
International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO

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Abstract

This article examines the relationship between ‘negative’ (market) and ‘positive’ (policy) integration in the European Union and the World Trade Organization. It does so in relation to trade in goods, and takes as its example the area of environmental law. It argues that the strong role accorded to instruments of policy coordination in the EU (through the adoption of European standards and harmonizing legislation) is tied to the fact that such measures are contestable, so that authority and contestability go hand in hand. Contestation proceeds by way of administrative and judicial channels, and serves to instil a measure of accountability and to protect diversity. In the WTO, by contrast, the Appellate Body has shown a marked reluctance to accord authority to international standards and — important developments in Shrimp/Turtle notwithstanding — deep uncertainty persists as to the relationship between the free movement norms and multilateral environmental agreements. This paper argues that in defining the role of these instruments, the Appellate Body would do well to regard their authority as contingent. In the WTO — as in the EU — contestability could contribute to ensuring forms of transnational governance which are more accountable and appropriately respectful of diversity. To the extent that contestability would seem to imply a quasi-review function for the Appellate Body, some might fear that this suggestion would feed the ‘constitutionalization’ of the WTO, by placing it in a position of supremacy vis-à-vis other regimes. This paper argues that this fear would be misplaced.

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1 Introduction

It is often suggested that attempts to compare the European Union (EU) and the World Trade Organization (WTO) are misconceived. While each of these two entities seeks to achieve a reduction in barriers to trade between states, each pursues this objective in a manner which is structurally distinct. Whereas the WTO is committed to market-building through deregulation, the EU represents an ambitious experiment in re-regulation. While it, like the WTO, undermines the regulatory autonomy of states, it serves also to reinforce their collective strength through a strategy of transnational policy coordination.

This picture of the EU is at once its greatest strength and its greatest weakness. It confuses the role of the EU in the neo-liberal story of the unleashing of global economic forces, in that the EU is seen both to contribute to this and to promise containment of it. By closing the gap between the economic and the social — between market and policy — the EU pledges competitive markets *and* social solidarity. It promises to preserve the capacity of our ‘entangled and accommodating nation-states ... to escape enforced assimilation to the social model now imposed by the predominant global economic regime’.¹

But that promise would seem to come at a price. Effective regulation in an integrating market would seem to demand effective government on a scale which is commensurate with it. And so the process of functional spill-over begins. Market integration begets regulatory gaps. Regulatory gaps beget political integration. Political integration begets ...?

For some, the current political reality (and above all the legal reality) already strains the project’s meagre social foundations. The EU polity is said to lack legitimacy by virtue of its being embedded in a social context characterized by fragmentation and difference. The absence of a European ‘people’ capable of grounding European-level democracy renders suspect all but the ‘thinnest’ version of cooperation. The European Union, with its developed parliamentary structure, its attachment to supranational forms of governance, and the distinctly federal quality of its core legal concepts (direct effect, supremacy, pre-emption, and so on), is said to be facing a crisis of social legitimacy. This is the price to be paid for wishful thinking.

For others, it is caution, not boldness, which is the Union’s curse. Its reticence in occupying the symbolic space capable of sustaining and legitimating its activities ignores the constitutive function of discourse, and in particular the constitutive function of constitutional discourse. The idea of a European constitution is said to represent a ‘condensing symbol’² around which ‘European’ political association and communication, and identity formation, can take shape. Even those who accept that there may be good reasons to eschew the ‘finality’ of a constitutional settlement

¹ Habermas, ‘Why Europe Needs a Constitution?’, *New Left Review* (2001) 5.

² Poiares Maduro, ‘Where to Look for Legitimacy’, available at <http://www.ieei.pt/images/articles/674/PaperMPPM-IEEucp.pdf>.

recognize that the ‘inclusive political conversation which a constitutional process can offer’ may contribute to the formation of European-level political community.³

Against a backdrop of the irresolution of this grand debate, policy coordination continues to play an important role in the EU. Nonetheless, its nature and role is shaped by this irresolution in two crucial respects. This will — as with the other arguments in this paper — be exemplified by reference to the example of environmental policy.

First, although instruments of policy coordination are granted considerable authority within the EU system — at times in prising markets open and at others in justifying their closure — the legal framework within which they take shape encompasses a range of ‘safety-valves’, which serve to ensure their contestability. Contestation occurs by way of administrative and judicial procedures which operate to render authority contingent, and to ensure that instruments of policy coordination are subject to oversight and evaluation.

