflict outside the boundaries of the WTO. A proper analysis of the trade–environment conflict calls for a richer research strategy, which will consider further domains. For a more detailed exposition of this thesis, see O Perez, *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict* (Oxford: Hart Publishing, 2004), Chap 1.

[4] For a historical assessment of this development, see MD Bordo *et al*, 'Is Globalization Today Really Different than Globalization a Hundred Years Ago?', *NBER Working Paper 7195*, (1999) at 56.

[5] B Cohen, 'Phoenix Risen: The Resurrection of Global Finance' (1996) 48 *World Politics* 268, at 269.

building-blocks of the financial system and the micro-transactions that take place within its boundaries. Thus, the global network of financial laws includes rules which govern framework issues such as the structure of stock-exchanges, international clearing and settlement,[6] the constitution and working procedures of key global institutions, such as the International Monetary Fund (IMF) and the World Bank, and general rules pertaining to the behaviour of private players, such as capital adequacy ratios and data-disclosure principles.[7] It also includes *transactional rules* which govern various aspects of transnational financial transactions, a prominent example of which is lending and investment criteria.[8] Institutionally, this network is deeply fragmented: it is comprised of multiple and structurally different legal systems, which include multilateral treaties such as the treaties establishing the IMF and the World Bank, state-to-state treaties such as Bilateral Investment Agreements, private instruments, such as standard loan contracts and common investment criteria, and hybrid—private–public—legal instruments such as the new Global Reporting Initiative and the various decisions of the Basel Committee on Banking Supervision.[9]

But why should we be interested in studying this network? Should we not just leave it to the financial 'experts' of the treasury ministries, central banks and the big commercial banks? Such an approach reflects a strategy of denial—a conceptual ostrichism. It refuses to recognise the close link between the financial universe and the tangible reality of the global economy. This connection makes the financial universe potentially problematical. Thus, to give one example, in many cases transnational funding is a precondition to the commencement or continuation of environmentally controversial business endeavours (for example, the funding of an infrastructure project with adverse ecological impact, or equity investment in a petro-chemical company). International financial law, because of its ability to influence cross-border financial transactions, offers, therefore, a powerful mechanism for influencing tangible (global) dilemmas.

My critique of the field of transnational financial law utilises two conflicting narratives: that of *homo economicus*, and that of *environmental protection*. The image or model of *homo economicus* is one of the most

[6] See the Group of Thirty Study Group Report, 'Global Clearing and Settlement: A Plan of Action', (2003), available at http://www.group30.org/recommendations.php (visited on 15 May 2005).

[7] See, e.g., for example, the Basel Capital Accord at: http://www.bis.org/bcbs/index.htm (visited on 16 Mar 2005).

[8] In many cases, a single legal instrument may cover both issues. A good example is bilateral investment treaties.

[9] From the manifold institutions which are associated with this field of law, one can mention the International Centre for Settlement of Investment Disputes, the International Monetary Fund, the International Organisation of Securities Commissions (IOSCO), the Basel Committee on Banking Supervision, leading national regulators such as the US Securities and Exchange Commission (SEC), and large financial firms (such as Deutsche Bank of Germany and Citigroup of the US).

influential intellectual legacies of the twentieth century. This model depicts the human agent as an unboundedly rational 'maximiser', who plans his or her actions by picking the choice which maximises his or her expected utility.[10] The *homo economicus* model has been criticised extensively over the last 30 years; its many critiques have questioned its behavioural validity and offered various alternatives. Thus, for example, a major critique which is closely related to the topic of this chapter argued that utility should not be defined narrowly as reflecting only the individual's material interests (in terms of her consumption patterns). Instead, utility, properly measured, should also reflect the various psychological costs and benefits which may be experienced by the individual, reflecting, for example, altruistic preferences (for example, a concern for fairness—for the consumption patterns of other people) or ecological values (for example, a concern for the welfare of sea turtles).[11]

Despite this and other critiques,[12] this construct still dominates the economic literature and has also spread into other social disciplines (for example, law and economics).[13] The field of international economic law, in its manifold discursive and institutional sub-systems, is very much influenced by the narrative of *homo economicus*; indeed, it is possible to find the imprints of this narrative in various legal doctrines and concepts. Following the imprints of this narrative in the field of international financial law reveals a process of reconstruction, which has changed the contours of the economic narrative, creating a novel legal concept: *homo investicus* (the '*reasonable investor*'). Whereas the concept of *homo economicus* (as articulated in the economic discourse) is broad enough to incorporate non-material interests, such as altruistic or ecological concerns, the *homo investicus* is a greedy, materialistic creature, who cares only about maximising his monetary gains—disregarding those concerns which cannot be represented monetarily. In exploring the influence of the *homo economicus* model on international financial law, I will focus on one segment of the financial field: the rules pertaining to *corporate reporting*. These rules, I

[10] Formally, this assumption can be presented as depicting the individual 'as maximizing at each instant *t* over some action set *At* the expectation of the present discounted value of the flow utility of consumption *u*t (*c*t) given the information *It* he has accumulated prior to date *t*': J Tirole, 'Rational Irrationality: Some Economics of Self-Management' (2002) 46 *European Economic Review* 633, at 634.

[11] Ibid., at 635; H Gintis, 'Beyond *Homo economicus*: Evidence from Experimental Economics' (2000) 35 *Ecological Economics* 311, at 320.

[12] See, e.g., G Gigerenzer and PM Todd, 'Fast and Frugal Heuristics: The Adaptive Toolbox' in G Gigerenzer and PM Todd, *Simple Heuristics that Make Us Smart* (New York: Oxford UP, 2000), J Henrich *et al*., 'In Search of Homo Economicus: Experiments in 15 Small-Scale Societies' (2001) 91 *American Economic Review* 73; E Fehr and A Falk, 'Psychological Foundations of Incentives' (2002) 46 *European Economic Review* 687.

[13] See D McFadden, 'Rationality for Economists' (1999) 19 *Journal of Risk and Uncertainty* 73, at 73, and KN Hylton, 'Calabresi and the Intellectual History of Law and Economics' (2004) *Boston University School of Law Working Paper No. 04–04*, available at http://ssrn.com/abstract=547082.

will argue, strongly influence the way in which corporations behave, and, as such, deserve close scrutiny.

But I am interested in more than merely tracing the legal imprints of the *homo economicus*. I want to lay bare the blind-spots of these imprints; to expose what is concealed and suppressed through the use of the notion of *homo investicus*. Furthermore, I want to use this critique to outline alternative paradigms and normative structures. To make sense of my critique, I need to clarify my point of view and the environmental commitments underlying it. Otherwise, I am risking losing the *Hydra* body in a mist of conflicting perceptions of 'environmentalism'. However, I will resist the temptation to provide an exact definition of 'environmentalism'; instead, I will invoke this notion as a contested idea which will be unfolded as the chapter proceeds. The reason for my approach lies in the sociological reality of the environmental movement. The environmental resurgence of the last decade cannot be associated with some *unitary discourse* or a limited *set of agents* (that is a prototypical environmental rationality or social configuration). The new environmental movement was instead constituted by an inconsistent stream of themes and symbols, associated with multiple actors. While one can point to certain key terms, such as sustainable development, the polluter pays and the precautionary principle, which seem to constitute a new and distinctive environmental discourse, these concepts remain deeply contested. The common denominator of this stream of ideas and symbols was a new collective concern for the environment, which successfully constituted the 'environment' as a meaningful way of questioning contemporary social practices. While the environmental awakening of the last decade has provided society with a powerful *collective concern*, the *contents* and *practical consequences* of this concern have remained undetermined. Using a single vision of ecological rationality could thus create a problematical cleavage between the theory and the (conflicting) social reality.

The structural diversity of international financial law means that, in analysing it, one can focus on various institutional junctions. As noted above, I have chosen to focus on one fragment of the financial realm: the field of corporate reporting.[14] I will contrast the traditional corporate reporting schemes, which were highly influenced, I will argue, by the narrative of *homo economicus*—in its reconstructed greedy form—with a new alternative reporting scheme: the Global Reporting Initiative (GRI). This initiative is interesting because the reporting framework that it introduces is driven by a broader social vision, and seeks to provide a *comprehensive picture*

[14] For a discussion of other 'fragments', such as project finance and 'ethical' investment, see Perez, n 3 above, Chap 7; M Jeucken, *Sustainable Finance and Banking: The Financial Sector and the Future of the Planet* (London: Erathscan, 2001) and UNEP-Finance Initiatives report, *Finance and Insurance* (Geneva: United Nations Environment Programme/Finance Initiatives, 2002). The UNEP Report is available at: www.unepfi.net (visited on 22 June 2003).

of the social and ecological facets of the organisation's actions. Furthermore, by integrating the environmental report into the traditional financial report, the GRI scheme seeks to break the traditional commitment of corporate accounting to the narrative of *homo investicus* (thus, overcoming the hidden blind-spots this commitment induces).

The chapter starts by exploring the ecological responsiveness of the realm of traditional accounting, decoding its environmental blind-spots. It then goes on to consider alternative reporting schemes,[15] focusing on the GRI. Here, I will discuss the attempt of the GRI initiative to challenge the legal commitment to the *homo economicus* narrative (in its reconstructed form) and evaluate the potential of this initiative to transform the current corporate practices.[16] In discussing the GRI initiative, I will also try to expose the environmental logic underlying it.

I. ECOLOGICAL RESPONSIVENESS WITHIN THE REALM OF TRADITIONAL ACCOUNTING

The practices and rules of financial reporting play a key role in the functioning of the modern economic system. These rules influence the way in which the economic system *selects* and *interprets* information.[17] They fulfil a dual task: first, they prescribe which facts or events should be recognised as economically relevant (a pre-selection role), and secondly, they determine how the decidedly relevant facts should be transformed into precise numerical measures which reflect the firm's economic resources. This presentation is then channelled into the market and back into the reporting corporation, thus triggering further economic decisions.

Accounting can influence the inner life of the corporation through two different paths. First, it influences corporate life by triggering external actions (for example, in the stock or goods market), which could influence the firm (*external governance*). Secondly, accounting practices can influence internal decision-making processes within the firm by structuring the cognitive frame in which they take place (*internal governance*). By creating a monetary record of the organisation's activities—from production, research and development to marketing—accounting creates a frame for measuring and ordering the organisation's actions.[18] Managerial decisions are structured by this monetary representation, and the logic and expectations

[15] In Sect II below, I discuss the differences between the GRI scheme and other types of disclosure schemes such as the US Toxic Release Inventory Program or the European Pollution Emissions Register. The key difference between the GRI scheme and these types of mandatory disclosure programmes is, I will argue, the GRI integrative vision.

[16] Because of limits of space, this chapter focuses on corporate reporting; it does not consider the equally important field of 'green' national accounting.

[17] Especially, those rules pertaining to publicly traded companies.

[18] P Montagna, 'Modernism vs. Postmodernism in Management Accounting' (1997) 8 *Critical Perspectives on Accounting* 125, at 134.

underlying and hypothesised by it (financial reports provide cues for further decisions and set goals for 'best practice'). It is in this spirit that scholars in the accountancy field argue that 'accounting is more than a neutral technical practice … it shapes preferences, organisational routines, and the forms of visibility, which support and give meaning to decision making'.[19] Indeed, the key role of accounting practices in the operation of the economic system—both at the level of market behaviour and at the level of the firm—provides the motivation for studying their environmental blindspots.

The traditional view of financial accounting conceptualises it as an instrument whose main purpose is to *enable* investors and other users (for example, suppliers, customers and employees) to *evaluate*—through 'proper' disclosure—the economic value of the firm whose shares they are holding or with which they are doing business, and to *make economic decisions* in view of that disclosure. This basic conception has an almost universal status. It was endorsed, for example, by the International Accounting Standards Board (IASB), which leads the process of creating uniform international accounting standards.[20] Thus, for example, the *IASB Framework for the Preparation and Presentation of Financial Statements* (IASB Framework) states in paragraph 12 that:

> The objective of financial reports is to provide information about the *financial position, financial performance and cash flows* of an entity that is useful to a wide range of users in making economic decisions.

And further on in paragraph 14, it states that:

> Financial reports also show the results of the stewardship of management, or the accountability of management for the resources entrusted to it. The users who wish to assess the stewardship or accountability of management do so in

[19] MK Power, 'Auditing and the Production of Legitimacy' (2003) 28 *Accounting, Organizations and Society* 379, at 379.

[20] The IASB was preceded by the Board of the International Accounting Standards Committee (IASC), which was established in 1973 and operated until 2001. The IASB was instituted in 2001 as part of a constitutional reorganisation of the IASC. For further details, see the IAS website: www.iasb.org (visited on 1 Apr 2005). IASB publishes its Standards in a series of pronouncements called International Financial Reporting Standards (IFRS). It has also adopted the body of Standards issued by the IASC. Those pronouncements continue to be designated 'International Accounting Standards' (IAS). IASB standards are used by many nations, although their application is not universal. Prominent users of the IASB Standards are the European Union, Australia, Hong Kong and Singapore. Most of the countries which have not adopted the IASB standards are undergoing a process of adapting their standards to those of the IASB. Prominent examples of non-users are Canada, Japan and the US. The US uses its peculiar standards known as the Generally Accepted Accounting Principles (GAAP) (in the case of the US, the prospects of convergence are still unclear, although they seem inevitable). While at micro-level, there are still substantial differences between disclosure standards in various jurisdictions, they are all driven by the same economic ethos described above. The global accounting firm Deloitte, Touche & Tohmatsu manages a website that monitors the global use of International Financial Reporting Standards: see: http://www.iasplus.com/country/useias.htm (visited on 1 Apr 2005).

> order that they may make *economic decisions*; these decisions may include, for example, *whether to hold or sell their investment* in the entity, or whether to reappoint or replace the management.[21]

Underlying this vision is the presumption that investors and other users behave according to a reconstructed version of *homo economicus*: the *homo investicus*. The *homo investicus* is motivated *solely* by the desire to maximise his financial returns (be it from investment in the firm's stocks or from other economic interactions with the firm)[22]. To serve this goal, the financial report must reflect both the firm's economic resources and any changes which occur or are likely to occur to them—*nothing else is important*.[23] This is also reflected in the way in which the concept of materiality has been interpreted in accounting standards and judicial rulings. Thus, the IASB Framework states that:

> Information is material if its omission or mis-statement could influence the *economic decisions* of users taken on the basis of the financial report. Materiality depends on the size of the item or error judged in the particular circumstances of its omission or mis-statement. Thus, materiality provides a threshold or cut-off point rather than being a primary qualitative characteristic which information must have if it is to be useful [paragraph 30, emphasis added].

Similarly, the US Supreme Court interpreted the notion of materiality through the eyes of the 'reasonable investor'—the *homo investicus*.[24] The Court noted, in a widely quoted paragraph, that for a fact to be considered material 'there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the *reasonable investor* as having

[21] My emphasis. The IASB does not provide free access to its documents. However, the IASB framework was adopted by the Australian Accounting Standards Board (AASB), which made its version of the framework publicly available. See http://www.aasb.com.au/ (under: AASB Standards), (visited on 12 Jan 2006).

[22] The IASB Framework recognises that the potential users of financial reports are not just the investors' community, but also those who have economic relations with the firm (such as employees, lenders, suppliers and customers), government agencies and the public at large (para 9). However, the IASB Framework presumes that this varied audience is interested only in the organisation's financial performance. This is evident from the text of paras 12 and 14, which were quoted above. Even where the Framework recognises the limitations of standard financial reports, these limitations are viewed from the perspective of the *homo investicus*, that is, from the perspective of their possible (adverse) influence on the capacity of users to make 'economic decisions'. Thus, para 13 states that '[f]inancial reports prepared for this purpose meet the common needs of most users. However, financial reports *do not provide all the information that users may need to make economic decisions* since they largely portray the financial effects of past events and *do not necessarily provide non-financial information*' (my emphasis).

[23] See, in this spirit, paras 15–20 of the IASB Framework.

[24] The concept of materiality appears in various US statutes. For example, Rule 405 of the Securities Act Rules provides that '[t]he term *material*, when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered' (Rule 405 of the General Rules and Regulations under the Securities Act of 1933).

significantly altered the "total mix" of information made available'.[25] The reasonable investor is not, however, an empirically driven construct, but a normative-idealised artefact; a legally reconstructed version of the concept of *homo economicus*. Indeed, in a another ruling, the Supreme Court observed that both the ordinary investors and the professional investors of Wall Street are entitled to the same protection, assuming, implicitly, that two investor types are driven by the same desire—to maximise their profits from stock trading. Thus, the Court noted that a material fact (in the context of a discussion of insider trading):[26]

> encompasses any fact 'which in reasonable and objective contemplation might affect the value of the corporation's stock or securities'.... Such a fact is a material fact and must be effectively disclosed to the investing public prior to the commencement of insider trading in the corporation's securities. The speculators and chartists of Wall and Bay Streets are also 'reasonable' investors entitled to the same legal protection afforded conservative traders. Thus, material facts include not only information disclosing the earnings and distributions of a company but also those facts which affect the probable future of the company and those which may affect the *desire of investors to buy, sell, or hold the company's securities* [my emphasis].

The economic disposition that underlies the rules of financial reporting has influenced the character and public image of accounting as a unique practice and mode of expertise. Accounting was perceived by its practitioners and the general public as a technology of *monetary representation*, rather than a general technology of measurement.[27] The capacity of accounting—as a field of knowledge and expertise—to measure, in a neutral and objective way, the reality of corporate life[28] was constrained (or moulded) by this monetary vision.[29]

[25] *TSC Industries, Inc v Northway, Inc*, 426 US 438, 449 (1976) (my emphasis). See, further, on the question of the 'reasonable investor', DC Langevoort, 'Taming the Animal Spirits of the Stock Markets: A Behavioural Approach to Securities Regulation' (2002) 97 *Northwestern University Law Review* 135, at 184–6, and PH Huang, 'Moody Investing and the Supreme Court: Rethinking the Materiality of Information and the Reasonableness of Investors' (2005) 13 *Supreme Court Economic Review* 99, at 109–112.

[26] *SEC v Texas Gulf Sulphur, Co*, 401 F 2d 833, 849 (2nd Cir 1968).

[27] See M Power and R Laughlin, 'Habermas, Law and Accounting' (1996) 21 *Accounting, Organisations and Society* 441 at 457.

[28] D Solomons, 'Accounting and Social Change: A Neutralist View' (1991) 16 *Accounting, Organisations and Society* 287.

[29] Accounting not only shapes organisational routines and managerial preferences—it is also shaped by them. One of the major critiques, which were mounted against auditors (especially in the US) post Enron, was that modern auditing techniques fail to reflect the firm's real economic resources. It was argued that auditors—driven by rent–seeking managers and securities issuers—have adopted aggressive reporting techniques, which were used to enhance reported earnings beyond their true level: see WW Bratton, 'Rules, Principles, and the Accounting Crisis in the United States' (2004) 5 *European Business Organisation Law Review* 7, at 8. To the extent that this argument reflects a broad social phenomenon, it adds force to the environmental critique only because it re-emphasises the strength of the economic incentives, which may work against the disclosure of problematical ecological data.

Identifying the driving ethos of financial accounting makes it easier to pinpoint its ecological blind-spots. The remaining part of this section describes the ecological insensitivities of mainstream corporate accounting, and exposes their linkage to the narrative of the *homo investicus*. Against this background, I will consider, in the next section, the reporting scheme of the Global Reporting Initiative, which challenges this narrative, replacing it with a broader social vision.

Within the traditional framework of corporate accounting, environmental disclosure is required only when *the data have an influence on the firm's future revenues*; that is, when they represent a current or potential cost to the reporting firm. In the following discussion, I rely mainly on the US Securities Regulations. However, the US rules perform a merely illustrative role here—the logic underlying them is universal. Common examples of environmental *cost factors* include issues such as compliance with environmental laws, response actions (for example, clean-up), defence and legal fees arising from tort claims or criminal prosecutions, and any other costs arising from ecological misbehaviour (for example, loss of reputation or damage to the corporate property).[30] Arguably, this form of environmental disclosure should extend the environmental sensitivity of economic actors—from shareholders to corporate officers. The reason is that this type of environmental data impinges directly on both the firm's and shareholders' calculus of return, and thus is not likely to be ignored. However, as will be made clear below, this commitment to the calculating logic of economics *limits the extent of the disclosed environmental data*.

A good example of this type of environmental reporting is the US Securities and Exchange Commission (SEC) corporate disclosure regulations. The SEC rules are interesting because the SEC controls the two biggest stock exchanges in the world, NYSE and NASDAQ, and is considered a global leader in the field of securities regulation.[31] The SEC working practices and underlying rules influence various foreign companies that are registered in these exchanges. The disclosure requirements of registered corporations, which outline what should be reported in annual or quarterly

[30] In some cases, these costs can be huge, leading otherwise healthy companies to file for bankruptcy. A prominent example is the case of asbestos. Recent studies estimate that the ultimate costs arising from exposure to asbestos in the US could range from $200 to $275 billion: JL Biggs, 'Statement before the Committee on the Judiciary United States Senate—Hearing on 'Asbestos Litigation', 25 September 2002), at 5, available at http://www.actuary.org/pdf/casualty/asbestos_25sept02.pdf (visited on 20 May 2005). The scale and cost of asbestos litigation have forced several US corporations to file for bankruptcy: ibid, at 1.

[31] For more extensive discussion of US disclosure practices and a comparison with the UK and Canadian markets, see L Holland and YB Foo, 'Differences in Environmental Reporting Practices in the UK and the US: The Legal and Regulatory Context' (2003) 35 *The British Accounting Review* 1, and N Buhr and M Freedman, 'Culture, Institutional Factors and Differences in Environmental Disclosure between Canada and the United States' (2001) 12 *Critical Perspectives in Accounting* 293.

reports, are set out in Regulation S-K.[32] Regulation S-K contains three items that pertain to environmental disclosure. Item 101, which deals with the description of the business, requires firms to disclose:[33]

> the *material effects* that compliance with Federal, State and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries.[34]

The next relevant item, Item 103, deals with legal proceedings. This item requires SEC registrants to disclose the existence of pending or known to be contemplated environmental legal proceedings that may have a *substantial influence* on the business or financial condition of the registered firm.[35] Finally, Item 303 requires the management to describe, in its 'Discussion and Analysis of Financial Condition and Results of Operations', any known trends or uncertainties 'that have had or that the registrant reasonably expects will have a *material* favourable or unfavourable impact on *net sales or revenues or income* from continuing operations'.[36] This requirement could give rise to environmental disclosure wherever the firm expects certain environmental contingencies to have a material impact on the firm's operations.[37]

[32] The regulation was issued under the Securities Act of 1933, the Securities Exchange Act of 1934 and the Energy Policy and Conservation Act of 1975. Available at www.sec.gov/divisions/corpfin/forms/regsk.htm (visited on 27 June 2003).

[33] Art 229.101(c)(1)(xii).

[34] My emphasis. In *Levine v NL Industries, Inc*., 926 F 2d 199 (2nd Cir 1991), the court held that Item 101(c)(1)(xii) requires companies to disclose not only the cost of complying with environmental regulations, but also the cost of failing to comply with them, in terms of fines, penalties, or other significant effects on the corporation: ibid, at 203–204.

[35] Art 229.103(5)(A)–(C) requires disclosure in any of the following circumstances:

> 'A. Such proceeding is material to the business or financial condition of the registrant; Such proceeding involves primarily a claim for damages, or involves potential monetary sanctions, capital expenditures, deferred charges or charges to income and the amount involved, exclusive of interest and costs, exceeds 10 per cent of the current assets of the registrant and its subsidiaries on a consolidated basis; or C. A governmental authority is a party to such proceeding and such proceeding involves potential monetary sanctions, unless the registrant reasonably believes that such proceeding will result in no monetary sanctions, or in monetary sanctions, exclusive of interest and costs, of less than $100,000; provided, however, that such proceedings which are similar in nature may be grouped and described generically'.

[36] My emphasis. Art 229.303(a)(3)(ii).

[37] These include, e.g., a 'pending change in environmental law(s) that would increase operating costs &hllip; an environmental legal proceeding that may result in material financial liabilities, [and] revocation of, or the inability to obtain an operating permit, or a product registration': NC Franco, 'Corporate Environmental Disclosure: Opportunities to Harness Market Forces to Improve Corporate Environmental Performance', Paper presented at the American Bar Association Conference on Environmental Law, *Keystone Colorado*, 8–11 Mar 2001, at 12, available at http://www.rosefdn.org/images/EPA.Disclosure.Study.pdf (visited on 20 May 2005).

The potential influence of this form of environmental disclosure on the equity market and corporate behaviour depends on two key factors. The *first factor* concerns the level of informational asymmetry.[38] If there is a significant informational gap in the equity market with regard to the environmental liabilities of registered firms, reducing this gap through better designed and more strictly enforced environmental disclosure rules could yield positive environmental results, by generating market pressure that could cause firms to improve their environmental performance.[39] Studies of the US equity markets seem to indicate the existence of such a gap, finding poor compliance with the SEC reporting requirements. Thus, for example, a 1998 study by the US. Environmental Protection Agency (EPA) found that 74 per cent of companies failed to report cases where environmentally related legal proceedings could result in monetary sanctions over $100,000, only 26 per cent of civil and administrative proceedings involving penalties were correctly disclosed, and only 16 per cent of proceedings involving court-ordered supplemental environmental projects were.[40] A study of the SEC's Division of Corporation Finance, which examined the disclosure practices of all Fortune 500 companies, also found significant under-reporting in the area of environmental and product liability.[41] In view of this situation, the EPA's Office of Enforcement and Compliance Assurance (OECA) has taken several steps aimed at improving the level of compliance with SEC disclosure requirements.[42] The enactment of the Sarbanes–Oxley

[38] In general, information asymmetry refers to variations across persons in the amount and quality of information, which is relevant to a certain economic transaction: ibid, at 4. Such asymmetry could arise if firms persistently violated their mandatory disclosure obligations (whether under securities regulations—e.g., the SEC rules—or other mandatory disclosure schemes—e.g., the US Toxic Release Inventory program) and if environmental data do not leak to the market through informal channels.

[39] See ibid, at 8, and S Konar and MA Cohen, Information as Regulation: The Effect of Community Right to Know Laws on Toxic Emissions' (1997) 39 *Journal of Environmental Economics and Management* 109.

[40] Franco, n 37 above, at 13–16.

[41] Much of the under-reporting was due to questionable reporting practices regarding companies' contingent environmental liabilities. For a discussion of the SEC study, see SB Goodman and T Little, *The Gap in GAAP: an Examination of Environmental Accounting Loopholes* (Report for the Rose Foundation, Dec 2003), at 8–9, available at http://www.rosefdn.org/images/GAPinGAAP.pdf (visited on 20 May 2005). Goodman and Little discuss other studies, which reached similar conclusions: ibid, at 6–7. A summary of the SEC study can be found at http://www.sec.gov/divisions/corpfin/fortune500rep.htm (visited on 15 May 2005). It should be noted, however, that determining whether companies under-report without access to company records, given the ambiguity of the disclosure guidelines, is extremely challenging. It is not easy to determine whether a low level of disclosure means that a company does not have existing or potential environmental liabilities, has determined that such liabilities are not material or is not adequately complying with disclosure requirements. See the US government Accountability Office study, 'Environmental Disclosure' (Washington, DC: Accountability Office, July 2004) at 4.

[42] Oct 2001 the OECA issued an Enforcement Alert urging companies to abide by the requirements of Regulation S-K; it has also improved its information-sharing with the SEC in order to expand the SEC enforcement capacities. See *EPA Enforcement Alert*, volume 4, No. 3 (October 2001), available at: www.epa.gov/compliance/resources/newsletters/civil/enfalert

Act in 2002 could give further support to the EPA's efforts because of the greater responsibility it imposes on a firm's top management.[43]

A *second factor* concerns the rules that determine the cost-value of certain ecological data (for example, the potential cost to the firm of breaching certain emission standards), which ultimately determine which ecological facts will be disclosed in the financial report. If the methods of estimating environmental costs and liabilities are vague or highly varied across the industry, environmental reporting is not likely to generate the proper financial signals to the market, and hence it will lose much of its capacity to trigger changes in corporate behaviour. A recent petition to the SEC argues that this vagueness and variability represents the current corporate practice in the US[44] As a result, it asked the SEC to adopt new standards which would provide accurate and general methods for estimating monetary costs and liability for environmental matters. In particular, the petition urges the SEC to adopt two standards, developed by the American Society for Testing and Materials International (ASTM): the ASTM 2001 Standard Guide for Disclosure of Environmental Liabilities (E 2173–01), and the 2001 Standard Guide for Estimating Monetary Costs and Liability for Environmental Matters (E 2137–01).[45]

While improving the accuracy and extent of the environmental data disclosed under the traditional rules of financial reporting, as codified, for example, in the SEC rules, could generate positive environmental results, *the transformative capacity* of such rules remains limited because of their commitment to the economic ethos.[46] The sensitivity of this form of environmental reporting to ecological concerns remains *bounded* by the need to re-present environmental data in monetary (cost) values and by the image of the investor as *homo investicus*. Thus, to give a practical example, if a firm emits polluting substances without breaching the applicable legal standards, if the economic interpretation of the emissions is contestable or vague, or if a firm is engaged in problematical ecological behaviour under a valid licence (for example, a construction project in an area rich in

(visited on 1 Apr 2005). The Enforcement Alert focuses, in particular, on firms which are parties to EPA enforcement actions.

[43] See Ganzi *et al*, *Linking Environmental Performance to Business Value: A North American Perspective*, Report to the Commission for Environmental Co-operation (Montreal, 2004), at 33, available at http://www.cec.org/files/pdf/ECONOMY/Linking-Env-Performance-BP_en.pdf, (visited on 21 May 2005), and T Clarke, 'Cycles of Crisis and Regulation: the Enduring Agency and Stewardship Problems of Corporate Governance' (2004) 12 *Corporate Governance: an International Review* 153, at 159.

[44] A petition to the SEC by the Rose Foundation for Communities and the Environment, SEC File # 4–463, dated 20 Sept 2002, available at www.sec.gov.

[45] Ibid. For further discussion of this *problématique*, see Goodman and Little, n 41 above, and the US government Accountability Office study, n 41 above, at 29–33.

[46] It is important to note that my critique of the current accounting practices is to some extent open-ended in that it is not based on an explicit alternative ('green') disclosure framework. The question of the possible boundaries and nature of possible alternative schemes is discussed in the next section (which focuses on the Green Reporting Initiative).

wildlife), its actions cannot be described as a source of liability or cost, and thus need not be reported.[47]

The disclosure obligations of traditional accounting and this portrait of the 'reasonable investor' are linked in a co-determinative cycle. Thus, the 'reasonable investor'—interpreted as *homo investicus*—is presumed not to be interested in data that have no bearing on the firm's future revenues; consequently, the rules of accounting do not require the disclosure of such data; and, in turn, this standpoint contributes to the pervasiveness of the legally reconstructed image of *homo economicus*.[48]

II. ALTERNATIVE LTERNATIVE REPORTING SCHEMES AND THE GRI GEVOLUTION: FROM ECONOIMC ORIENTED TO COMPREHENSIVE ENVIRONMENTAL REPORTING

The novel aspect of the GRI Guidelines lies in their attempt to discard the longstanding commitment of corporate accounting to the ethos of *homo investicus*, replacing it with a broader social vision. This transformed way of doing corporate accounting should not only open new paths for observing and evaluating the behaviour of corporations, it could also transform the way in which corporations select and process information and mange their operations. The attempt to create such alternative 'accounting' raises several questions. First, what are the concrete principles and criteria that should guide the disclosure process and replace the traditional economic vision? What should the structure of the new corporate report be? It is the structure and underlying philosophy of the new 'alternative' reporting framework that will determine whether it can succeed in *constructing* a *different corporate 'reality'* (through the introduction of a different selection and interpretative principles).

A second intriguing question concerns the possible social effects of such transformed accounting. In this context, one can mention two issues. First, what could induce multi-national corporations to adopt such radical reporting practices which go beyond what is currently required by the law in most of the developed countries? Secondly, what would be the likely effects of such an alternative scheme on the internal structure and the environmental behaviour of the firms which adopted it? Is it possible that we

[47] In *Levine v. NL Industries, Inc.*, n 34 above, the court held that, although the cost of failing to comply with environmental regulations must be disclosed in principle, the associated firms were under no duty of disclosure because the Department of Energy had agreed to indemnify them in the event of liability or loss arising out of such violations. Under these circumstances, the firms' shareholders could not have suffered financially from the consequences of the alleged environmental violations, and thus a 'reasonable investor would not consider [the firms'] asserted violations of environmental law important information'; consequently no duty to disclose this information has arisen under securities regulations: Ibid, at 203.

[48] See, e.g., ibid.

will witness the emergence of a new kind of corporation—a schizophrenic creature living in two worlds—a fantasy world of corporate environmentalism (in which it reports on its environmental misbehaviour as though it 'cares')—and the 'real' world, in which it continues to pollute in order to maximise its profit?

Before proceeding to evaluate the GRI Guidelines, it is important, I think, to consider the differences between the GRI initiative and other mandatory disclosure programmes, such as the US Toxic Release Inventory programme (TRI), the European Pollution Emissions Register (EPER) and the Canadian National Pollutant Release Inventory Scheme (NPRI). These programmes require manufacturing establishments which meet certain conditions (usually in terms of size and type of business) to provide estimates of their chemical emissions for a designated set of toxic substances.[49] The GRI scheme is *much more demanding*. First, it requires the reporting organisation not only to disclose details about its chemical emissions, but also to provide a broad picture of its ecologically problematical actions, using a wide-ranging set of indicators (see below for details). Secondly, whereas mandatory disclosure programmes, such as the TRI, do not interfere with the prevalent accounting practices, but offer a parallel route instead, the GRI scheme offers a direct challenge to these practices. By proposing to

[49] See J Brehm and JT Hamilton, 'Noncompliance in Environmental Reporting: Are Violators Ignorant, or Evasive, of the Law?' (1996) 40 *American Journal of Political Science* 444, at 445. More details about these three programmes can be found at http://www.epa.gov/tri/, http://eper.eea.eu.int/eper/ and www.ec.gc.ca/pdb/npri, respectively. Other prominent examples include the Swiss Pollutant Emission Register, the Mexican pollution inventory (http://www.ine.gob.mx/?lang=_e), Australia National Pollutant Inventory ('NPI') (http://www.npi.gov.au/index.html), the Swedish Pollutant Release and Transfer Register ('PRTR') (http://www.naturvardsverket.se/prtr/), and the British Pollution Inventory (www.environment-agency.gov.uk/pi). Let me expand upon the relatively new European scheme. The European Pollution Emissions Register implements the data dissemination requirements included in Dir 96/61/EC concerning integrated pollution prevention and control, [1996]OJL/257/26 available at http://europa.eu.int/comm/environment/ippc/index.htm. The IPPC Dir requires the Member States and the Commission (respectively) to publish the results of monitoring of releases as required under the conditions of IPPC permits and to publish an inventory of the principal emissions and sources responsible (Art 15(2) and (3)). To implement this requirement the Commission has established the European Pollution Emissions Register, which covers 50 substances of environmental significance emitted to the air or water (the EPER became operative on 23 Feb 2004). Further disclosure requirements are included in Dir 2003/4/EC of the European Parliament and of the Council 2003 on public access to environmental information (repealing Council Dir 90/313/EEC), which requires the Member States progressively to make available to the public (preferably in electronic format) environmental data including 'data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment' (Art 7(2)(e). The Dir should be implemented by 14 Feb 2005. For further information about the US scheme and a list of pollution registers in other countries, see UNEP *et al.*, *World Resources 2002–2004: Decisions for the Earth: Balance, Voice, and Power* (Washington, DC: World Resources Institute, 2003), at 110–112. A significant advance in the adoption of pollution registers came in May 2003, when a broad coalition of countries signed the Protocol on Pollutant Release and Transfer Registers (PRTR) under the Aarhus Convention. The PRTR Protocol reflects an ambitious effort to expand mandatory disclosure requirements for toxic pollutants. For further discussion of the PRTR Protocol, see UNEP *et al.,* above, at 114–115.

integrate the environmental report with the traditional financial report, the GRI scheme seeks to revolutionise the cognitive frame in which corporations operate.

Let us consider the first question that I noted above: what the concrete principles and criteria which are used by the Global Reporting Initiative (GRI) in order to guide the disclosure process are, and what their underlying ethos is. The GRI was founded in 1997 by the Coalition for Environmentally Responsible Economies in partnership with the United Nations Environment Programme. Following a wide-ranging consultation process, the GRI published guidelines for sustainability reporting (entitled 'Sustainability Reporting Guidelines') in 2002.[50] The *driving ethos* of the GRI Guidelines is the concept of *sustainable development*. The Guidelines offer a new reporting framework which, arguably, should enable firms and other organisations to measure and report their contribution to sustainable development. The Guidelines distinguish between three aspects of the activities of organisations: economic, environmental and social.[51] This choice is supported by the thesis that '*achieving sustainability* requires balancing the complex relationships between current economic, environmental, and social needs in a manner that does not compromise future needs'.[52] A sustainability report issued in accordance with the GRI Guidelines should include information on each of these three aspects of corporate behaviour (although I will focus only on the environmental segment of the GRI guidelines). The Guidelines assume that this report will be issued in *conjunction* with the corporate conventional financial statement.[53]

While the environmental picture that emerges from the traditional financial report is *bounded* by economic calculations, the profile of the organisation's environmental performance, which is generated by the GRI Guidelines, is *driven* by a *distinctive* environmental concern. The ecological indicators of the Guidelines seek to measure the organisation's 'impact on living and non-living natural systems, including eco-systems, land, air and water'.[54] This is achieved by requiring the organisation to 'provide environmental performance information in terms of both absolute figures and

[50] GRI, *Sustainability Reporting Guidelines* (Amsterdam: Global Reporting Initiative, 2002). The GRI secretariat in 2005 initiated a process (entitled 'G3') to revise the Guidelines. The process is based on extensive stakeholder input and should result in a third generation of GRI Guidelines due for release in mid-2006. The process is based on three key components: Guidelines Innovations (improving indicators and linking with other CSR tools), Digital Solutions, and Education and Accreditation Programmes.

[51] Ibid, at 9. The Guidelines emphasise their holistic vision, noting that '[p]articular care should be taken to match the scope of the report with the economic, environmental, and social "footprint" of the organisation (i.e., the full extent of its economic, environmental, and social impact', at 34.

[52] Ibid, at 9, my emphasis.

[53] The two reports might, in some instances, be overlapping; in general, however, they should be complementary: ibid, at 45.

[54] Ibid, at 48.

normalised measures (for example, resource use per unit of output)'.[55] The complete list of environmental indicators included in the GRI Guidelines is attached to this chapter (Annex A). They include data about total material use, direct energy use segmented by primary source, total water use (and discharges into water), location and size of land owned, leased or managed in bio-diversity-rich habitats, major impact on bio-diversity, greenhouse gas emissions, use and emissions of ozone-depleting substances, NOx, SOx and other significant air emissions by type, total amount of waste by type and destination, significant environmental impact of principal products and services, and incidents of and fines for non-compliance with environmental regulations.

Was the attempt of the GRI to create a disclosure framework which would produce a new corporate reality successful? What are the limits or blind-spots of this alternative cognitive framework? Consider, first, the way the Guidelines conceptualise the idea of Sustainable Development. The definition of sustainability used by the Guidelines is extremely vague. It builds on the intuitively compelling notions of 'balancing' and 'not compromising future needs', but does not make an attempt to develop a precise understanding of these notions through some kind of integrative algorithm (although the Guidelines do insist that these notions be considered in an integrative manner, taking account of the three dimensions noted above).[56] This intrinsic ambiguity of the Guidelines is reflected, for example, in the fact that they do not provide any formula for evaluating the organisation's *impact* on the environment or on human welfare. Nor do they offer a method of *integrating* the economic, social and environmental indicators included in the Guidelines, although it is clear that, in judging the contribution of an organisation to the goal of sustainable development, its impact within each of these domains needs to be aggregated somehow and their inter-connections exposed.[57]

[55] Ibid.