Second, ‘harmonization’ proceeds in a manner which is capable of accommodating diversity. It recognizes the multiplicity of *demoi*, even constituting at times a point of resistance for sub-national groups trapped within the confines of an overbearing ‘nation-state’. This accommodation is achieved in part by structural mechanisms, such as overlapping competences and minimum harmonization; thus permitting the adoption by Member States of more stringent protective measures. It is reflected also in the substance of the Community measures. Increasingly open-ended, and predicated upon broadly drawn principles and objectives, Community legislation is highly permissive of Member State flexibility in implementation. These broad objectives tend to be buttressed by a wide range of procedural requirements. These serve both to shape the political process according to which Member State implementation occurs, and to facilitate European level — and peer — review of implementation. The flexible nature of Community environmental law — both at the level of Treaty principle and at the level of legislation — has an important bearing upon the role played by courts. Be it at the level of the Community or at the level of the Member States, heavy emphasis is placed upon political processes. Issues of participation, transparency and reflexivity take centre stage.

The concepts of contestability and flexibility are related; flexibility — in the guise of principles such as subsidiarity and proportionality — being one of the benchmarks according to which the lawfulness of Community intervention may be assessed. These two concepts exemplify the manner in which Community law has come to encompass certain core values. Community instruments — be they standards or norms — enjoy considerable authority, but this authority is conditional not absolute; this being contingent upon respect for these core values. Such values may be set out by the European Court of Justice in the form of general principles. They may be enshrined in political agreements, or in legal or constitutional texts. Their origin and status will often be subject to evolution over time. Each seeks to protect legitimate difference, and

³ Walker, ‘The Idea of a European Constitution and the Finalité of Integration’, available at <http://www.fd.unl.pt/je/wpfp05a.doc>.

to secure the accountability of the Community decision-maker detached from the ‘thick’ and often taken-for-granted authority of the state.

In sum, there is a gap between the grand debate and the elusive search for *demos* on the one hand, and the sphere of environmental policy on the other, where contestability and flexibility combine to ground Community governance premised upon coordination not centralization; cooperation not uniformity; shared governance not pre-emption.⁴ It is around this gap that the first step in the argument of this paper takes shape. The glitz and gloss of constitution-building in the EU has tended to conceal, and sometimes to distort, the premises according to which policy coordination occurs.

But still, you might ask, what does this have to do with the WTO? Relative to the EU, its capacity for policy coordination appears to be much reduced. Its principal focus is upon ‘knocking down’ rather than ‘building up’, and it is for this reason that its deregulatory impetus is so greatly feared. The breadth of its substantive reach, and the strength of its system for the settlement of disputes will impress even the most complacent observer.

Yet a closer look reveals another side. The WTO is embroiled in policy coordination, albeit that its efforts in this respect are largely parasitic upon the institutional resources of other actors. The Appellate Body (AB), by virtue of its gatekeeper function, plays a crucial role. Recent case-law reveals at least three settings in which the interpretative approach of this body will be critical in determining the impact of transnational policy coordination upon free movement.⁵

First, it will fall to the WTO dispute settlement bodies (DSB) to adjudicate upon the role of international standards in securing the free movement of goods. Such standards emanate from a range of international organizations, for example, the *Codex Alimentarius* for food safety, and the International Standards Organization. The existence conditions laid down for international standards in the WTO are parsimonious in the extreme. International standards are those which are non-binding and which have been adopted by standard-setting bodies open to at least all Member States of the WTO. Though exogenous to the WTO, they may accrue authority within this system by virtue of the text of the covered agreements. Thus, for example, the Agreement on Technical Barriers to Trade (TBT) obliges Member States to base their domestic measures upon such standards, other than where these would be ineffective or inappropriate in fulfilling the legitimate objective pursued. That said, the AB has been notably diffident in according authority to such standards, conscious perhaps of the disputed legitimacy of the bodies responsible for them.

⁴ This is an example of a broader thesis along these lines outlined by Gráinne de Búrca in her paper ‘Constitutional Challenge of New Governance in the European Union’, 28/6, *European Law Review*.

⁵ This paper will not examine the role of WTO committees. See Von Bogdandy, ‘Law and Politics in the WTO: Strategies to Cope with a Deficient Relationship’, 5 *Max Planck Yearbook of United Nations Law* (2001). Neither will it focus attention upon the relatively rare instances where the WTO ‘covered agreements’ themselves may be construed as ‘re-regulatory’ rather than ‘de-regulatory’. See, especially aspects of the plurilateral Agreement on Government Procurement and the positive rights and duties established by TRIPS (Trade Related Aspects of Intellectual Property Rights).