[56] The Guidelines recognise indeed that sustainable development is a complex concept and that the Guidelines approach may need to be revised in the future: ibid, at 9. The vagueness of the Guidelines understanding of sustainability is reflected also in other places. Thus, e.g., on p. 28, the Guidelines note that:

> 'Where relevant and useful, reporting organisations should consider their individual performance in the contexts of economic, environmental, and social sustainability. This will involve discussing the performance of the organisation in the context of the limits and demands placed on economic, environmental, or social resources at a macro-level. This concept is most clearly articulated in the environmental area in terms of global limits on resource use and pollution levels, but may also be relevant to social and economic issues.The understanding of how best to link organisational performance with macro-level concerns will continue to evolve. GRI recommends that individual reporting organisations explore ways to incorporate these issues directly into their sustainability reports in order to advance both reporting organisations' and users' understanding of these linkages'.

[57] While the Guidelines encourage organisations to relate their individual performance to the particular environments in which they operate, they do not require it, nor do they provide

Although the GRI Guidelines maintain a certain ambiguity with regard to the meaning of sustainability, they do, however, take a more exact approach with regard to the design of 'green' behavioural (or performance) indicators. The Guidelines introduce a variety of rigorously defined economic, environmental and social indicators. The choice of indicators reflects, of course, an embryonic vision of sustainability. It delineates the space controlled by the principle of sustainable development, and what is not indicated remains outside the protective circle of this principle.[58] What is probably the most important aspect of the Guidelines is that they facilitate the cognitive conditions for engaging in an interpretative dialogue about 'sustainability' within the corporate universe. The current practice of corporate accounting does not provide the cognitive conditions for engaging in such deliberation. Although the Guidelines do not delineate the rules according to which this deliberation should take place, or what its conclusions should be, creating the necessary cognitive conditions for engaging in such deliberation within the corporate universe is an extremely important achievement.

But the attempt of the GRI to use the measurement techniques of accounting to carve a new space for deliberating 'sustainability' within the corporate universe has its own blind-spots, too. The attempt to develop detailed indicators seems to reflect a belief in the capacity of auditing—as a knowledge–ordering technique—to provide 'objective' representation of 'reality'.[59] But this belief is elusive, and remains so even when the traditional commitment of corporate accounting to the economic narrative is replaced by a broader sustainable vision.[60] It is elusive in several senses. First, not every ecologically problematical aspect of a firm's behaviour can be measured in numerical terms—for example, its aesthetic interference in nature. The reporting scheme of the Guidelines is thus blind to the ecological attributes of corporate behaviour which cannot be expressed in numerical language.

Secondly, as was noted above, the Guidelines do not provide a method for evaluating the environmental *impact* of an organisation. They do not offer an algorithm associating between the scheme's behavioural indicators and potential adverse impacts (on the eco-system and the human

guidance on how this 'relating' process should be carried out: see ibid, at 49. I will return to the question of environmental impact below. Similarly, the Guidelines recognise the importance of developing integrated indicators, distinguishing between systemic indicators and cross-cutting indicators. However, they leave the task of developing explicit indicators to the subscribing organisations and their stakeholders: ibid, at 44.

[58] Thus, e.g., by requiring the organisation to report its greenhouse gas emissions (EN8, at 50) the Guidelines make clear that climate change represents a dilemma which should be tackled using the discourse of sustainable development.

[59] See the explanatory text in ibid, at 48.

[60] On this elusiveness, see, further, Montagna, n 18 above.

community supported by it).[61] Nor do they provide a common scale through which various types of impact—within the ecological domain and across domains—could be aggregated. Without an impact algorithm or a universal scale, the meaning of the data provided by an organisation reporting according to the Guidelines will remain uncertain, and it will be difficult to compare between different organisations. Thus, how the data generated by the Guidelines should be interpreted remains an unresolved dilemma.

Another difficulty with the Guidelines' adherence to the auditing ethos of objective measurement concerns the question of the institutional and professional settings, where the task of measurement will be carried out. As has been noted in various studies of the sociology of accounting, the knowledge produced by audits is highly dependent on the communal background in which it is produced.[62] A possible professional contest between various specialists, such as accountants and environmental consultants, could deeply influence the ultimate audit product.[63]

The picture of the world that is generated by the GRI framework is broader than the picture generated by the prevalent accounting framework, but it is not, as we have seen, free from potential distortions and biases. It is also incomplete, in that it does not provide a clear map of the ecological impact of corporate behaviour, and leaves the task of interpreting the data generated by the Guidelines to the observer. But these imperfections of the Guidelines are not necessarily a flaw; indeed, they have certain important advantages. First, by establishing a strict disclosure framework which is constructed around a set of crisply defined behavioural indicators, the GRI Guidelines create a cognitive setting which is less susceptible to manipulation and is more immune to economic pressures. In the current

[61] Indeed, the impact of an organisation on the environment/society depends not just on the volume of its emissions, but on various other factors, such as the toxicity of the emitted substance, the absorptive capacity of the eco-system in which the organisation operates and the cultural preferences of the adjacent communities. The Guidelines include some items which require the organisation to identify its impact in some ecological domain (items EN7, EN25, EN 26, EN14, EN 34). Item EN14, e.g., requires the organisations to describe and quantify, where relevant, the significant environmental impacts of principal products and services EN7 includes a similar requirement with respect to the organisation's impact on bio-diversity). However, none of the items specify how the organisation should actually measure its impact, and how such an impact may be derived from the other environmental indicators. Presumably, such guidance should be provided in the more detailed technical protocols which are being developed by GRI, but these are still far from completion: see, for further details, http://www.globalreporting.org/guidelines/protocols.asp (visited 15 May 2005).

[62] Power, n 19 above, at 390.

[63] The GRI Guidelines recognise the importance of providing independent assurance about sustainability reports. They encourage the independent assurance of GRI-compatible reports and the development of guidelines for the assurance process to be followed by assurance providers: GRI Guidelines, n 50 above, at 18, 78–79. Such third-party verification is not obligatory, though. The use of the neutral term 'assurance provider' indicates that the Guidelines do not wish to interfere in any possible professional contest. During 2005 and 2006, the GRI secretariat will be co-ordinating a review process which should lead to the revision of the current guidelines; one of the issues considered in that context is that of improving the assurance processes of the GRI indicators.

social climate, basing the reporting scheme on general principles such as sustainable development (rather than on relatively crisp indicators), would have exposed the scheme to capture and to appropriation by economic and political forces.[64] Although the choice of using crisp indicators can be criticised with regard to what it fails to indicate and signify, it does also have an important advantage.

There are also certain advantages in the substantive imperfection of the Guidelines. The decision of the Guidelines' drafters not to offer a detailed definition of sustainability, and to refrain from devising an algorithm which could associate the indicators with their impact, and integrate between the economic, ecological and social indicators, makes the Guidelines compatible with conflicting visions of sustainable development and environmentalism.[65] It allows companies to develop their own vision, whether through their own individual efforts or by using one of the various corporate codes available on the market.[66] This reflects a recognition of the pluralistic nature of contemporary environmental thought. The guidelines leave the task of interpreting the data which they will generate to various civic intermediaries: from financial analysts to environmental NGOs, the general media, rating agencies and academics. The key contribution of the Guidelines lies in their making such an interpretative contest possible—not merely in the realm of academic deliberation—but also at the heart of the corporate universe.

III. THE GRI GUIDELINES AS A TRIGGER FOR CORPORATE TRANSFORMATION: SOME PRELIMINARY THOUGHTS

Assessing the possible social effects of a new model of corporate accounting raises two questions. The first concerns the incentives to adopt such a

[64] This argument is supported by empirical studies of environmental performance, which found that environmental disclosure that is based on general guidelines, such as those of CERES or GEMI, did not allow the researchers meaningfully to differentiate between companies. See D Hussey, P Kirsop and R Meissen, 'Global Reporting Initiative Guidelines: An Evaluation of Sustainable Development Metrics for Industry' (2001) 11 *Environmental Quality Management* 1, at 14.

[65] The literature offers a variety of sustainability indicators, reflecting different conceptions of this idea: see, e.g., Haberl *et al.*, 'Progress Towards Sustainability? What the Conceptual Framework of Material and Energy Flow Accounting (MEFA) Can Offer' (2004) 21 *Land Use Policy* 199, and TE Graedel and BR Allenby, 'Hierarchical Metrics for Sustainability' (2002) 12 *Environmental Quality Management* 21. For a discussion of the difficulties associated with the design of such indicators, see VH Dale and SC Beyeler, 'Challenges in the Development and Use of Ecological Indicators' (2001) 1 *Ecological Indicators* 1, and JCJM van den Bergh and H Verbruggen, 'Spatial Sustainability, Trade and Indicators: an Evaluation of the 'Ecological Footprint' (1999) 29 *Ecological Economics* 61.

[66] Prominent examples of such codes are the CERES Principles, UN Global Compact, Hannover Principles, the OECD Guidelines for Multinational Enterprises, International Chamber of Commerce Business Charter for Sustainable Development. The GRI Guidelines emphasise, indeed, their compatibility with various codes of conduct. See GRI Guidelines, n 50 above, at 11–12.

radically different reporting scheme which goes beyond the requirements of the law in most of the developed countries. It seems improbable that multinational enterprises will adopt such a radical programme without strong support from the external social and economic environment. Indeed, this intuition is supported by the relatively small number of firms that have fully adopted the GRI Guidelines (see below), and by the substantive level of non-compliance with mandatory (national) schemes of environmental disclosure which have been documented in several studies.[67] Studies that explored the reasons which motivate firms to adopt (voluntary) environmental management systems, such as ISO 14001, have also pointed to the motivation issue as a central barrier to the adoption of such schemes. Thus, for example, Jiang and Bansal note that:

> although environmental preservation and sustainable development seem to have become accepted values among large portions of society, firms still need to see the need for voluntary environmental standards like ISO 14001. Many firms will not certify for ISO 14001 if they do not receive clear market or institutional pressures and are not in need of external recognition and communication. Therefore, the most effective way for governments to improve the take-up rate of ISO 14001 is to increase supply-chain pressure for certification by having large influential firms commit to the standard.[68]

Nonetheless, corporations also face several incentives which could lead to the adoption of the GRI scheme. A non-cynical motivation could stem from an internal, pro-environmental change in the culture of the organisation. More instrumental explanations for adopting voluntary programmes include an attempt to create a positive reputation,[69] a belief that the creation of more accurate data-collection and dissemination systems within the firm could allow it to reap economic benefits through the identification of technological/managerial options which would have otherwise

[67] See, e.g., Brehm and Hamilton, n 49 above (non-compliance under the TRI scheme); K Haragan and J Wilson, *Who's Counting? The Systematic Under-reporting of Toxic Air Emissions*, A joint study by the Environmental Integrity Project and the Galveston-Houston Association for Smog Prevention (Washington, DC and Houston, Tex, 2004) (discussing inherent flaws in the TRI scheme, which cause toxic air emissions to be widely underreported), and Franco, n 37 above (discussing non-compliance with SEC disclosure rules).

[68] JR Joy and P Bansal, 'Seeing the Need for ISO 14001' (2003) 40 *Journal of Management Studies* 1047, at 1065.

[69] Potoski and Prakash conceptualise voluntary programmes such as ISO 14001 as club goods that provide non-rival but potentially excludable benefits to their members. For firms, the value of joining a green club over taking the same actions unilaterally lies the club's positive brand reputation. They find some support to their argument in an analysis of US firms: see M Potoski and A Prakash, 'Green Clubs and Voluntary Governance: ISO 14001 and Firms' Regulatory Compliance' (2005) 49 *American Journal of Political Science* 235, and K Kollman and A Prakash, 'EMS-based Environmental Regimes as Club Goods: Examining Variations in Firm-level Adoption of ISO 14001 and EMAS in U.K., U.S. and Germany' (2002) 35 *Policy Sciences* 43.

remained hidden,[70] or the hope that the management or disclosure programme could assist the corporation in complying with existing regulatory requirements or provide it with some other regulatory benefits.[71]

How many corporations have adopted the GRI scheme so far? By 27 December 2005, there were 120 organisations from 27 countries that had published 'In accordance' reports. 'in accordance' reporting represents the highest level of compliance with the GRI Guidelines—there are more companies which have used only some segments of the Guidelines in their annual reports.[72] While the number of 'in accordance' reporters is relatively small, it includes several global leaders, such as British Petroleum, the BT Group, the Dow Chemical Company, the Ford Motor Company, General Motors, Holcim (a Swiss construction material company), the Intel Corporation, Rio Tinto Borax, Shell International and the Volvo Car Corporation.[73] The inclusion of market leaders in the list is important because it could influence the decisions of other firms, thereby triggering a network effect.[74]

What about the social effect of such a programme once it is adopted? This, I believe, is one of the more fascinating questions associated with the GRI scheme. We are confronted again with the question of the schizophrenic corporation which lives in parallel worlds. Is this a real

[70] E.g., the Guidelines, requirement to monitor the waste produced by the firm (EN11) could help the firm in finding ways to improve the efficiency of its production processes generating significant cost savings. See ibid, at 48. The decision whether to adopt a voluntary programme such as the GRI can thus be constructed in cost-benefit terms. Firms will voluntarily go beyond any legally mandated regulatory standard if it is in their interest to do so. Thus, e.g., firms will need to assess whether the 'public' cares enough about the information being released to 'punish'/'reward' firms that are bad/good actors: see Konar and Cohen, n 39 above. For the GRI view on the question of the programme's benefits, see http://www.globalreporting.org/guidelines/benefits.asp (visited on 16 May 2005).

[71] Other regulatory benefits include, e.g., an attempt to pre-empt stricter regulatory intervention, or an attempt to secure certain regulatory 'carrots', which are guaranteed to firms that adopt voluntary programmes. Thus, e.g., the EU Eco-management and audit scheme (EMAS) is supported in many of the Member States by a variety of means, such as reduced inspection or supervisory fees to certified companies, simplified application and/or permitting procedures, reduced regulatory inspection frequencies, and reduced monitoring or reporting requirements. See K Dahlstrom *et al.*, 'Environmental Management Systems and Company Performance: Assessing the Case for Extending Risk-Based Regulation' (2003) 13 *European Environment* 187, at 189. The US Environmental Protection Agency (EPA) also introduced a scheme of incentives: see EPA, *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations* (2000), available at http://www.epa.gov/compliance/resources/policies/incentives/auditing/finalpolstate.pdf (visited on 16 May 2005).

[72] For an explanation of the different options of using the Guidelines, and the conditions that must be fulfilled by firms wishing to report 'in accordance' with the Guidelines, see the GRI Guidelines, n 50 above, at 13. On 23 Sept 2004, the GRI Secretariat published a 'clarification note on 'in accordance' expectations', see: http://www.globalreporting.org/guidelines/reports/IAclarification.asp (visited on 16 May 2005). As of 27 Dec 2005, there were 751 organisations registered in the GRI database, as organisations that have released a report referring to the Guidelines. The list is continuously updated at the GRI database at http://www.globalreporting.org/guidelines/reports/search.asp.

[73] For the full list, see, ibid.

[74] See Kollman and Prakash, n 69 above, at 55.

possibility? I must admit that I am sceptical. There are several paths in which the GRI scheme can influence both the organisations structure and ecological behaviour. First, the cognitive reorganisation of the reality in which the corporation operates is likely to influence the *internal dynamics* of the subscribing organisation. Forcing the firm to consider the impact of its various activities through new distinctions—which are not recognised by the traditional accounting framework—should, I believe, have a substantial influence on the decision-making dynamics within the firm.

This claim draws on a constructivist view of accounting, which recognises that it is not a neutral technical practice. Accounting, by giving rise to new forms of visibility, can transform organisational routines, shape preferences and trigger wide-ranging cultural changes within the organisation.[75] At individual level, the adoption of a new reporting technique which recognises the independent value of environmental issues can support and engender non-instrumental ecological motivations within the workers' community, facilitating and supporting pro-environmental institutional changes at the organisational level.[76] The simultaneous existence of corporations working in accordance with the GRI Guidelines and within the classic framework of corporate accounting provides a unique opportunity to examine this constructivist thesis empirically.

The argument above referred, primarily, to non-instrumental endogenous processes within the organisation. However, in discussing the likely effects of the GRI scheme and the stricter rules of environmental disclosure that it introduces, one also has to consider various instrumental considerations. For example, if a firm believes that consumers, community groups or investors care about the environmental behaviour of firms, it must take into account that providing more firm-specific environmental information may cause consumers to adjust their purchasing decisions, community groups to mobilise against polluting firms and/or investors to change their portfolios. Thus, a firm that has adopted the Guidelines should have stronger incentives to change its behaviour in a pro-environmental way. It should be recognised, though, that, at least in the first stages, the GRI scheme may suffer from a deep self-selection bias: only firms which can demonstrate good environmental behaviour are likely to subscribe to the GRI Guidelines. As long as non-subscription is not considered *in itself* as a signal of 'bad behaviour', polluting firms can continue to play according to the 'old rules'.

[75] See Power, n 19 above, at 379. Studies in behavioural economics indicate, similarly, that in contrast to the assumptions of the *homo economicus* model, preferences over economic choices are not exogenous, but rather are shaped by the economic and social interactions of everyday life: Henrich *et al*., n 12 above.

[76] New studies in organisational psychology demonstrate that institutional choices can influence the motivations' pattern of the workers community: see M Osterloh, BS Frey and J Frost, 'Managing Motivation, Organisation and Governance' (2001) 5 *Journal of Management and Governance* 231.

Overall, these dual and simultaneous processes provide the basis for the following thesis: *organisations which fully adopt the GRI scheme are likely to be better environmental performers than their non-reporting comparable peers*.[77]

In conclusion, the GRI Guidelines represent a radical attempt to break the long-standing commitment of corporate accounting to the model of *homo economicus* (reconstructed according to the conventions and prescriptions of traditional accounting and financial law). However, the capacity of this new discursive vision to trigger meaningful changes in the preferences and behavioural patterns of economic players remains an open question. Resolving this question—in terms of the institutional changes that the GRI may induce within the adopting organisations and their influence on the organisations' ultimate ecological behaviour—requires a thorough empirical analysis, which will utilise both quantitative and qualitative methods. However, one thing is clear: the Global Reporting Initiative presents a bold challenge to the conventional precepts of corporate accounting and financial law, and the way in which it will unfold deserves close scrutiny.[78]

ANNEX A: GRI ENVIRONMENTAL PERFORMANCE INDICATORS (GRI GUIDELINES 2002: 49–51)

Environmental Performance Indicators

The environmental dimension of sustainability concerns an organisation's impacts on living and non-living natural systems, including ecosystems, land, air and water. The environmental dimension of sustainability has achieved the highest level of consensus among the three dimensions of sustainability reporting.

It is particularly important to provide environmental performance information in terms of both absolute figures and normalised measures (for example, resource use per unit of output). Both measures reflect important, but distinct, aspects of sustainability. Absolute figures provide a sense of scale or magnitude of the use or impact, which allows the user to consider

[77] Other things being equal. E.g., in examining this claim, one would have to take into account differences in regulatory and social conditions.

[78] Because the GRI Guidelines are relatively new, there have been very few studies which have examined them in an empirical fashion. The studies I have been able to find focus on the question of firms' compliance with the Guidelines' provisions; they do not discuss the influence of adopting the GRI stricter disclosure practices on firms' behaviour. See Hussey *et al.*, n 64 above, and JE Morhardt, S Baird and K Freeman, 'Scoring Corporate Environmental and Sustainability Reports Using GRI 2000, ISO 14031 and Other Criteria' (2002) 9 *Corporate Social Responsibility and Environmental Management* 215. It should also be noted that examining the behavioural effects of the GRI guidelines would involve difficult methodological problems, reflecting, among others, the multiple causal factors which influence firms' behaviour. For a discussion of these difficulties (in the context of a study that explored the effect of voluntary environmental management systems), see Dahlstrom *et al.*, n 71 above.

performance in the context of larger systems. Normalised figures illustrate the organisation's efficiency and support comparison between organisations of different sizes. In general, stakeholders should be able to calculate normalised figures using data from the report profile (for example, net sales) and absolute figures reported in the environmental performance section. However, GRI asks the reporting organisation to provide both normalised and absolute figures.