Second, and in a different vein, the AB has intervened to promote the transnational resolution of global and transboundary environmental problems. Thus, in the well-known *Shrimp/Turtle* dispute, it demanded of Member States that they enter into serious, across-the-board negotiations with other states, prior to the institution of unilateral restrictions on trade. In this way, it sought to narrow the gap between jurisdictional reach and practical problem-solving. In so doing, it established a version of global subsidiarity (requiring such action only where the problem at hand is global or transboundary), although the constituent elements thereof remain under-specified in the extreme.

Third, though the *Shrimp/Turtle* report is ambiguous, the case raises the possibility that the AB might adopt a more 'forgiving' approach to trade restrictions adopted pursuant to a multilateral environmental regime. It is not inconceivable that it might do so even where the party against which the restriction is imposed is not a party to the environmental agreement in question, and hence has not consented to it. In this way, as with standards, it would be open to the AB to concede authority to multilateral agreements, above and beyond that which such agreements could claim — in the light of the doctrine of consent — as being intrinsic to them. The existence of a multilateral environmental agreement might be permitted to impact upon the interpretation and application of the WTO Agreement, even in the absence of explicit state consent.

It is then clear that the AB does — and will continue to — play a gatekeeper role in relation to instruments of transnational policy coordination. At times, this role is mandated by the clear wording of the WTO Agreements, as for example with international standards. Even then the contours remain ill-defined. Otherwise, this gatekeeper role flows from the open-ended nature of the text of the WTO Agreement. This leaves considerable autonomy to the AB in identifying the circumstances in which national trade restrictions may be regarded as legitimate, and in enunciating the relevance to this of the existence of positive instruments of transnational policy coordination. In defining such concepts as 'appropriate' and 'necessary' — so critical in circumscribing the regulatory autonomy of Members States — the AB enjoys considerable creative room for manoeuvre. This will not disappear in a puff of dictionary definitions, however self-consciously the AB seeks to stick close to the wording of the text. The AB, inexorably, faces profound interpretative choices, often on the basis of a text which is strikingly vague. A commitment to textual fidelity will not buy interpretative peace of mind. Amidst the many interpretative questions which the AB must address is that pertaining to the relationship between the WTO Agreement and externally generated standards and norms.

This paper argues that the AB, in the performance of its gatekeeper function, could learn much from the EU. Put broadly, it might learn that the authority enjoyed by instruments of transnational policy coordination may be regarded as contingent, not absolute. International standards and multilateral agreements offer benefits in the environmental sphere, not least (but not only) those associated with scale. Equally though, they carry risks. Their legitimacy cannot be assumed, particularly where they are elaborated in a context disassociated from national political life and from the

mechanisms of accountability and/or democratic oversight associated with this. By viewing the authority claims of transnational standards or norms within the WTO as contingent (contestable), the AB might serve to nurture much needed cooperation across national boundaries, whilst nonetheless striving to guard against these dangers. This need not (and should not) imply a role for the AB in second-guessing substantive policy choices reached in international fora. Nonetheless, contestability in the WTO, as in the EU, ought to imply scrutiny of the instruments concerned, in the light of relevant core values. Such values may be explicit or implicit in the text of the covered agreements. Witness the manner in which the AB in *Shrimp/Turtle* extrapolated far-reaching procedural requirements (transparency, reason giving, due process, for example) from the chapeau to GATT, Article XX, and from its surrounding context. Thus, to give just one example, the ‘appropriateness’ of international standards, within the meaning of the TBT Agreement, may be deemed to depend not only upon the content of these standards, but upon the transparency of the decision-making processes leading to their adoption.

The arguments put forward in this paper will be controversial, never more so than those in Section 4 below. Here, in considering the role of the AB *vis-à-vis* multilateral environmental agreements, the paper will go too far for some (in eroding the doctrine of state consent) and not far enough for others (in guaranteeing the unequivocal supremacy of multilateral environmental agreements). The paper is intended to be provocative. It puts forward an idea, rather than an elaborate blueprint. It does so in the belief that judicial creativity — as in *Shrimp/Turtle* — may operate in the name of responsible deference, not heightened intrusion. In the context under discussion here, it may serve not only to enhance the legitimacy of the WTO, but also to stimulate much needed reflexivity and reform in other spheres of transnational governance.