In reporting on environmental indicators, reporting organisations are also encouraged to keep in mind the principle of sustainability context. With respect to the environmental measures in the report, organisations are encouraged to relate their individual performance to the broader ecological systems within which they operate. For example, organisations could seek to report their pollution output in terms of the ability of the environment (local, regional, or global) to absorb the pollutants.

Core Indicators	Additional Indicators
Materials	
EN1. Total materials use other than water, by type. Provide definitions used for types of materials. Report in tonnes, kilogrammes, are or volume.	
EN2. Percentage of materials used that are wastes (processed or unprocessed) from sources external to the reporting organisation. Refers to both post-consumer recycled material and waste from industrial sources. Report in tonnes, kilogrammes, or volume.	
Energy (4)	
EN3. Direct energy use segmented by primary source. Report on all energy sources used by the reporting organisation for its own operations as well as for the production and delivery of energy products (e.g., electricity or heat) to other organisations. Report in joules.	**EN17. Initiatives to use renewable energy sources and to increase energy efficiency.**
	EN18. Energy consumption footprint (i.e., annualised lifetime energy requirements) of major products. Report in joules.
EN4. Indirect energy use. Report on all energy used to produce and deliver energy products purchased by the reporting organisation (e.g., electricity or heat). Report in joules.	**EN19. Other indirect (upstream/downstream) energy use and implications, such as organisational travel, product lifecycle management, and use of energy-intensive materials.**
Water (4)	
EN5. Total water use.	**EN20. Water sources and related ecosystems/habitats significantly affected by use of water.** Include Ramsar-listed wetlands and the overall contribution to resulting environmental trends.
	EN21. Annual withdrawals of ground and surface water as a percentage of annual renewable quantity of water available from the sources. Breakdown by region.

(Continued)

(Continued)

Core Indicators	Additional Indicators
	EN22. Total recycling and reuse of water. Include wastewater and other used water (e.g., cooling water).
Bio-diversity	
EN6. Location and size of land owned, leased, or managed in bio-diversity-rich habitats. Further guidance on bio-diversity-rich habitats may be found at www.globalreporting.org (forthcoming)	**EN23. Total amount of land owned, leased, or managed for production activities or extractive use.**
	EN24. Amount of impermeable surface as a percentage of land purchased or leased.
EN7. Description of the major impacts on biodiversity associated with activities and/or products and services in terrestrial, freshwater, and marine environments.	**EN25. Impacts of activities and operations on protected and sensitive areas. (e.g., IUCN protected area categories 1–4, world heritage sites, and biosphere reserves).**
	EN26. Changes to natural habitats resulting from activities and operations and percentage of habitat protected or restored. Identify type of habitat affected and its status.
	EN27. Objectives, programmes, and targets for protecting and restoring native ecosystems and species in degraded areas.
	EN28. Number of IUCN Red List species with habitats in areas affected by operations.
	EN29. Business units currently operating or planning operations in or around protected or sensitive areas.
Emissions, Effluents, and Waste	
EN8. Greenhouse gas emissions. (CO_2, CH_4, N_2O, HFCs, PFCs, SF6). Report separate subtotals for each gas in tonnes and in tonnes of CO2 equivalent for the following: — direct emissions from sources owned or controlled by the reporting entity	**EN30. Other relevant indirect greenhouse gas emissions.** (CO_2, CH_4, N_2O, HFCs, PFCs, SF6). Refers to emissions that are a consequence of the activities of the reporting entity, but occur from sources owned or controlled by another entity Report in tonnes of gas and

(Continued)

(Continued)

Core Indicators	Additional Indicators
— indirect emissions from imported electricity heat or steam See WRI-WBCSD Greenhouse Gas Protocol.	tonnes of CO2 equivalent. See WRI-WBCSD Greenhouse Gas Protocol.
EN9. Use and emissions of ozone-depleting substances. Report each figure separately in accordance with Montreal Protocol Annexes A, B, C, and E in tonnes of CFC-11 equivalents (ozone-depleting potential).	**EN31. All production, transport, import, or export of any waste deemed 'hazardous' under the terms of the Basel Convention Annex I, II, III, and VIII.**
EN10. NOx, SOx, and other significant air emissions by type. Include emissions of substances regulated under: — local laws and regulations — Stockholm POPs Convention (Annex A, B, and C)—persistent organic pollutants — Rotterdam Convention on Prior Informed Consent (PIC) — Helsinki, Sofia, and Geneva Protocols to the Convention on Long-Range Trans-boundary Air Pollution	**EN32. Water sources and related ecosystems/habitats significantly affected by discharges of water and runoff.** Include Ramsar-listed wetlands and the overall contribution to resulting environmental trends. See GRI Water Protocol.
EN11. Total amount of waste by type and destination. 'Destination' refers to the method by which waste is treated, including composting, reuse, recycling, recovery, incineration, or landfilling. Explain type of classification method and estimation method.	
EN12. Significant discharges to water by type. See GRI Water Protocol.	
EN13. Significant spills of chemicals, oils and fuels in terms of total number and total volume. Significance is defined in terms of both the size of the spill and impact on the surrounding environment.	
Suppliers	
	EN33. Performance of suppliers relative to environmental components of programmes and procedures described

(Continued)

(Continued)

Core Indicators	Additional Indicators
	in response to Governance Structure and Management Systems section (Section 3.16).
Products and Services	
EN14. Significant environmental impact of principal products and services. Describe and quantify where relevant.	
EN15. Percentage of the weight of products sold that is reclaimable at the end of the products' useful life and percentage that is actually reclaimed. 'Reclaimable' refers to either the recycling or reuse of the product materials or components.	
Compliance	
EN16. Incidents of and fines for noncompliance with all applicable international declarations/conventions/ treaties, and national, sub-national, regional, and local regulations associated with environmental issues. Explain in terms of countries of operation	
Transport	
	EN34. Significant environmental impacts of transportation used for logistical purposes.
Overall	
	EN35. Total environmental expenditures by type. Explain definitions used for types of expenditures.

4. Draft protocols are currently under development for these indicators.

Section IV

Epilogue

18

Constitutionalism in Postnational Constellations: Contrasting Social Regulation in the EU and in the WTO

CHRISTIAN JOERGES*

I. INTRODUCTION: THE CONSTITUTIONALISATION OF GOVERNANCE AND THE SOCIAL EMBEDDEDNESS OF MARKETS

THE INTRODUCTION TO this book by my co-editor E-U Petersmann[1] announces the summarising up of our findings in my concluding chapter. I am taking this commitment seriously, although I have to refrain from the effort to compile and evaluate the 17 preceding chapters both comprehensively and systematically. It would simply not be possible to do justice to the range of their enquiries and the subtleties of their individual viewpoints. I will, instead, start with a brief summary of our common agenda and then present the approach which I am going to develop step by step in the course of this chapter. Within this framework, I will identify a number of core issues which seem particularly well suited to explaining the specifics of my own viewpoints and to illustrate the convergences and divergences among the contributors, which seem to me to be particularly illuminating.

* A first version of the EU part of this chapter was presented in Nov 2003 at the conference on 'Debating the Democratic Legitimacy of the European Union' at the Mannheim Centre for European Social Research. The Colloquium on 'Globalization and its Discontents' at the NYU Law School provided an opportunity to present a new draft with extended scope in Feb 2004. Damian Chalmers (London) was my commentator in Mannheim; Richard Stewart (NYU Law School), Rainer Nickel (Frankfurt aM/Florence) and Francesca Bignami (Durham, NC) commented on the second draft. That second version was presented at the EUI conference in Sept 2004 and published in the *TranState Working Papers Series* of the Collaborative Research Centre 597 Transformations of the State in Bremen; it is available at http://www.sfb597.uni-bremen.de. However, as time passed and I witnessed the intensity of revisions of the original conference contributions, I made use of a famous Bremen saying, which endorses the right to a third try (*Drei Mal ist Bremer Recht*). Special thanks go to Rainer Nickel who accompanied this third revision process patiently and prudently.

[1] Introduction, V.

I.1 The Agenda

As indicated in our preface, this book pursues a threefold agenda: first, it seeks to further the debate on the legitimacy of transnational governance. In this respect, our common assumption is that legitimate governance presupposes a commitment to the rule of law. The ensuing normative challenge—to which all of the contributors who engage in normative queries respond—is how *law* might foster the legitimacy of transnational governance. Our second agenda is interdisciplinarity. This is by now a widely-shared, if popular, demand. We are expected to expose ourselves to trans-disciplinary learning processes, study the analytical frameworks of our academic neighbours, and reflect on both their empirical assumptions and normative aspirations. Each and every contribution to this book documents such efforts—albeit, and, indeed, necessarily, in great variety and never comprehensively. Thirdly, the agenda of transnational governance itself could also have been nominated first, because this phenomenon marks the starting point of all of our enquiries: the book addresses it in three ways:

— Most lawyers seek to determine the specifics of 'governance arrangements', in order to contrast them with the inherited categories through which the law describes, delimits and controls the exercise of public power, and then develop legal frameworks for adequate normative responses to the governance *problématique*—and, at this point, their argument inevitably merges with the constitutionalisation debate.
— Governance is, at the same time, a common topic which all of the political scientists contributing to this book have taken up—as the reflection on the distinctiveness of the disciplinary approaches is part of our interdisciplinary agenda.
— Last, but not least, we seek both to contribute to and to enhance knowledge about important areas of transnational governance through enquiries into the 'underworld' of positive law—the practices of standardisation and norm generation in private and semi-private bodies, the activities of governmental and non-governmental organisations on the one hand—and into the emergence of, and interaction between, ever more sites of transnational juridified governance on the other.

I.2 The Argument in a Nutshell: Three MainTheses

Any type of report on what we have accomplished will inevitably be biased to some degree. In view of the complexity of our project, it may be best to do directly and openly what would not have been so easily visible in a reconstructive account: I will start with a very brief summary of my argument and its premises in the form of three theses. The risk is, of course,

that such a straightforward presentation of my often unconventional theses will provoke more resistance than an inductive, more gradual and nuanced development. But I hope to achieve more transparency for my argument, and I will refer to earlier work in which elements of it were developed at some length.

Thesis 1:

Constitutionalisation via Conflict of Laws 'The constitutionalisation debate should be renewed with the help of conflict-of-laws methodologies.' Long explanations are necessary to define these two terms. However, two remarks must suffice at this stage.

I use the notion of 'constitutionalisation' to denote the need for a law through which decision-making processes can be structured in a way which ensures their legitimacy and the rule of law. This is what constitutions do at national level. Constitutionalisation, however, is a broader concept. It denotes the need to legitimate the production of laws beyond the reach of the institutions of parliamentary democracies, both at national and at international level. It denotes, to take up Frank Mickelman's formula, the need for a 'law of lawmaking'.[2]

'Conflict of laws' is an old discipline which, unfortunately, seems to have lost much of its former prestige, and which the European law community tends to disregard. Conflicts between laws can be observed in all conceivable legal sub-disciplines: private law, administarative law, even constitutional law. This is why I prefer to talk of a methodology rather than a legal field. My claim is that the conflict of laws scholarship and practices have developed methodologies for the resolution of conflicts which have the potential to provide appropriate legal approaches, not only to multi-jurisdictional but also to multilevel constellations.[3] Not only can conflict-of-law methodologies be used to mitigate between conflicting

[2] F Michelman, *Brennnan and Democracy* (Princeton, NJ: Princeton UP, 1999), at 48; as a close equivalent in German jurisprudence there is the term *Rechtfertigungs-Recht* or *Rechtsverfassungsrecht* coined by R Wiethölter: see his 'Just-ifications of a Law of Society' in O Perez and G Teubner, *Paradoxes and Inconsistencies in the Law* (Oxford: Hart Publishing, 2005), at 65–77, also available at http://www.jura.uni-frankfurt.de/ifawz1/teubner/RW.html. My concept of 'constitutionalism' at the European and international level can be characterised as 'horizontal' because I seek to base legal commitments on a conflict-of-laws approach (see the next n).

[3] See the Excursus in Section II.2 below and C Joerges, 'Rethinking European Law's Supremacy: A Plea for a Supranational Conflict of Laws', with comments by D Chalmers, R Nickel, F Rödl and R Wai, *EUI Working Paper Law No. 12/2005*, available at http://www.iue.it/LAW/Publications.shtml. For an operationalisation in the Europeanisation of private law, see C Joerges, 'The Challenges of Europeanisation in the Realm of Private Law: A Plea for a New Legal Discipline' (2005) 24 *Duke Journal of Comparative and International Law* 149; for an operationalisation in the field of European governance, see M Everson and C Joerges, 'Re-conceptualising Europeanisation as a Public Law of Collisions: Comitology, Agencies and an Interactive Public Adjudication' in A Türck and H Hofmann (eds), *EU Administrative Governance* (Cheltenham: Edward Edgar, 2006), at 512–40

policies and the interests of different legal systems ('horizontal conflicts'), they are also adaptable to the conflict patterns of multilevel systems of governance (to 'vertical' conflicts and 'diagonal' conflict constellations).

What is 'constitutional' about such an exercise? All 'supranational constitutionalism' has to 'juridify' a paradox. It has to create a type of unity which maintains diversity. Conflict of laws is committed to precisely this objective. '*Unitas in pluralitate*', the motto of the European Union according to Article IV–1 of the Draft Constitutional Treaty, can be read as a constitutional conflict-of-laws paradigm. 'The international law order strives to achieve the same objective, unity in diversity', my co-editor has objected. This may well be true. My argument, however, in contrast to the assertions of international law, does not rest upon an assumption of legal sovereignty, but, instead, asserts that there is a systematic 'democracy failure' on the part of nation-states, which conflict-of-laws is to cure: this deficit results from their inability to integrate all those affected by their policies into their domestic will formation processes.[4] In my account of the European supranationalism, the supremacy of European law simply reflects the 'mutual recognition' of these deficits, and does not need any further justification. This is the normative core of European (deliberative) supranationalism.[5]

The ensuing questions are: can WTO law be conceptualised in an equivalent way as a modern type of conflict of laws? Could such a conceptualisation be the key to 'constitutionalisation'?

Thesis 2:

The Irreversibility of the Turn to Governance in Post-national Constellations Two terms in this thesis—'governance' and 'post-national constellations' are not genuine legal concepts. The term 'post-national constellation' was coined by Jürgen Habermas back in 1998.[6] Once translated,[7] it became popular among political theorists and political scientists. However, it underwent significant modifications. While Habermas had

[4] To put it slightly differently, the interdependence of the EU Member States has become so intense that none of them can take decisions of any political weight without causing 'extra-territorial' effects for its neighbours. See Joerges, 'Rethinking', n 3 above and Sects II.1 and III.1 below. The formula used here may sound drastic, but the phenomenon which it designates has been identified in different disciplines and perspectives in very similar ways: see, e.g., A von Bogdandy, 'Legitimacy of International Economic Governance: Approaches to WTO Law and Prospects of its Proceduralization' in S Griller (ed), *International Economic Governance and Non-economic Concerns* (Vienna: Springer, 2005), at 103, 126 *eq*.ff.

[5] As I have tried to explain so often, e.g., in C Joerges, '"Deliberative Supranationalism"—A Defence', *European Integration online Papers (EIoP) 5* (2001) No. 8, available at http://eiop.or.at/eiop/texte/2001–008a.htm.

[6] J Habermas, 'Die postnationale Konstellation und die Zukunft der Demokratuie' in J Habermas, *Die postnationale Konstellation. Politische Essays* (Frankfurt aM: Suhrkamp, 1998), at 91.

[7] J Habermas, 'The Postnational Constellation and the Future of Democracy' in J Habermas, *The Postnational Constellation: Political Essays*, (Cambridge Mass: MIT Press, 2001), at 58.

underlined the normative challenges for *democratic* governance, political scientists sought to operationalise the concept so that it could be analysed and substantiated in more empirical terms.[8] The term 'governance' is similarly two-dimensional. Its European career was nurtured by the hope that new governance practices would strengthen the EU's problem-solving potential.[9] However, it is only recently that lawyers have started to adopt the term—and to analyse its legal problems.[10] We will reproduce this evolution and take the following factual observation as a starting point: governance arrangements respond to an irrefutable need of legal systems, namely, the necessity to integrate non-legal expertise—the knowledge and the management capacity of non-governmental actors—in the management of public affairs. Transnational governance arrangements have the *additional task* of compensating for the lack of a political hierarchy which would be normatively legitimated and factually capable of delivering and implementing binding responses to problems which require multi-jurisdictional answers and/or co-ordination between different levels of governance. This development, we submit, is irreversible. But we have both to understand and to face its normative challenges.

Thesis 3:

A Proceduralisation of the Rule of Law within Constitutional Democracies and in Post-national Constellations Within national legal systems the turn to governance is an old phenomenon to which the law has sought and found primarily procedural responses. However, the law of post-national constellations has to cope with two additional difficulties. Whereas the supervision of governance practices within constitutional states can build upon both commonly shared principles and the residuary power of a legitimated legislator, the law of transnational governance must compensate for its lack of coherence and political hierarchy through reflexivity. The procedural criteria for the supervision of governance arrangements are not given, but must be generated, in deliberative interactions. Similarly, the residual powers of democratic institutions to refuse the recognition of non-governmental practices must be co-ordinated if it is to achieve mutually acceptable responses.

[8] Michael Zürn in an exceptionally transparent summary, underlines three dimension of the postnational constellation: (1) the nation-state is no longer autonomous in *determining political priorities* but needs to co-ordinate its policies within international institutions; (2) national political actors have to *strive for recognition* not just by their national constituencies; their practices are increasingly exposed to evaluation at international level; (3) the nation-state retains significant resources which are indispensable for an implementation of internationally agreed upon policies: M Zürn, 'The State in the Post-National Constellation—Societal Denationalization and Multi-Level Governance', *ARENA Working Paper, 35/1999* (Oslo).

[9] See Sect IV.2 below.

[10] See, in particular, GF Schuppert, 'Governance im Spiegel der Wissenschaftsdisziplin', in GF Schuppert (ed), *Governance-Forschung. Vergewisserung über Stand und Entwicklungslinien* (Baden-Baden: Nomos, 2005), at 371.

Our discussion below[11] will again rephrase this legal *problématique* with the help of conflict of laws categories: it is submitted that the recognition of normative orders not generated by the regular constitutional machinery can usefully be discussed with the help of the criteria that conflict-of-laws has developed when confronted with foreign judgments or private arbitration. The problem of their co-ordination among different jurisdictions is but a variant of the problem conflict of laws has to address.[12]

It is a merit, rather than a failure, of a conflict-of-laws approach that this perspective makes us aware of the limited strength of law. Where legal responses must be generated through deliberative processes between semi-autonomous entities, there is no guarantee that such responses will be found and respected. But, such failures need not throw us back into a state of nature: where the law ends, there is still room for diplomacy and *comitas*.[13]

I.3 The Embeddedness of Markets: An Additional Unsubstantiated Fourth Thesis

Our three sets of theses may appear somewhat cryptic at first sight, but they will be substantiated and explained in the following sections. Another bundle of premises, however, will not be elaborated, but will simply be made explicit in order to illuminate the background on which our argument is built. These background premises concern the explanation and interpretation of the phenomena which triggered our whole project, namely, the observation that the growth of world trade does not occur in an institutional and normative vacuum, but goes hand in hand with the reconfigurations of national and international institutions, of the relations between political systems and markets, and of the organisation of the economy. Many contributors address this issue, but it is, perhaps, Damian Chalmers, who does so in the most articulate way.[14]

He distinguishes three tales about the erosion of national government and the emergence of transnational governance. The tales are about the patterns which dominate these transformations, about their reasons and institutional dynamics. One such narrative underlines the 'fugitive power' which economic actors derive from the openness of borders. The second tale is about de-regulation fostered by transnational institutions such as the EU and the WTO in the interest of freedom of trade. The third tale is about

[11] See, in particular, Sect IV.1

[12] See C Joerges and M Everson, 'The European Turn to Governance and Unanswered Questions of Legitimacy' in C Joerges, B Stråth & P Wagner (eds), *The Economy as Polity: The Political Constitution of Contemporary Capitalism* (London: UCL Press, 2005), at 159.

[13] On this difficult category which we situate in an undefined space between real law and politics, see Sect III.2 and IV.3 (b) below.

[14] Chap 12, at II.

the interdependence of markets and institutions, of privately organised rule-making acquiring recognition by national and international governmental actors and public law. It attributes the emergence of transnational governance not only to functional necessities *but also* to the responses that these necessities provoke.

This is a useful heuristic, even though neither Chalmers himself,[15] nor any of the other contributors would fully identify with any of them.[16] The three tales point to the great variety of sources and processes that contribute to the legal embeddedness of international trade. Precisely because of this variety and the partial plausibility of each and every tale, it seems both indispensable and promising, in a conceptualisation of transnational governance, to provide for diversity not only of the legitimate authorities (states, the EU, international organisations), but also of public and private law generation.

As outlined above, the conflict-of-laws approach deserves recognition because of its potential to resolve the *unitas in pluralitate* paradox. However, this is only one of the challenges that we have to address. The second one, upon which our project is focused, is the 'turn to governance', i.e., the realm of non-governmental ordering and 'sub-legal' norm generation which is of such obvious importance, especially in transnational arenas. Despite its importance, the factual dimensions of this realm are still insufficiently explored and their normative dimensions under-theorised.[17] The state of the legal art is, in this respect, so much in flux that any comprehensive account would require a project of considerable proportions. However, I must refrain from such an effort and restrict myself to very brief hints as to the background of my own views. They have much in common with Damian Chalmers' third story about the norm generation and ordering outside the public sphere, but they should, nevertheless, not be read as suggesting that the validity of transnational governance could be ensured without the help of public law.[18] Instead, it rests on the assumption that the separation of the public sphere from the private sphere is erroneous, and that, instead, we have to bring Jürgen Habermas' messages on the co-originality of private autonomy and political participation[19] into the

[15] See Chap 12, at II.3.

[16] Not even Harm Schepel and Oren Perez, who are cited in Chalmers' n 7 as supporters of the third tale because they could argue that their classification does not do justice to the subtleties of their notions of legal pluralism. J Pauwelyn's diagnosis of a 'global governance deficit' (Chap 14, at II.1) has elements of the second and of the third tale.

[17] Sects II and III of this book are dedicated to pertinent phenomena; most of the other contributions discusses pertinent theoretical and legal issues.

[18] See C Möllers, 'Transnational Governance without a Public Law' in C Joerges, I-J Sand and G Teubner (eds), *Transnational Governance and Constitutionalisn* (Oxford: Hart Publishing, 2004), at 337.

[19] J Habermas, *Between Facts and Norms* (Cambridge, Mass: MIT Press, 1999), at 84, and his later restatement: J Habermas, 'On the Internal Relation between the Rule of Law and Democracy' (1995) 3 *European Journal of Philosophy* 1.

European and the international arena. Habermas' argument, which seeks to overcome the impasses of the public/private distinction, is not just a normative postulate, but is, instead, based on sociological assumptions. It is precisely this blend of facticity and validity which, on the one hand, constitutes its strength, and, on the other, constitutes the necessity and difficulty to update it continuously.[20] However, this cannot be done in passing.[21] Suffice it to note that such a project can be backed by various traditions of political economy,[22] *Wirtschaftssoziologie (sociology of the economy)*,[23] political sociology[24] (including strands of systems theory[25]), and the debates on the risk and the knowledge society.[26] Similar efforts are under way both in international relations theory[27] and in the broad interdisciplinary debate on transnational governance.[28]

[20] For a very thoughtful and critical effort in that direction, see JP McCormick, 'Habermas on Constitutional-Social Democracy in the EU: Can the *Sozialstaat* Survive the Structural Transformation to the *Sektoralstaat*?'; typescript, Chicago, 2005 (on file with the author).

[21] The entire *Collaborative Research Centre* on 'Transformations of the State' at the University of Bremen (http://www.staatlichkeit.uni-bremen.de.), will in the second stage of its research activities focus on these explanations and the dynamics of transnational governance: see B Zangl, 'Der Wandel von Staatlichkeit—Antriebskräfte und Weichensteller', typescript, Bremen, Nov 2005 (on file with the author).

[22] F Block, 'Towards a New Understanding of Economic Modernity' in Joerges, Stråth and Wagner (eds), n 12 above, at 16 (Block develops this argument systematically in the context of his reconstruction of Karl Polanyi's political economy).

[23] J Beckert, *Grenzen des Marktes. Die sozialen Grundlagen wirtschaftlicher Existenz* (Frankfurt aM: Campus). ('Beyond the Market. The Social Foundations of Economic Efficiency.' Princeton: Princeton UP 2002); more recently, see J Beckert, 'The Moral Embeddedness of Markets', MPIfG Discussion Paper 05/6, Cologne, 2005, available at http://www.mpi-fg-koeln.mpg.de/pu/dp03–05_de.html.

[24] N Fligstein, 'Markets as Politics: A Politico-Cultural Approach to Market Institutions' (1996) 61 *American Sociological Review* 656.

[25] H Willke, 'Dekonstruktion der Utopie' in H Wilke, *Atopia. Studien zur atopischen Gesellschaft* (Frankfurt aM: Suhrkamp, 2001), at 7 (his argument concerns the utopia of the pure market).

[26] N Stehr, *Wissenspolitik. Die Überwachung des Wissens* (Frankfurt aM: Suhrkamp, 2003), at 222.

[27] In this volume, see, most explicitly, Patrizia Nanz (Chap 2). But Habermas' impact is also visible in other contributions, e.g., in Robert Wai's suggestions on the complementary role of private international law and private law litigation in transnational governance (Chap 8, at I.4). It is tempting to suggest that in particular the co-originality thesis could lend support even to E.-U. Petersmann's (see Chap at 1, I and *passim*) contested views on the role of human rights in international trade law:(see most recently DZ Cass, *The Constitutionalization of the WTO. Legitimacy, Democracy, and Community in the International Trading System* (Oxford: OUP, 2005). Her assertion and critique that Petersmann's integration of human rights into international trade law would subject social rights to economic liberties (ibid., at 157) is a restatement of the public/private dichotomy which Habermas (who is cited at the same page in n 54) seeks to overcome. The open question is, of course, whether Petersmann can feel comfortable with Habermas' insistence on the importance of political processes in determining the contents of rights (including human rights).

[28] See, e.g., M Zürn, 'Democratic Governance Beyond the Nation-State: The EU and Other International Institutions', (2000) 6 *European Journal of International Relations* 183. The difficulty for lawyers with most of the international relations studies on law is that the latter tend to restrict themselves to the facticity of law and to conceptualize 'legalisation' ('*Verregelung*') as an empirical phenomenon which they seek to describe and explain, whereas the

Law cannot remain silent until the debates produce some consolidated knowledge and/or consensus. How can it deal with such uncertainties? Does it simply have to suspend its inherited normative role and refuse to pose the question whether the norms generated in transnational governance arrangements 'deserve recognition'?[29] It is submitted that a conflict-of-laws approach has the potential to frame this question adequately. The question whether another order 'deserves recognition' is a core issue of this discipline. Undoubtedly, in traditional private international law an examination of the merits of foreign law was an exceptional matter to be undertaken only when the forum state's *ordre public* seemed at stake. However, this permissive stance rested on the assumption that the 'foreign' law stemmed from an autonomous statal jurisdiction.[30] The recognition of non-state law is another matter. This observation is the basis of my fourth thesis.

Thesis 4:

Legal systems must not treat non-state law as a given. In their exercise of control over non-state law, states and their courts or other authorised bodies must, however, remain aware of the reasons for the inclusion of non-governmental actors into transnational governance scheme. Their control can hence be only procedural—but, in principle, this is also true with constitutional democracies.[31]

I.3 Structuring of the Argument

Our starting point of the following discussion is the phenomenon which Damian Chalmers' three tales[32] seek to interpret: it is the phenomenon

law's claims to validity remains external to such scientific endeavours. See, on this schism, J Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) 29 *Political Theory* 766; on the difficulties of interdisciplinarity see C Joerges, 'Compliance Research in Legal Perspectives' M Zürn and C Joerges (eds), *Law and Governance in Postnational Europe. Compliance Beyond the Nation-State* (Cambridge: CUP 2005), 218, at 225 ff. The schism Habermas has complained about is still important but the frontlines are getting blurred. See, for a sensitive summary on de-formalisation and de-juridification tendencies which tend to go hand in hand with the turn to governance, E Grande and L W Pauly (eds), *Complex Sovereignty: Reconstituting Political Authority in the Twenty-first Century* (Toronto: University of Toronto Press, 2005), at 3. The dark side of this at first glance encouraging message is that the potential of the rule of law to discipline governance practices is becoming precarious: see the dramatising contribution of MT Greven, 'The Informalization of Transnational Governance: A Threat to Democratic Government', to the Grande and Pauly volume, above at 261 and Sect IV below.

[29] J Habermas, 'Remarks on Legitimation through Human Rights' in: Hebermas, n 7 above, 113, at 113.

[30] See the Excursus on private international law in Sect II.1 below.

[31] See Sect IV.1 below. The parallel to the recognition of foreign law and foreign judgments seems obvious but is rarely drawn. But see E Schanze, 'International Standards—Functions and Links to Law', in P Nobel (ed.), *International Standards and the Law* (Berne: Stämpfli, 2005), at 84, especially. at 90–1.

[32] See Sect I.2 (Thesis 4) above.

which has puzzled the debate on the implementation of the legendary programme on 'Completion of the Internal Market' which the European Commission had launched in the mid-1980s.[33] What proponents and critics observed contradicted their expectations completely: a new regulatory activism; more, rather than less, 'juridification'[34]—intense re-regulation, new forms of co-operation among governmental and non-governmental actors, and the promotion of a range of participation entitlements, such as the opening of policy-making processes to civil society. Within Europe, free trade and market-building objectives were accomplished in conjunction with the establishment of complex regulatory machinery, especially in 'social regulation', such as the protection of health, safety and environmental interests.[35] Europeanisation has led to the erosion of the regulatory powers of the democratic, constitutional, interventionist state, and of its capability to weigh the costs and benefits of opening the national economy

[33] European Commission, *White Paper to the European Council on Completion of the Internal Market*, COM(85)310 final, 14 June 1985.

[34] This notion will be used quite frequently throughout this chapter, whereas the more widely used term 'legalisation' will be avoided. The concepts have different connotations. The term 'juridification' was introduced into the parlance of law and society studies as a translation of the notion of '*Verrechtlichung*', first used in the Weimar Republic by labour lawyers from the left in their critique of the use of law to domesticate class conflicts: see G Teubner, 'Juridification—Concepts, Aspects, Limits, Solutions' in G Teubner (ed), *Juridification of Social Spheres* (Berlin–New York: de Gruyter, 1987), 3, at 9. It hence carries with it a perception of the ambivalent effects of the use of law, which were characterised first as depoliticisation and later, e.g., (and most famously) as a destruction of social relations, a 'colonialisation of the life-world' by Habermas: J Habermas, 'Law as Medium and Law as Institution', in G Teubner (ed.), *Dilemmas of Law in the Welfare State* (Berlin: de Gruyter, 1985), at 203; see the recent thorough reconstruction by C Humrich, 'Legalisation and the Evolution of Law in International Society: A Habermasian Approach', Paper presented at the 5th Pan-European International Relations Conference in The Hague, available at www.sgir.org/conference2004. 'Legalisation' analysis, as presented by KW Abbott *et al*., 'The Concept of Legalization' (2000) 54 *International Organization* 401, is not linked to these traditions and their critical normative agenda. Pertinent studies explore parallels and differences between the subjection of political process to rule of law requirements within states and the causes and consequences of rule-bound governance beyond the nations states: see B Zangl and M Zürn, 'Make Law, Not War: Internationale und transnationale Verrechtlichung als Baustein für Global Governance' in M Zürn and B Zangl, (eds), *Verrechtlichung—Baustein für Global Governance?* (Bonn: Dietz, 2005); M Zürn, 'Introduction—Law and Compliance at Different Levels' in M Zürn and C Joerges (eds), *Law and Governance in Postnational Europe: Compliance Beyond the Nation-State* (Cambridge: CUP, 2005). A Helmedach and B Zangl, Chap 3 above, avoid both terms; they talk instead about the 'rule of law', and, in particular, about 'judicialisation'. Their interest is an exploration of the 'facticity' of law and judging, whereas the lawyers cannot avoid discussing the normative and institutional dimensions of these phenomena.

[35] We are following the terminology used by G Majone, 'Regulating Europe: Problems and Perspectives',(1989) 3 *Jahrbuch zur Staats- und Verwaltungswissenschaft* 159, and P Selznick, 'Focusing Organizational Research on Regulation' in RG Noll (ed), *Regulatory Policy and the Social Sciences* (Berkeley and Los Angeles, Cal: University of California Press, 1985), at 363–367. This notion of 'social regulation' covers the fields taken up in Sect II (Chaps 9–14) and Sect III Chaps 15–17) of this book. It does not include social protection in its entirety and in particular redistributive policies. The extension of juridification to issues of social protection (especially through labour standards) will be a core issue of the next phase of the project on 'social regulation and world trade' mentioned in the Preface.

autonomously. But Europeanisation has also led to the establishment of sophisticated transnational governance arrangements which nation-states could not have accomplished on their own.

This is a European experience. Are there lessons to be learnt from this experience for the organisation of free trade at international level? The premises outlined at the end of the preceding section[36] suggest precisely this and lead us to ask to what degree we have to attribute the 'regulatory re-embedding' of free trade in Europe to its specific institutional features and interest configurations. To what degree should these developments simply be understood as responses to internationally salient concerns? To what degree has workable social regulation become a precondition for the functioning of international markets? If free international trade can be realised only in conjunction with the establishment of transnational governance arrangements, how can the 'reasonableness' of transnational governance be assessed and ensured? Does the nation state have to accept the loss of regulatory autonomy because this is what the functioning of international markets requires? To take up Jürgen Habermas' formula again, do the emerging transnational governance arrangements 'deserve recognition'?[37]

Our exploration of this bundle of questions will be developed step by step: we will first summarise the European experience (Section II), and then turn to the WTO level (Section III) before addressing the theoretical and normative issues systematically (Section IV).

II. THE EUROPEAN EXPERIENCE: FREE INTRA-COMMUNITY TRADE AS INSTIGATOR OF REGULATORY INNOVATION

The re-regulatory and modernising side-effects of the 'completion' of the European Internal Market remain puzzling, but are so well documented and uncontested that we can refrain from reporting them in any detail. What we will, instead, focus on are the *governance patterns* which Europe has developed in its search for integration strategies that ensure the compatibility of the logic of market-building with the market-correcting logic of social regulation. If we understand these patterns as responses to the political weight that regulatory concerns for the protection of health, safety and the environment have gained, we will have to be prepared for functionally equivalent developments at international level.

[36] Sect I.2. (Thesis 4).

[37] J Habermas, 'Remarks on Legitimation through Human Rights' in Habermas, n 29 above, 113, at 113.

II.1 The *Cassis* Jurisprudence under Article 28 EC Treaty: A Conflict-of-Laws Approach

The most important of Europe's institutional innovations was hardly mentioned in the debates on the so-called 'new modes of governance' for a long time.[38] Back in 1979, the *Cassis de Dijon* case[39] saw the European Court of Justice (ECJ) declare that a German ban on the marketing of a French liqueur—the alcohol content of which was lower than that of its German counterpart—was incompatible with the principle of the free movement of goods (Article 30 EC Treaty, now 28 EC). The ECJ's response to the conflicts between French and German policies was as convincing as it was trifling: the confusion of German consumers could be avoided, and a reasonable degree of protection against erroneous decisions by German consumers could be achieved by disclosing the low alcohol content of the French liqueur. With this observation, the Court defined the constitutional competence to review the legitimacy of national legislation which presented a non-tariff barrier to free intra-Community trade in a new way. This move was of principled theoretical importance and had far-reaching practical impact.[40]

In a comparison of European and international responses to non-tariff barriers to trade, it is important to underline that the ECJ's celebrated argument can be translated into the language of a much older discipline, namely, that of conflict of laws.[41] What the ECJ did, in substance, was to identify a 'meta-norm' which both France and Germany, as parties to the conflict, could accept. Since both countries were committed to the free trade objective, they were also prepared to accept that restrictions of free trade must be based on credible regulatory concerns.

How can we explain the readiness to respect foreign regulatory concerns and to seek a reasonable compromise between the exporting 'home state' (France) and the importing 'host state' (Germany) on which the conflict-of-laws approach advocated here rests? This question has empirical, functionalist and normative dimensions. A blatant disregard of regulatory concerns, and the insistence on the abolition of non-tariff obstacles to free trade, in conflict-of-laws terms: the refusal to recognise and apply foreign public law is apparently no longer an option which is open to the proponents of free trade. It has hence become 'reasonable' to establish independent judicial bodies and entrust them with the task of identifying the rules

[38] A revival seems under way in both disciplines as the announcement of two special issues on 'mutual recognition' (of the *European Law Journal*, guest editor: Alexander Somek, and of the *Journal of European Public Policy,* guest editor: Susanne K Schmidt) indicate.

[39] Case 120/78, *Rewe-Handelsgesellschaft Nord GmbH v Bundesmonopolverwaltung fürBranntwein* [1979] ECR 649.

[40] See, e.g., M Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Oxford: Hart Publishing, 1997), at 150 ff., and JHH Weiler, *The Constitution of Europe*, (Cambridge: CUP, 1999), at 221 ff.

[41] Joerges *et al*., n 3 above.

and principles under which the free trade objective and respect for legitimate regulatory concerns become compatible. The European experience is, indeed, instructive. In particular, the case law on Article 28 has again and again documented that it is possible to distinguish between legitimate and illegitimate regulatory concerns, and that rules and principles which mitigate between the autonomy of Member States, on the one hand, and Community discipline on the other, can be found.[42]

II.2 Excursus: The Legacy of Conflict of Laws

Why this plea for a conflict-of-laws revival? The plausibility of this suggestion presupposes some rudimentary understanding. The modern legal history of conflict of laws and its methodology is part of the political history of the sovereign nation-state, and the conceptualisation of international relations by the various legal disciplines is based on the same paradigm as traditional theories of international relations. In a very brief account,[43] traditional (public) international law (*ius gentium*) was confined to an ordering of inter-*state* relations. National public law—in particular, administrative law—was conceptualised as an emanation of the sovereign. A truly 'international' public law was hence inconceivable. 'International' public law instead delineated the sphere of application of national provisions 'one-sidedly', because, in the heyday of legal positivism any subjection to the commands of the law of another sovereign seemed inconceivable.[44]

By contrast, private international law in the von Savigny tradition was more universalistic in its orientations. Its universalism was based upon an understanding of private law as the organiser of strictly private relations in a, by definition, apolitical (civil) society, *i.e.*, *Gesellschaft*. The private law orders of civilised nations could be treated as equivalent, and the application of foreign law was not perceived as a threat to the sovereignty of the *forum* state. This type of universalism is fully compatible with the refusal to support foreign regulatory objectives. Such 'political' dimensions are

[42] The legal literature fills libraries. For a particularly illuminating political science analysis, see FW Scharpf, 'Community and Autonomy: Multi-level Policy Making in the European Union' (1994) 1/2 *Journal of European Public Policy* 219.

[43] As will become apparent, my narrative is more American than German; it should be read together with Robert Wai's Chap 8, especially. at I.3.c.

[44] See K Vogel, *Der räumliche Anwendungsbereich der Verwaltungsrechtsnorm* (Frankfurt aM: Metzner, 1965), at 176; for alternative traditions, see C Tietje, *Internationalisiertes Verwaltungshandeln* (Berlin: Duncker & Humblot, 2001). See, also, C Joerges, 'Vorüberlegungen zu einer Theorie des Internationalen Wirtschaftsrechts' (1979) 43 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 6, at 8 ff; and for a surprisingly similar recent reconstruction, see Humrich, n 34 above Humrich restricts his analysis to 'international law in the narrow sense of interstate law' (at 3). In this respect, international law and international relations scholars tend to share the same benign neglect of international economic law (*Wirtschaftskollisionsrecht*) which accompanied the transformation of the liberal to the interventionist state. See, also, Sect IV.1 below.

beyond private law. Friedrich Carl von Savigny, Germany's *maître penseur* of all time, knew, of course, about public law and the public order. But to incorporate what we now call regulatory or political objectives into the legal order was about realising non-legal (*außerrechtliche*) values, and thus was stepping outside the law. If private international law were to engage in such activities, it would, in his understanding, cease to be law at all.[45] These traditional dichotomies of private law and public (including administrative) law are definitely outdated. The disciplines of international private, economic and administrative law are all aware of the regulatory dimensions of modern legal systems and take them into account in the choice-of-law process. The difficulty lies in going beyond 'unilateral' or 'one-sided' definitions of the international sphere of the application of domestic law (the *lex fori*) and conceptualising co-operative legal responses for all the jurisdictions concerned. This hesitancy is often expressed as a refusal to obey the commands of a foreign sovereign, but it can also be based on good 'constitutional' reasons, namely, on objections to the legitimacy of validity claims of law that are not generated in democratic processes, or that are irreconcilable with the principles and rules to which the forum state has declared is absolute allegiance. Furthermore, where courts are expected to handle transnational matters and/or to mediate between autonomous state orders, they seem to move beyond their constitutionally legitimated functions. Thus, a 'judicialisation' of international conflicts is a challenge to legal theory[46]—an aspect which some political scientists have integrated in their research design.[47]

[45] J Israël, *European Cross-Border Insolvency Regulation* (Antwerp & Oxford: Intersentia, 2004), at 102.

[46] Nobody has ever pointed this out more provocatively and stringently than Brainerd Currie in his search for a new choice-of-law methodology. Currie's views were—since the time of their presentation in the late 1950s and early 1960s—perceived as a break with the traditions of American conflicts law, let alone continental private international law, that was nothing less than revolutionary. Laws, statutes and even common law rules, Currie argued, should be read as pursuing some policy. His real assault on the citadels of private international law, however, was the implications of this realist insights for intrastate settings: the application and implementation of policy-guided laws, he submitted, will often be backed by the 'interests' of that state (Currie's unfortunate term: 'governmental interests') which courts must not disregard: B Currie, 'Notes on Methods and Objectives in the Conflict of Law' (first published 1959) in B Currie *Selected Essays on the Conflict of Laws* (Durham, NC: Duke UP, 1963), at 177–187 and B Currie, 'The Constitution and the Choice of Law: Governmental Interests and the Judicial Function' (first published 1958), in ibid, at 188. It is not compatible with the judicial function in constitutional democracies, Currie concluded, that courts balance competing state interests. To rephrase these objections in more contemporary terms, the courts of national states are neither legitimated nor well equipped to address the challenges of transnational governance. Such theses may sound provocative, but are to be taken seriously (see Sect III.3 below). For a contemporary reading of Currie's work and a constructive critique of his parochialism, see PS Berman 'Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmntal interests in a Global Era' (2005) 153 *Pennsylvania Law Review* 1819–1882 at 1845 ff.

[47] See A Stone Sweet, 'The New GATT: Dispute Resolution and the Judicialization of the Trade Regime' in ML Volcansek (ed), *Law Above Nations: Supranational Courts and the Legalization of Politics* (Gainesville, Flo: Florida UP, 1997), at 118.

Once one has become aware of these difficulties, the virtues of the conflict-of-laws alternative to orthodox 'substantive' supranationalism become apparent. The search for a conflict norm can be understood as a 'proceduralisation'[48] of the conflict between competing validity claims, as a search for a meta-norm to which parties can commit themselves in a search for a solution to their conflict without betraying the loyalty to their own law. To take up the trivial *Cassis* case again, France does not need to adapt the alcohol content of its liqueur to German legal requirements, while Germany can continue to protect the expectations of its consumers. Both jurisdictions can live with a consumer information requirement. However, solutions of this kind are not always as unproblematical and soft as the *Cassis* case was. To put all this slightly differently, in a conflict-of-laws perspective, it becomes apparent that the Member States are not requested to replace their own law by some supranational substantive regime, but to accept the implications of their commitments.

Damian Chalmers[49] has commented critically on these suggestions. To cite a crucial objection which he has framed as a as an empirical observation:

> The case [*Cassis*] was, after all, not between the French producers of Cassis de Dijon and the German authorities. The parties to the dispute were exclusively German. It was between *Rewe*, a German distributor, and the German regulatory authorities. It was not only the parties to the dispute that were domestic, the centre of gravity of the dispute was also domestic. *Cassis de Dijon* is not a widely sold drink. Instead, it was used as the touch paper to resolve a wider redistributive question between German distributors and German producers.

It would certainly be naïve, at best, to close one's eyes to such implications. It is also true that interested actors are trying to instrumentalise European law continuously. If the law were to rubber-stamp such practices, my conflict of laws approach and the 'deliberative' supranationalism that it seeks to promote would undoubtedly collapse. The in my view decisive difference is that the policies at stake have been endorsed by legitimated legislators and that their adaptation as Community requirements is supervised by a judicial body entrusted with (EU-constitutional) review powers. The parties to the *Cassis* proceedings may have been after a 'Faustian Pact' with DG III: however, the ECJ's reasoning remains correct and unaffected by such motives—and the conflict-of-laws reading of *Cassis* remains a sound choice.[50]

[48] On this term, see Sect IV.1 below.

[49] D Chalmers, 'Deliberative Supranationalism and the Reterritorialization of Authority' in Joerges, n 3 above, 31, at 37.

[50] My conflict of laws interpretation is—with some reservations—endorsed by R Wai (Chap 8, at II.2); his reservations concern 'hard cases' at international level, but I do not think that my reading (III.2 below) differs substantially from his. The notion of a Faustian Pact was coined by G Peters and J Pierre, 'Multi-level Governance and Democracy: A Faustian Bargain?' in I Bache and M Flinders, *Multi-level Governance* (Oxford: OUP, 2004), at 79.

II.3 The New Approach to Technical Harmonisation and Standards: 'Private Transnationalism' and its Public Supervision

The 'completion' of the internal market could not be accomplished through mutual recognition. More positive and more comprehensive regulatory innovations were needed. It is these innovatives that mark the 'turn to governance'. They were realised long before the invention of that notion.

However, most important of all was 'the new approach to harmonisation and standards'.[51] In its efforts to build a common market, the EC found itself in a profound dilemma: market integration depended upon the 'positive' harmonisation of countless regulatory provisions. Harmonisation was difficult to achieve even after the old unanimity rule of Article 100 EC Treaty was replaced by qualified majority voting in Article 100a EC Treaty as introduced by the Single European Act of 1987. Similarly, the implementation of new duties to recognise 'foreign' legislation which the *Cassis de Dijon* decision of 1979 had arguably imposed, posed complex problems. Somewhat paradoxically, self-regulation, a technique very widely used in Germany in particular, was by no means easier to live with. Voluntary product standards were 'private' obstacles to trade, which the Community legislature could not overcome by legislative fiat. How can we, i.e., the EU, resolve this *impasse*?

The new approach achieved precisely this through a bundle of interrelated measures: European legislation was confined to laying down 'essential safety requirements', whereas the task of detailing the general requirements was delegated to the experts of European and national standardisation organisations. The involvement of non-governmental actors involved a *de facto* 'delegation' of law-making powers, which could not be openly admitted. Harm Schepel[52] cites, with a somewhat ironic undertone, a leading representative of the standardisation community, stating that the new approach 'makes it possible to distinguish better between those aspects of Community harmonisation activities which fall within the province of the law, and those which fall within the province of technology, and to differentiate between matters which fall within the competence of public authorities and those which are the responsibility of manufacturers and importers'.[53]

This language covers and hides the political dimensions of standardisation. This is small wonder, because the advocates of the new approach had

[51] The story of the new approach has often been told; see, e.g., J Falke and C Joerges, 'Traditional' Harmonisation Policy, European Consumer Protection Programmes and the New Approach, *EUI Working Paper Law 91/14*, available at http://www.iue.it/LAW/WP-Texts/Joerges91/ 1991; and recently and brilliantly, by H. Schepel, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets* (Oxford: Hart Publishing, 2004), at 225.

[52] Ibid, at 65.

[53] F Nicolas, *Common Standards for Enterprises* (Luxembourg: Office of Official Publications, 1995), at 94.

to present their project in legally acceptable clothes. They were perfectly aware of the limited guidance that 'essential safety requirements' can offer in the standardisation process. But they had good reasons to trust in the responsibility of the standardisation process, and the engineers of the approach were happy to see their invention functioning smoothly.[54] Do we have to conclude that 'private transnationalism' had replaced public legislation and administration? That would be too simplistic. The new 'private transnationalism' did not operate in a vacuum. Interaction between the standardisation community, the Commission and national officials remained intense. Product liability law, tort law and competition law retained powerful multifaceted potential of control and supervision, while national and European public authorities retained the means to intervene, if their trust were disappointed.[55] It is in the shadow of the law that 'private transnationalism' flourishes. It is not an autonomous legal order.

II.4 The Comitology System and European Agencies: Governance Without Government for the Internal Market:

Two more European institutional innovations need to be mentioned: the comitology system and European agencies. Both operate at the crossroads of market building and social regulation. Comitology committees, which are composed of administrative practitioners and experts from the Member States, are supposed to support the Commission in the implementation of European legislative programmes; they are also involved in the continuous process of amending the existing legislation, filling legislative gaps and preparing new initiatives. These committees embody the functional and structural tensions which characterise internal market regulation. They hover between 'technical' and 'political' considerations, between the functional needs and the ethical/social criteria which inform European regulation. Their often very fluid composition not only reflects upon the regulatory endeavour to balance the rationalisation of technical criteria against broader political concerns, but also forcefully highlights the schisms that exist among the political interests of those engaged in the process of internal market regulation. Even where they are explicitly established to support and oversee the implementing powers delegated to the Commission, committees are deeply involved in political processes and often resemble 'mini-councils', in that they are the forum in which the balancing of a European

[54] See. H Schepel, n 51 above, at 37 ff, 101 ff, 225 ff; J Falke, 'International Standards for the Elimination of Barriers to Trade—An Analysis of the Agreements and of the Discussion of Standardisation Policy', Report Commissioned by the Commission for Occupational Health and Safety and Standardisation (KAN), (Bremen: ZERP, 2001).

[55] See C Joerges, H Schepel and E Vos,'"Delegation" and the European Polity: The Law's Problems with the Role of Standardisation Organisations in European Legislation', *EUI Working Paper in Law 9* (1999), available at http://www.iue.it/LAW/WP-Texts/law99_9.pdf; Schepel, n 51 above, at 234–256, 309–338 and 347–400.

market-integrationist logic against a Member State's interest—in terms of the substance and the costs of consumer protection and cohesive national economic development—has to be achieved.[56] Their activities can be characterised as 'political administration', an oxymoron, which reflects their hybrid nature.[57]

Independent agencies were the core institutions of the European 'regulatory state' advocated by Giandomenico Majone throughout the 1990s.[58] Majone's suggestions attracted a great deal of attention but were never implemented. Europe has, however, adopted his term and established an impressive number of bodies that are called agencies.[59] What these bodies are, or will become, is indeterminate. Agencies are certainly not self-sufficient bureaucratic entities: this much is uncontested. Charged with the regulation of market entry and exit, or with more general informal, policy-informing and information-gathering duties, these new European entities meet a technical demand for market-corrective and sector-specific regulation. In their public presentation, it is often submitted that their functions are primarily technocratic. This is what they may accomplish best, and such a function seems to be very compatible with their semi-autonomous status, and the expectation that they should also give voice to private market interests. It is equally compatible with the thesis that 'administering' the Internal Market has more to do with the 'neutral' sustenance of individual economic enterprises than with the imposition of (collective) political/social values. Notwithstanding the placement of the new entities under the Commission's institutional umbrella, and the presence of national representatives within their management structures, agencies seem, in the main, to be shielded from explicitly political processes by their founding statutes (Council directives and regulations), permanent staff, organisational independence, varying degrees of budgetary autonomy and direct networking with national administrators. Their autonomy and independence are also limited for a second reason: they must co-operate with a web of national authorities in accomplishing the tasks laid down in European legislation. Because of these relationships, it is virtually impossible to allocate responsibility for policy decisions to one set of civil servants or another.

[56] See, in more detail, C Joerges and E Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Oxford: Hart Publishing, 1999).

[57] C Joerges, '"Good Governance" Through Comitology?' in Joerges and E Vos, n 58 above, at 311.

[58] See, e.g, Majone, 'Regulating Europe: Problems and Perspectives', n 36 above and, 'The Rise of the Regulatory State in Europe' (1994) 17 *West European Politics* 77; but note that Majone's recent work has, without betraying its original theoretical framework, become much more sceptical in its evaluation of the European 'regulatory model', see his *Dilemmas of European Integration. The Ambiguities and Pitfalls of Regulation by Stealth* (Oxford: OUP, 2005), at 143.

[59] E Chiti, 'On European Agencies' in EO Eriksen, C Joerges and J Neyer (eds), *European Governance, Deliberation and the Quest for Democratisation* (Oslo: Arena Report 2/2003), at 271–322.

II.5 First Interim Observation on European Conflicts Law and Governance

The 'completion' of the internal market rested on two legal footings. The first is European primary law with its guarantees of economic freedoms and the insistence on mutual recognition. This legal layer did not simply promote 'negative' integration. It can more adequately be characterised as a search for rules to ensure a balance between market completion and legitimate social regulation.[60]

There is no guarantee, however, that this type of conflict mitigation will always provide comprehensive and satisfactory solutions. The 'embedding' of the internal market often requires what European primary law cannot accomplish, namely, the institutionalisation of a second layer, i.e. of frameworks of 'positive integration'. This is accomplished through secondary law *and* the governance patterns which prepare and implement these legal frameworks.

We postpone the discussion of the legitimacy of these developments and their compatibility with the ideals of the rule of law. We note, however, that our short sketch has revealed a great variety in the modes of European governance. What they have in common can best be defined negatively:[61] they do not fit into our inherited schemes of administrative law and the separation of powers which these models presuppose. Any positive characterisation is more difficult and controversial. This is unavoidably so because our characterisations explicitly or implicitly define how the new governance practices should be juridified and thus determine the conditions under which we are ready to acknowledge that they may 'deserve recognition'.[62]

The pertinent interdisciplinary debate on these issues has, first of all, produced a vast amount of analyses of the functioning of European governance, interest constellations, standards of legitimacy and accountability[63] and then a steadily growing body of legal literature which considers the problems and prospects of juridification.[64] The importance of these efforts for an assessment of the transnational governance arrangements of social regulation under scrutiny in this volume may seem obvious. This holds true in particular for the constitutionalisation controversies. Once one becomes aware of the activities and practical impact of transnational governance, the famous question whether constitutionalising the WTO might be 'a step

[60] My interpretation of this balancing as a conflict-of-laws methodology is idiosyncratic only in its terminology. For a functionally equivalent view, see, e.g, Scharpf, n 42 above.

[61] See Joerges, n 57 above, at 326 ff.

[62] See for this formula n 29 above.

[63] See the two big Commission-financed project 'Connex' in Mannheim (http://www.connex-network.org/) and 'NewGov' in Florence (http://www.eu-newgov.org/).

[64] See, most recently, H Hofmann and A Türk (eds), *EU Administrative Governance*, (Cheltenham: Edward Elgar, 2006 forthcoming), and E Fisher, *Risk Regulation and Administrative Constitutionalism* (Oxford: Hart Publishing, 2006).

too far'[65] no longer seems to identify the real challenge. Instead, we have to ask what kind of power transnational governance exercises and we need to explore the law's potential to delineate that power and to control its exercise. To this question, we will return later.[66]

III. NON-TARIFF BARRIERS AND THE WORLD TRADE ORGANISATION: A SURVEY OF CONFLICT-RESOLVING AND POLICY-INTEGRATING MECHANISMS

The potential importance of European experiences for the understanding of WTO law and transnational governance is not as widely acknowledged as the preceding remarks suggest. The institutional discrepancies between the two systems are only one reason for the hesitancy to enter into systematic comparisons; the fact that they are studied by different scholarly communities is just as important. But there is a growing body of bridging enquiries,[67] which discuss the affinities and functional similarities: both institutions have to balance free trade objectives and regulatory concerns, or, as the Appellate Body in the *Hormones* case put it, 'the shared, but sometimes competing, interests of promoting international trade and of protecting … life and health'.[68] The non-tariff barriers to trade to which the proponents of international free trade had increasingly to pay attention in recent decades are requirements which the EU tends to recognise as legitimate restrictions on the freedom of intra-Community trade. The SPS and the TBT Agreements are institutionalised responses to health and safety concerns, and the legitimacy of trade restrictions resulting from environmental policies is explicitly recognised in the Preamble to the WTO Agreement.

Our discussion of these parallels in this section will deal with conflict resolutions under these agreements. We will, on the one hand, contrast juridified and judicialised resolution as opposed to political conflict resolution. We will focus on 'product' as opposed to 'process' regulation, and the governance patterns in this area.[69] Both of these distinctions refer to

[65] R Howse and K Nicolaïdis, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step too Far' in RB Porter *et al.* (eds), *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millenium* (Washington, DC: Brookings Institution Press, 2001), at 227.

[66] See Sects II.4 and IV.2 below.

[67] See G de Búrca and J Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (Oxford: Hart Publishing, 2001); J Scott, 'Mandatory or Imperative Requirements in the EU and the WTO', in C Barnard and J Scott (eds), *The Law of the Single European Market—Unpacking the Premises* (Oxford: Hart Publishing, 2002) at 269–294, and J Scott 'International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO' (2004) 15 *European Journal of International Law,* 307.

[68] Report of the Appellate Body on *EC—Measures Concerning Meat and Meat Products Hormons*, WT/DS26/AB/R & WT/DS48/AB/R, 16 Jan 1998, para 177.

[69] And hence here neglect the whole field of environmental protection to which Sect III of this book is dedicated.

separate debates, but are, nevertheless, interdependent. Clearly, product regulation is more closely linked to the realisation of free trade than process regulation, because product-related mandatory requirements can hinder the importation of goods directly, while process regulation need not affect the quality of the output of production. Stricter and more costly standards can be a competitive disadvantage. Conflicts arising from such differences are often primarily economic. But the distinction is of limited use: environmental and safety at work requirements may relate to the product itself; low environmental standards may have external effects on other countries; safety-at-work standards may have a human rights basis; and, last but not least, international agreements often do not apply the product/process distinction. Here, it is sufficient to mention the 'measures necessary for the protection of human, animal or plant life or health' in the Preamble to and in Article 2(1) of the SPS Agreement. Nevertheless, it seems plausible to assume that the juridification of transnational product regulation will be more intense than transnational standardisation in the field of safety at work and environmental protection. To put it slightly differently, the latter can probably be better explained by political processes, whereas the former will more often be dictated by functional necessities.

III.1 The Potential of Conflict of Laws at the WTO Level

As underlined in the previous section, the celebrated jurisprudence of the ECJ on Article 28 EC, which seeks to 'harmonise' the principle of freedom of intra-Community trade with respect for the legitimate regulatory concerns of EC Member States, can be understood as a modernisation of conflicts of law because this jurisprudence seeks to identify meta-norms which the jurisdictions involved can accept as a supra-nationally valid yardstick for evaluating and correcting their legislation. It is submitted that the same interpretative scheme can be applied to the reports of the WTO Appellate Body which assesses the compatibility of health and safety related non-tariff barriers to trade with the SPS Agreement.[70] To generalise this observation, the SPS Agreement does not invoke a supranational legislative authority. It provides a framework within which WTO Members may seek a resolution of conflicts arising from the extra-territorial impact of their regulatory policies. To become aware of these parallels is not just doctrinally interesting, but also practically relevant because a conflict-of-laws approach is politically much 'softer' than the imposition of a supranational substantive rule.[71]

[70] See, on these parallels, R Wai's Chap 8 at II.2.

[71] And, again, the suggestion of Howse and Nicolaïdis that 'constitutionalisation' of the WTO might be 'a step to far' (n 57 above) does not seem appropriate. To put it slightly differently, at stake in WTO controversies like *Hormones* or *Shrimps* are regulatory concerns (including their economic implications). An acknowledgement of the legitimacy of such con-

The transatlantic conflict over hormones in beef[72]—widely discussed in this volume –provides an instructive example. The US and (most of) the Member States of the EU are in disagreement regarding the use of growth-promoting hormones in the feeding of beef-producing cattle. Can both parties agree to expose their practices to a science-based analysis of the health risks which the consumption of hormone-enhanced beef may entail? The requirement in the SPS Agreement that the measures of the WTO Members must not be 'maintained without sufficient scientific evidence' (Article 2(2)) and that it must be 'based on' a risk assessment (Article 5) seems to suggest exactly that. But, as the actors involved know all too well, a meta-norm referring to science as an arbitrator is not so innocent. It is sufficient to underline three reasons here to illustrate this point:[73] first, science does not typically answer the questions that policy-makers and lawyers unambiguously pose; secondly, and even more importantly, it cannot resolve ethical and normative controversies; thirdly, consumer anxieties about 'scientifically speaking' marginal risks may be so considerable that policy-makers cannot neglect them.[74]

III.2 Second Interim Observation on True Conflicts, the Limits of WTO Judicialisation and the Resort to *Comitas*

Conflicts-of-law solutions are inconceivable in cases of 'true' conflicts, Brainerd Currie once argued,[75] because such cases require 'political' solutions which courts are neither equipped nor legitimated to deliver. Does the hormones dispute confirm the relevance of Currie's *monitum*?

With what kind of questions was the AB confronted; on what kind of knowledge can valid answers be based; what kind of answer did the AB deliver? These queries are discussed intensively by a great number of contributions in their empirical, epistemic, normative and institutional dimensions.[76] The analyses concur in one finding: the AB sought to invoke 'science' as a yardstick for the assessment of the validity of the assertions of the litigants, but it did not 'outlaw' their normative arguments and

cern and the search for a mediating resolution is of 'constitutional' significance. What Howse and Nicolaïdis reject, namely, the imposition of some substantive standard in the name of a higher order is not at stake in a conflict-of-laws perspective.

[72] Appellate Body Report, n 68 above.

[73] The issue will be taken up in Sect IV.3(b) below.

[74] Lawyers and political scientists look at decision-making through very different lenses—but there insights into science remain unaffected: see Hüller and Maier, Chap 9, at III: Herwig, Chap 10, at II.1; Fisher, Chap 11, at I.

[75] Currie, 'Notes on Methods and Objectives in the Conflict of Law' and 'The Constitution and the Choice of Law: Governmental Interests and the Judicial Function', above note 46.

[76] See n 74 above.

political concerns.[77] The 'meta-norm' to which the AB subjected them—'scientific risk analysis'—remained indeterminate as the AB knew perfectly well. But this answer may, nevertheless, be productive because of its potential to transform political controversies into more argumentative and deliberative processes.

Is such an answer of 'judicial' quality, and does it actually create 'law'? 'Judicialisation' has been defined as 'the presence of binding third-party enforcement'.[78] Such an understanding implies, as Andreas Helmedach and Bernhard Zangl underline,[79] that compliance is an essential element of judicialisation. How much compliance is enough? One should take into account that legal principles, once announced, 'stay on the books because they may well be used in the future as authoritative sources of precedent', Karen Alter has argued.[80] These efforts to come to grips with an institutional issue in empirical terms are certainly illuminating. But the normative dimensions of 'judicialisation' which they seek to avoid cannot be left unresolved.[81]

If it is 'judicialisation' then the result reached in the AB's report must be 'law'. In the discussion of this issue, Patrizia Nanz and Rainer Nickel reach an interesting trans-disciplinary agreement. 'Both the *Cassis de Dijon* and *Hormones* decisions can be interpreted as a move from legal formalism to "free" balancing, from interpretative certainty to an ongoing "interpretative struggle" (Frank Michelman) over the meaning of constitutional principles', Nanz argues.[82] Nickel concurs,[83] albeit in different terms. He observes 'a tendency towards the materialisation of the "soft law" vested in flexible international treaties into hard international law', which represents to him

[77] See the analyses of Codex decision-making by Hüller and Maier in Chap 9, I and the famous passage from the Report of the Appellate Body which explicitly recognised that 'the risk that is to be evaluated in a risk assessment under Art. 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die': Appellate Body Report, n 68 above, para 187.

[78] Thus, the definition of the term by D Bièvre, 'Governance in International Trade: Judicialization and Positive Integration in the WTO', Preprints of the Max Planck Institute for Collective Goods 2004/7 (Bonn: Max Planck Institute, 2004), at 3. It is a workable but undercomplex formula as De Bièvre himself shows in later parts of his paper (e.g. at 7).

[79] Chap 3, at I.

[80] 'Agents or Trustees? International Courts in their Political Context', *TranState working papers* no. 8 (Bremen: SFB Staatlichkeit im Wandel, 2004), available at http://www.staatlichkeit.uni-bremen.de, at 18.

[81] This is not to say that lawyers addressing these challenges would arrive at conclusive answers. For a review of the discussion, see C Gerstetter, Chap 4, who argues that the performance of the AB does not differ from that of 'real' courts. DZ Cass, the most pronounced advocate of judicial constitutionalisation of WTO law (see 'The "Constitutionalization" of International Trade Law: Judicial Norm-generation as Engine of Constitutional Development in International Trade' (2001) 12 *European Journal of International Law* 39), has revoked her position recently (see Cass, n 28 above, at 209).

[82] Chap 2, at III.2, text following n 77.

[83] Chap 6, at II.4.

the emergence of no longer merely state-centred transnational law production.

I hesitate to follow for two interdependent reasons. One concerns the equation of law-related argument, deliberation and problem-solving with law itself. The second relates to the inability of this law to impose some sort of discipline on its 'subjects', let alone to compensate for asymmetries of power or to address distributive issues. A comparison with the EU again seems useful. In the EU's institutional framework, it is, in principle, possible to resolve the tensions between economic freedoms and regulatory concerns and/or the conflicts between competing objectives through legislation, and it is even conceivable to provide compensation for the distributive implications of regulatory policies.

It is for these reasons that I prefer the notion 'comity' to characterise the type of decision-making that we observe in the *Hormones* case and the processes that such decisions trigger.[84] Comity (*comitas*) is, again, a term from the world of conflict of laws. It is an ancient 'doctrine' with a complex history and an ambivalent legacy. Its dark side is a subordination of law under political prerogatives and the denial of legal duties to respect foreign law and interests. Its brighter side, to which we allude, is the respect for foreign law and foreign interests.[85] Even this brighter side of the doctrine, however, is not without ambivalences, since the understanding of the term hovers between *courtoisie internationale*, political opportunism and 'hard' international law. Thus, comity should be understood as designating a problem, not a solution: the problem is that justice cannot be done; this, however, is not to say that non-juridification is to be equated with a state of nature and a *bellum omnia erga omnes*.

III.3 Limits of Transnational Juridification: the Example of Health-related Governance Arrangements

There are, as we have concluded in the introductory remarks, many (functional) reasons which militate in favour of internationally valid product standards. Unsurprisingly, international standardisation is, indeed, taking place on a grand scale in the (non-governmental) ISO (International Organisation for Standardisation), the IEC (International Electrotechnical Commission) and the ITU (International Telecommunication Union). The ISO is administering around 14,000 standards.[86] Some 30,000 experts organised in technical committees, sub-committees and working groups, are engaged

[84] See C Joerges and J Neyer, 'Politics, Risk Management: World Trade Organisation Governance and the Limits of Legalisation' (2003) 30 *Science and Public Policy* 219.

[85] See R Wai, Chap 8, at III.3–5; J Israël, n 45 above, at 150, 323–5; J Paul, 'Comity in International Law' (1991) 32 *Harvard Journal for International Law* 1.

[86] Detailed and regularly updated information is available at http://www.iso.org/iso/en/aboutiso/introduction/index.html.

in their elaboration.[87] The CAC, the (intergovernmental) Codex Alimentarius Commission,[88] a mutual institution of the World Health Organisation (WHO) and of the Food and Agriculture Organization (FAO), is the relevant body in the foodstuffs sector.[89]

Both bodies follow a harmonisation philosophy which has its basis in the pertinent WTO related agreements, in the case of the ISO, in the TBT Agreement, and, in the case of the CAC, in the SPS Agreement. But on a near global scale, any stringent harmonisation is neither economically reasonable nor politically conceivable. Moreover, contrary to the situation in the EU, the WTO–ISO or WTO–CAC compounds have no supranational legal competence which could trump the validity of national legislation. Anybody sufficiently familiar with the jurisprudence of the ECJ on Article 28 EC Treaty and on the New Approach knows that such legal deficiencies are important—but also knows that they are not insurmountable barriers to transnational governance.

The TBT Agreement prescribes in its Article 2(2) that the technical regulations of its members 'shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking into account the risks that non-fulfilment of these objectives would create'. The legitimate objectives include the concerns recognised by European law, in particular, the protection of health, safety and the environment.[90] Unsurprisingly, there is no equivalent to the European mutual recognition rule, but only a softer commitment to 'give positive consideration' to foreign regulations in which 'these regulations adequately fulfil the objectives' of the importing member. The same objective is served by the preference which, in Article 2(8), is only softly prescribed for performance, rather than construction or design standards. All this caution notwithstanding, the TBT Agreement is a powerful means for the promotion of reliance on international product standards as it provides for in its Article 2(2):

> Where technical regulations are required and international standards exist or their completion is imminent, members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance, because of fundamental climatic or geographical factors or fundamental technological problems.

[87] See on all this Schepel, n 51 above, at 177 ff. with many references.

[88] http://www.codexalimentarius.net.

[89] On its operation, see Hüller and Maier, Chap 9; Herwig, Chap 10; Fisher, Chap 11, all with many references.

[90] On these parallels, see Scott, 'Mandatory or Imperative Requirements…' and 'International Trade…', n 67 above; J Peel, 'Risk Regulation Under the WTO/SPS Agreement: Science as an International Normative Yardstick', *Jean Monnet Working Paper 02/04* (New York: NYU, 2004).

The SPS Agreement pursues a very similar strategy which has proved to be quite effective.[91] Prior to the adoption of the SPS Agreement, the impact of the CAC standards was apparently quite limited. They had no legal significance whatsoever. The SPS Agreement, which, in Article 3(1), requires that WTO members 'base' SPS measures on international standards, guidelines and recommendations, has changed the situation quite dramatically. Legally speaking, the SPS requirement is clearly much less than a mandatory supranationally valid rule. The 'right' of WTO members to determine the risk level that their constituency has to live with is *de jure* not at issue. Instead, the SPS Agreement has to build upon an incentive strategy which is similar to the safety 'presumption' upon which the European New Approach to harmonisation and standards rests. Its Article 3(2) provides that national:

> sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.

In this way, Article 3(2) SPS imports these norms into the WTO system. In this way, transnational governance arrangements have been established. They seem to operate quite effectively. How can we assess their normative quality?

III.4 Third Interim Observation on the Incorporation of International Standards

Our observations so far have touched only tentatively upon the legitimacy of transnational governance in the European context.[92] The European modes of governance, we noted, remain embedded in political processes and operate in the shadow of positive law and of possible legislative interventions. However, this is not a sufficient reason to confirm that they 'deserve recognition', but remains a feature which contrasts markedly with the international level.

Robert Howse states the *problématique* of 'WTO–TBT–ISO Transnationalism' very clearly in his conclusions: '[a]t first glance, Article 2(4) TBT, as interpreted by the Appellate Body, appears as a mechanism that constrains democratic regulatory space by bootstrapping into binding law, norms that have been created by bodies and institutions which are not subject to direct democratic control or scrutiny, even where the norms have not been consented to by the state bound'.[93] But, as Harm Schepel adds,

[91] See R Streinz, 'Die Bedeutung des WTO-Übereinkommens für das Lebensmittelverkehr' (1996) 36 *Jahrbuch des Umwelt- und Technikrechts* 435.

[92] Sect II.5 above.

[93] Chap 13, at III.

the real (realistic) 'question is not whether we substitute private international standardisation for public rule-making, but whether we substitute private international standardisation for private national standardisation'.[94] In the end, their views seem to converge—and to this convergence we will return.[95]

At first sight, the WTO–SPS configuration may seems less problematic. Its 'public' component is much stronger and its commitment to scientific expertise provides further authority. Elizabeth Fisher correctly and approvingly notes[96] that, in the *Hormones* case, the AB did not rely on some Weberian administrative model and did not subscribe to some objective-instrumental understanding of the science formula. But she adds that the alternative of a transnational 'administrative constitutionalism' is not yet available. Alexia Herwig takes the reference to science as seriously as possible. But she acknowledges the need to move beyond scientific discourses and postulates[97] 'iterative deliberative processes of risk regulation that allow both citizens and the affected trading partners to raise arguments to ensure that the outcomes of risk regulation are connected to the practical rationality of those affected by decisions'. This I interpret as an analogy to European deliberative supranationalism.[98]

IV. THE TURN TO GOVERNANCE AND ITS LEGITIMACY *PROBLÉMATIQUE* AT NATIONAL, EUROPEAN AND INTERNATIONAL LEVEL

This final section can start with a first conclusion. The 'facticity' of social regulation in all contemporary legal systems is a challenge that the law can handle with the help of (modernised) conflict-of-laws methodology, albeit not as comfortably at WTO level as at European level.[99] The much more demanding challenge stems from the establishment of governance arrangements which seek to ensure reactive and proactive problem-solving. This challenge is the exclusive concern of the remainder of this chapter.

'Governance' has become the number one European buzzword. It is, however, by no means a purely European invention, but has both international and nation-state precursors and parallels. 'Governance', we noted right at the beginning of this chapter,[100] is a response to interdependent phenomena: to failures of traditional regulatory law, to the erosion of nation-state governance, and to the advent of post-national constellations.

[94] Chap 14, at II.
[95] Sect IV below.
[96] Chap 11, at III.
[97] Chap 10, at IV.
[98] See n 3 above and Sect IV.3(b) below.
[99] See Sects II.1 and III.1 above.
[100] Sect I.2 (Thesis 2), above.

The interdependence of these phenomena is the basis of our argument, which will be submitted in three steps. We start with a reflection on the national level. The 'turn to governance' was discovered, albeit in somewhat different terms, decades ago—and the responses developed since the 1980s remain attractive because the tribute that they paid to functional necessities did not betray the law's *proprium*, its inherent links with the legitimacy *problématique* of governance practices (Section IV.1). The European legitimacy *problématique* is distinct because Europe has to conceptualise legitimate governance in a 'market without a state' (Section IV.2). The *problématique* is again different at international level. Transnational governance at WTO level cannot duplicate the EU model (Section IV.3).

IV.1 Governance Practices in Constitutional States: The Turn to Proceduralisation and Reflexive Law

The phenomena that the notion of governance denotes are not entirely novel. In Germany, the inclusion of non-governmental actors into law-making processes and their participation in the political programmes that governments design to resolve social problems is as old as that country's nineteenth century 'organised capitalism'. What was new in the late 1970s and 1980s was the deliberate use and sophisticated design of contemporary 'modes' of governance as responses to the critique of state interventionism, de-regulation and privatisation, and then in the context of Europeanisation and globalisation processes.[101]

To restate: broad disappointment with 'purposive' legal programmes of economic management and a new degree of sensitivity towards 'intrusions into the life-world'[102] through social policy prescriptions mirrored the understanding that economic processes were embedded within societies in far more complex ways than a simple market-state dichotomy might suggest. This further triggered a search for new modes of legal rationality which were to replace interventionism and, by the same token, free themselves from the destructive myth that law might come to terms with social reality through the simple application of 'grand theories'. At the same time, however, 'proceduralisation'[103] and 'reflexive law'[104] were also concerned with very mundane issues such as the improvement of implementation and compliance. Discrepancies were clear between grand purposive legal

[101] See recently and very instructively C Franzius, 'Governance und Regelungsstrukturen' (2006) 97 *Verwaltungsarchiv* (forthcoming); Schuppert, n 10 above.

[102] J Habermas, 'Law as Medium and Law as Institution' in G Teubner (ed), *Dilemmas of Law in the Welfare State* (Berlin: de Gruyter, 1985), 203.

[103] R Wiethölter, 'Proceduralisation of the Category of Law' in C Joerges and DM Trubek (eds), *Critical Legal Thought: An American–German Debate* (Baden-Baden: Nomos, 1989), at 501–10; Habermas, *Between Facts and Norms*, n 19 above, at 414.

[104] G Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law and Society Review* 239.

programmes and their real-world social impact: it became a core concern of legal sociology to establish soft-law and regulatory alternatives to command and control regulation.[105] In other words, law, concerned with both the effectiveness of economic and social regulation and its wider social legitimacy, was, very early on, drawn into the refashioning of constitutional and administrative legal spheres. Law was developing far more constructive and legitimate synergies between markets and hierarchies. The importance of these debates for the assessment of 'governance' practices has long gone unnoticed—but that may now change, nonetheless.[106]

IV.2 European Modes of Governance: Constitutionalisation Through Deliberation?

As our survey in Section II has documented, the most important and most successful 'new mode of European governance' had been designed long before this concept became so popular. Under the new approach to technical harmonisation and standards, non-governmental organisations with links to administrative bodies, industry and expert communities are all engaged in long-term co-operative relationships. Europeanisation has managed to re-arrange these formerly national arrangements in such a manner that they operate across national lines and across various levels of governance. In the governance arrangements in the foodstuffs sector, the involvement of administrative bodies has been stronger—'food safety' has, for a long time, been a concern of public administration. This is why the role of bureaucracies in the European 'administration' of food safety through the comitology system was, and still is, stronger than in the field of standardisation. But it, too, has become a governance arrangement *par excellence*. Do such arrangements fit into our inherited notions of government, administration and the separation of powers? Can such hybrids be legitimate? Is it at all conceivable that their legitimacy will be ensured by law?

These questions concern the 'nature' of the European polity, which is now widely characterised as a 'heterarchically'—as opposed to hierarchically—structured multilevel system which must organise its political action in networks. This thesis has far-reaching implications. If the powers and resources for political action in the EU are located at various and relatively autonomous levels of governance, the coping with functionally interwoven problem-constellations will depend on the communication between the various actors who are relatively autonomous in their various domains, but who, at the same time, remain mutually dependent.

[105] G Teubner, 'Juridification—Concepts, Aspects, Limits, Solutions' in G Teubner., (ed.), *Juridification of Social Spheres* (Berlin & New York: de Gruyter, 1987), 3.

[106] See, e.g., W.E. Scheuerman, 'Reflexive Law and the Challenges of Globalization' (2001) 9 *Journal of Political Philosophy* 81.

We have concluded[107] that the debate on democracy in Europe is too one-sidedly concerned with the democracy deficits of the European construction. This debate tends to neglect the structural democracy deficits of nation-state Members. It fails to conceptualise the potential of European law to cure the democracy deficits of European nation-states. Such a vision is concerned with the whole of the European multilevel construction in such a way that the European polity will not just be compatible with, but even strengthen, democratic processes.[108] This is the vocation that Jürgen Neyer and I have assigned to European law under the heading of 'deliberative'—as opposed to orthodox or quasi-statist—supranationalism.[109]

In the field of social regulation, we have taken a further and more daring step:[110] the EU-specific context of risk regulation, so we suggested, favours a deliberative mode of interaction. Its epistemic components are not simply technocratic but are embedded in broader normative practices of reasoning. Is it conceivable for law to strengthen such qualities of social regulation in the EU? Is it conceivable to 'constitutionalise' the European committee system so that its operation becomes compatible with the essentials of the democratic ideals of policy-making? The answers that we found have already (implicitly) been rephrased in the distinction used in Sections II.1 and II.3 between conflicts-of-law methodologies and transnational governance arrangements which have been presented at length elsewhere.[111] 'Deliberative Supranationalism Type I' should respond to the inter-dependence of semi-autonomous polities by identifying rules and principles that respect the autonomy of democratically legitimated units and restrict controls to their design. 'Deliberative Supranationalism Type II' should also cope with the apparently irresistible transformation of institutionalised government into under-legalised governance arrangements. It must avoid two

[107] See n 3 above.

[108] See, for similar arguments, J Bohman, 'Constitution Making and Democratic Innovation' (2004) 3 *European Journal of Political Theory* 315; JA Caporaso, 'Democracy, Accountability and Rights in Supranational Governance' in M Kahler and DA Lake (eds), *Governance in a Global Economy. Political Authority in Transition* (Princeton, NJ: Princeton UP, 2003), 361, at 368 ff; R Schmalz-Bruns, 'On the Political Theory of the Euro-polity' in EO Eriksen, *Making the European Polity. Reflexive Integration in the EU* (London: Routledge, 2005), at 59.

[109] C Joerges and J Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology' (1997) 3 *European Law Journal* 273. Good, or at least well-meaning, intentions do not cure theoretical failures. And *vice versa*, the often-repeated thesis that deliberative supranationalism is anti-democratic or, at best, technocratic sounds odd to us and is particularly difficult to understand when brought forward together with the insight that the EU cannot develop into a state and hence is unable to realise/achieve state bound models of democracy.

[110] C Joerges, 'Comitology and the European Model? Towards a *Recht-Fertigungs-Recht* in the Europeanisation Process' in EO Eriksen, C Joerges and J Neyer (eds.), *European Governance, Deliberation and the Quest for Democratisation* (Oslo: Arena Report, 2/2003), 501; J Neyer, 'Discourse and Order in the EU: A Deliberative Approach to MultiLevel Governance' (2003) 41 *Journal of Common Market Studies* 687, and *Postnationale politische Herrschaft: Vergesellschaftung und Verrechtlichung jenseits des Staates* (Baden-Baden: Nomos, 2004).

[111] See nn 3 and 110 above.

dead-end alleys: it must come to terms with the new challenges, and it cannot hope to get rid of governance practices through which legal systems have, at all levels, responded to the *impasses* of traditional (administrative, interventionist) regulation. It cannot expect to achieve at European level that which could not be accomplished at national level, namely, a transformation of the practices of the 'political administration' of the Internal Market into a Weberian-type transnational administrative machinery for which the European Commission and the European Parliament could be held accountable. Instead, it should follow four strategies:[112]

— Build upon the interests of non-governmental (in particular, standardisation) bodies to commit themselves to fair, politically and socially sensitive procedures through which they can build up public trust;
— Place trust in the potential of areas such as product liability law, tort law and competition law, and product safety legislation which cannot prescribe and/or control the activities of non-governmental actors and administrators in detail, but can be invoked in critical cases by state officials or affected parties and exert a disciplining influence;[113]
— Introduce 'hard' procedural requirements to ensure that the governance of the Internal Market remains open for revision where new insights are gained or new concerns are raised by politically accountable actors;
— Institutionalise parliamentary oversight through specialised commissions.

IV.3 The Imperfect Constitutionalisation of Transnational Governance

All the difficulties that we experienced with respect to governance at national and at European level are present at international level—albeit due to institutional differences in even more challenging variations.

[112] As indicated (see Sect II.4 above), governance by committees and by agencies is not as diverse as the legal terms suggest—and the inquiries into the 'juridification' of agencies and comitology pose structurally similar difficulties: A Dammann, *Die Beschwerdekammern der europäischen Agenturen* (Frankfurt aM *et al*.: Peter Lang, 2004). Surprisingly similar in substanceis B Eberlein and E Grande, 'Reconstituting Political Authority in Europe: Transnational Regulatory Networks and the Informalization of Governance in the EU' in Grande and LW Pauly (eds), n 28 above, at 146.

[113] One element I have always emphasised in my defences of comitology (see n 5 above) are the exit options of Member States which all pertinent European directives protect through safeguard clauses. The preliminary ruling of an WTO dispute panel issued on 7 Feb 2006 on the EU's approval process for GMOs (available at http://worldtradelaw.typepad.com/ielpblog/2006/02/800_unavailable.html) found that 'safeguard measures' in the form of national bans on the marketing and import of EU-approved biotech products were WTO-incompliant. Such a finding questions a constitutionally indispensable element of the comitology system. The delecacy of the issue can hardly be over-estimated. But it would be premature to discuss it on the bais of an incomplete preliminary report.

These challenges will be addressed in three steps. We start with the institutional specifics that a 'juridification' of transnational governance has to cope with (a); we will then review various juridification strategies which have been suggested for Europe (economic and technocratic rationality, 'administrative' law and societal constitutionalism) (b); on this basis we will determine the prospects of a constitutionalisation of transnational governance.

(a) The facticity of Juridification

'Juridification' has intensified at international level in many respects. The empirical indicators are so strong that all legal disciplines, as well as political and social philosophy, are in the process of re-defining their premises. Juridification in the post-national constellation is broadening in its scope and deepening in its reach. This observation is uncontested and even Jürgen Habermas concludes that we have to take the notion of 'law without a state' seriously.[114]

(b) The normativity of Juridification: Lessons from European Experiences

The endorsement of such a conclusion by Habermas does not just indicate that he is prepared to loosen the links of his discourse theory of law to statal institutions; it also means that he needs to envisage the recognition of normative orders not generated through the type of political processes that constitutional democracies seek to ensure. The nature of this challenge is not identical within and/or beyond the EU. But it seems worthwhile to review once more the competing perspectives which have been developed in the Europeanisation process with a view to identifying their general importance for the challenges of post-national constellations.

Conflict of laws and comitas One difference between European and WTO law which we have already identified, namely, the degree to which *comitas* has been transformed into 'hard' legal commitments and conflict-of-laws decisions, can be juridified and legitimately taken by judicial bodies. We simply refer to the preceding section.[115]

Economic Constitutionalism In the formative era of the European Economic Community two answers to the—only much later notorious—

[114] J Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?' in J Habermas, *Der gespaltene Westen* (Frankfurt aM: Suhrkamp, 2004), at 113. On the good reasons for Habermas' hesitancy, see Humrich, n 34 above, Humrich himself (at 17 ff) is cautious about with the use of the term 'law' because he seeks to defend the normative quality that notion carries with it in Habermas' social philosophy and legal theory. He does not address explicitly in his theoretical reflections the *problématique* of 'deliberative supranationalism type II'. But his reserve against the heritage of 'regime theory' (at 2) and his inquiries into international environmental law (at 36 ff) mirror the concerns raised here.

[115] Sect III.2.

democracy deficits were developed. These answers had a paradigmatic importance. They could be developed further and were to become—in modified versions—influential beyond the European level. One was the theory of the European Economic Constitution which legitimised—and restricted—European governance through supranational valid commitments to economic freedoms, open borders and a system of undistorted competition.[116]

This perspective has been brought to international economic law including WTO law.[117] I will not join in this wide debate[118] because the type of regulatory concerns and governance arrangements on which this chapter focuses is not addressed in this tradition.[119] To repeat,[120] we seek to understand markets as social institutions and are accordingly interested in their 'infrastructure', i.e., the web of formalised and semi-formal relations through which decisions are taken and orders established through the individual actions of non-governmental and semi-public organisations.

Technocratic governance The second approach to European 'governance' was a technocratic alternative[121] to economic constitutionalism. Its exponents sought to defend—and to restrict!—European governance activities to a non-political type of expertise organised and represented by a transnational bureaucracy. One contemporary version of this argument has been cited in the presentation of the new approach to harmonisation and standards.[122] Its most prominent equivalent at international level is 'scientific expertise'. There are many reasons for the attractiveness of such references. 'Expertise' and 'science' claim a genuine authority in regulatory decision-making, which is, by its very nature, objective (neutral) and un-political. The standards of good science are not bound to some specific legal system which endorses the binding quality of scientific findings, but they are, by their very nature, transnationally valid. By resorting to scientific expertise,

[116] See, on this school of thought, C Joerges, 'What is Left of the European Economic Constitution?—A Melancholic Eulogy' (2005) 30 *European Law Review* 461.

[117] Most prominently by E-U Petersmann; see, recently, his 'Welthandelsrecht als Freiheits- und Verfassungsordnung' (2005) 65 *Heidelberg Journal of International Law* 543.

[118] See, e.g., for a critical and instructive evaluation of Petersmann's contribution to the constitutionalisation debate, von Bogdandy, n 4 above, at 115 ff.

[119] This is, of course, not to say that economic theories have nothing to contribute to issues of social regulation! That would do gross injustice to very important strands of economic and legal theory: see, for an instructive survey, A Arcuri, *Governing the Risks of Ultra-hazardous Activities. Challenges for Contemporary Legal Systems* (Rotterdam: Proefsehrift University of Rotterdam, 2005).

[120] See Sect I.1 (Thesis 4).

[121] For a surprisingly similar, concise comparative account, see M Shapiro, '"Deliberative," "Independent" Technocracy vs. Democratic Politics: Will the Globe Echo the EU?' (2005) 68 *Law and Contemporary Problems* 341, at 344, who underlines that in the formative era of regulatory politics in the US trust in expertise and its democratic credentials was high in contrast with European traditions at the right and at the left.

[122] See the reference to F Nicolas, *Common Standards for Enterprises* (Luxembourg: Office of Official Publications, 1995), Sect II.2.

legal systems subject themselves to 'external' validity criteria—and overcome their territorial parochialism precisely for this reason. If only science could be as objective as this and find answers to the questions that we pose! But, alas, to cite Niklas Luhmann's ironical characterisation, '[a]n expert is a specialist to whom one can put questions he is unable to answer'.[123] This is because citizens, policy-makers and courts are all confronted with trans-scientific questions. The good expert is aware of these limits, and these limits are, by now, so widely known that the myth of objectivity cannot even serve as a workable fiction.[124]

We have articulated our objections in our comments on the *Hormones* case[125] and need not repeat them. Their legal significance has been appreciated adequately by the Appellate Body in the *Hormones* case in its very cautious determination of the effects of the CAC standards.[126]

Administering European and Global Market Through Administrative Law? 'Scientific expertise' is a necessary, though not a sufficient, means to ensure the kind of 'social embeddedness'[127] that markets require. Is it conceivable that a global administrative law will fill this gap? This is a question pursued on a global scale in a project pursued by Benedict Kingsbury, Nico Krisch and Richard B Stewart at New York University Law School,[128] and it would be absurd to try to comment on its problems and achievements in the present context. What seems safe to state on the basis of the foregoing discussion of the European experience[129]—and very much

[123] N Luhmann, *Beobachtungen der Moderne* (Opladen: Westdeutscher Verlag, 1992), at 141.

[124] See, instructively, for the WTO context, T Christoforou, 'Settlement of Science-based Trade Disputes in the WTO: A Critical Review in the Face of Scientific Uncertainty' (2000) 8 *New York University Environmental Journal*, 622; J Pauwelyn, 'The Use of Experts in WTO Dispute Settlement' (2002) 51 *International and Comparative Law Quarterly* 325; VR Walker, 'The Myth of Science as a "Neutral Arbiter" for Triggering Precautions' (2003) 26 *Boston College International and Comparative Law Review* 197; Peel, n 90 above. For a very instructive summary of the sociological debate, see G Bechmann, 'The Rise and Crisis of Scientific Expertise' in G Bechmann and I Hronszky (eds), *Expertise and Its Interfaces. The Tense Relationship of Science and Politics* (Berlin: Edition Sigma, 2003), at 17–34.

[125] See Sect III.1–3 above. For an earlier version of the same argument, see C Joerges, 'Scientific Expertise in Social Regulation and the European Court of Justice: Legal Frameworks for Denationalized Governance Structures' in Joerges, Ladeur and Vos, at 295.

[126] 'To read Article 3.1 [of the SPS Agreement] as requiring Members to harmonize their SPS measures by conforming those measures with international standards, guidelines and recommendations, in the here and now, is in effect, to vest such international standards, guidelines and recommendations (which are by the terms of the Codex recommendatory in form and nature) with obligatory force and effect. …[Such an] interpretation of Article 3.1 would, in other words, transform those standards, guidelines and recommendations into binding norms. But … the SPS Agreement itself sets out no indication of any intent on the part of the Members to do so.': Appellate Body Report, n 68 above, para 165.

[127] Sect I.1 (Thesis 4), above.

[128] See http://www.iilj.org/global_adlaw/.

[129] See Sect II above.

in line with pertinent contributions in this book[130]—is that global administrative law must address very serious difficulties. The core conceptual problems of the 'administration' of the European internal market stem from its inherently 'political' nature and the complexity of its tasks—and the lack of a superior authority normatively legitimated and factually capable of imposing coherence on the administrative activities. The safeguards that Europe must establish in the interest of a 'constitutionalisation' of its administrative machinery[131] are all the more indispensable internationally.

'Private Transnationalism' In our evaluation of the European modes of governance, the 'new approach', its predominantly 'private' structuring notwithstanding, ranked surprisingly high. This assessment owes very much to Harm Schepel's intriguing analyses: in his account, 'good' governance, as we observe it in standardisation both within the EU and at international level, is not political rule through institutions as constitutional states have developed them. Instead, it is the innovative practices of networks, horizontal forms of interaction, a method of dealing with political controversies in which actors, political and non-political, public and private, arrive at mutually acceptable decisions by deliberating and negotiating with each other. The crux of this observation is a paradoxical one within traditional democratic theory, and is also counter-intuitive: productive and legitimate synergy between market and civil society cannot be furnished within traditional democratic theory, be it theory majoritarian (working with a *demos*) or deliberative (dispensing with the *demos*, but placing a 'governing' emphasis on the primacy of the public sphere). How can this be? To cite Schepel:

> The paradox is, of course, that the mechanism through which to achieve this is, well, politics. Due process, transparency, openness, and balanced interest representation are norms for structuring meaningful social deliberation. They are not obviously the appropriate vehicles for revealing scientific 'truth' or for allowing room for the invisible hand.[132]

This is a message with many theoretical premises and practical provisos. To relate it back to the beginnings of this chapter,[133] the modern economy and its markets are 'politicised' in the sense that politically important processes are taking place there. The political system cannot reach into this sphere directly. These two steps of the argument do claim some plausibility. However, it is the third thesis which is the critical one: there are constellations in which the political processes within society seem perfectly legitimate. 'Private transnationalism' is the term that Schepel employs.[134]

[130] Nickel Chap 6; Herwig, Chap 10; Fisher, Chap 11; Chalmers, Chap 12.
[131] Sect II.5.
[132] Schepel, n 51 above, at 223.
[133] Sect I.3.(Thesis 4).
[134] Most outspokenly in the 'Conclusions' in Schepel, n 51 above, at 403–14.

'Societal constitutionalism' may be a preferable notion because it covers national, European and transnational phenomena. But it, too, is a notion in need of further explanations. Those using this term however, accentuate, different aspects.[135] In the version advocated in this chapter,[136] 'societal constitutionalism' is a metaphor that seeks to capture three interdependent phenomena: the 'politicisation' of markets; the emergence of governance arrangements which need to acknowledge the problem-solving capacities and managerial qualities of the private sphere; and the transformation of nation-state governance in transnational constellations.[137] This is not to say that the rule of law has come to an end. As I interpret Harm Schepel's plea for 'private transnationalism', he insists that even where non-governmental actors commit themselves credibly to 'good' normative standards, their legitimacy and autonomy are not beyond, let alone above, 'real' law, but instead remain dependent upon the compatibility of their institutionalisation with the legal institutions surrounding them. This normative proviso can be rephrased as an empirical assumption. It seems hardly surprising that standardisation organisations seek to establish procedures in which both expert communities and society as a whole can trust, and that sufficiently self-critical law-makers and regulators realise that they would not be able to substitute what standardisation accomplishes. To restate this dependence in a more disciplinary terminology: the recognition of private and semi-private ordering should be conceptualised as an element of a conflict-of-laws approach to transnational governance.[138] In short, standardisation both integrates and co-ordinates private governance actors across national and international levels, and reconnects with national and international public spheres, functioning all the while, not under their direction, but in their shadow. To invoke conflict-of-laws again at this point as a means of supervising private and semi-private ordering is to concur with Christoph Möllers in his intriguing *monitum*: there can be no legitimate 'transnational governance without a public law'.[139]

[135] D Sciulli, *Theory of Societal Constitutionalism* (Cambridge: CUP, 1992); G Teubner, 'Societal Constitutionalism: Alternatives to State-centered Constitutional theory?' in C Joerges *et al.* (eds), *Transnational Governance and Constitutionalism* (Oxford: Hart Publishing, 2004), at 3–28.

[136] See previously C Joerges, 'Constitutionalism and Transnational Governance: Exploring a Magic Triangle' in ibid., at 339–75.

[137] See Sects I.1–2 and IV above.

[138] See Sect I.3 (Thesis 4) above. See J Scott's plea for supervision of standardisation procedures by the Appellate Body: 'International Trade and …', n 67 above, at 211 ff., which seems to be based on a very similar intuition.

[139] Möllers, n 18 above. The term 'public law' is not to be understood here in the technical continental sense. It instead denotes the need for a 'supervision' of private governace arrangements which ensures that they 'deserve recognition' (see Sect II.3 above).

(c) Where the Law Ends …

Our insistence that the notion of law should not be used for any form of decision-making, but should reflect a differentiation between political bargaining and conflict settlement on the one hand, and constitutionalised law generation and law guided adjudication on the other, highlights the concerns about which the contributors to this volume, notwithstanding their terminological and conceptual differences, agree to a very significant extent. My own approach has two implications and dimensions which should not be misunderstood as a plea against a contitutionalisation of transnational governance; instead, they point to obstacles to the generation of a normative order which would deserve to be called 'law'.

(i) The discrepancy between a conflict-of-laws response (which represents 'true' law) and pure comity (which represents non-juridified ways of dealing with conflicts) is the methodological side of the problem. In my (unconventional) understanding the resort to comity signals a defeat of constitutionalisation, not the pretence of harmonious relationship or a camouflage of the tensions against which Robert Wai objects.[140] Hence, I am not suggesting that a weak transnational juridification of social regulation might be a good thing. It is, instead, a reminder than one should not be surprised: conflicts between legal systems which become apparent in legal differences in the field of social regulation are usually multifaceted. They concern political preferences, economic interests, industrial policy objectives, distributional politics and ethical concerns. It is unsurprising that the judicial system tends to avoid addressing all these implications. However, 'comity' is not justice.

(ii) The persistence of non-co-ordinated legal regimes, the much deplored fragmentation of international law represents the substantive aspect of 'weak' juridification. Again, one should not be surprised. There is simply no political authority available which could ensure the type of normative coherence that we can expect within constitutional democracies. What we can expect, instead, are conflicts between competing and incoherent juridified policies with potentially constructive effects,[141] 'regime-collisions' as Gunther Teubner and Andreas Fischer-Lescano characterise these tensions.[142] This is neither good nor bad *per se*. But there are many ways—and many surprising possibilities—to handle or exploit such conflicts. Even deliberative problem-solving may occur. However, this is just much less likely than in the consolidated institutional framework of the EU.

[140] See Chap 8, at II.5.

[141] See M Koskenniemi, 'Gobal Legal Pluralism, Multiple Regimes, and Multiple Modes of Thought' typescript (Cambridge, Mass: 2005), on file with author.

[142] See G Teubner and A Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999.

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