The paper proceeds in four primary sections. The next section (Section 2) turns to the EU, and examines (first) the relationship between standards and free movement, and (second) the relationship between ‘harmonizing’ legislation and free movement. This provides comparative material for Sections 3 and 4. The comparison in Section 3 is plain to see. Picking up on the discussion of standards in the EU, this turns to examine the role of international standards in the WTO. Section 4 leaves aside the issue of voluntary standards, and examines the relationship between multilateral environmental agreements and the WTO, with a particular focus upon the possible role of such agreements in disputes involving a state which is not a party to the agreement in question. This section posits — as the EU parallel — the case of EU ‘harmonizing’ legislation. This parallel is far from exact. EU legislation is binding upon all Member States, even those voting against it. Thus, the EU does not face the all important problem of state consent. It is nonetheless argued that the evolving practice of the EU, with its emphasis upon contestability and flexibility (including subsidiarity and proportionality), offers insights for the WTO in managing the interface between multiple and overlapping international legal orders. The final section (Section 5), prior to concluding (Section 6), picks up on the theme of ‘constitutionalization’ in the context of the WTO. It argues that the proposals put forward in this paper should not be read as servicing any constitutional pretensions on the part of the WTO. On the

contrary, in much the same way as the AB has succeeded in combining a high level of 'vertical' deference in respect of member state regulatory choices, with close scrutiny of the governance processes which underpin these, so too 'horizontal' deference to international standards and norms could be combined with scrutiny of the transnational governance processes leading to their adoption.

2 Policy Coordination and Market Integration in the European Union

Standards and 'harmonizing' legislation are important instruments of policy coordination in the European Union. They play a crucial role in securing market integration, and in reconciling this with a high level of environmental protection. In accordance with this twin objective, and depending upon circumstances, they serve to prise markets open or to close them down. In different ways, considerable authority is granted to these instruments of policy coordination.⁶

Looking first to European *standards*, these have figured prominently in the Community's 'new approach' to harmonization.⁷ This — contrary to more prescriptive and detailed traditional approaches — seeks to reconcile market integration with regulatory diversity. The 'new approach' is based first on the adoption of directives. These harmonize 'essential requirements' to be achieved, but leave flexibility both in the definition of these and in the determination of the means to be employed to meet them. In the area of environment, the packaging waste directive is illustrative.⁸ Annex II lays down essential requirements relating, for example, to the composition, reusability and recoverability of waste. The directive provides that, within three years of its entry into force, only products which comply with all essential requirements may be placed on the EU market. Crucially for our purposes, compliance will be 'presumed' in the case of packaging which conforms with the relevant European harmonized standards, the numbers of which have been published in the Official Journal of the European Union.⁹ The European Commission is charged with promoting the preparation of European standards relating to these Annex II essential requirements and is, to this end, made responsible for requesting, by way of a mandate, that the

⁶ The relationship between standards and legislation on the one hand, and the Community's free movement rules and exceptions on the other, is complex and contentious. Many issues remain unresolved. Some of these complexities will be flagged up in the footnotes which follow.

⁷ See the EU's own comprehensive and, on the whole, excellent guide: *Guide to the Implementation of Directives Based on the New Approach and the Global Approach*, available at http://www.eotc.be/newapproach/EC_Guide/NA_Guide99_Content.htm.

⁸ Council Directive 94/62 on packaging and packaging waste, OJ 1994 L365/10.

⁹ See Article 9 and, esp., Article 9(2). This also provides that where no harmonized standards exist, compliance with the relevant national standards will also generate a presumption of compliance.

European standards organizations present such standards.¹⁰ Before publishing these European standards, thereby conferring authority upon them, the Commission *may* verify that the terms of the mandate have been met.

Whereas compliance with the essential objectives laid down in the directive is a pre-condition for market access, compliance with the European-level standards is not. While compliance with these standards generates a presumption of conformity with the essential objectives, compliance nonetheless remains optional. Where a manufacturer chooses not to comply with the standards, it will incur an obligation to demonstrate that the products concerned nevertheless satisfy the essential requirements. Thus, manufacturers incur a burden of proof penalty in the event that their products do not conform to the standards in question. Member States have no option but to accept that products conforming to these satisfy the essential requirements laid down.¹¹

Turning now to ‘*harmonizing legislation*’: as is exemplified by the packaging waste example above, it is commonplace for European Union legislation to prescribe that only certain goods may be lawfully marketed in the Member States. The legislation in question may be more or less precise.¹² It may prohibit the marketing of a specific product, or regulate the uses to which that product may be put. It may, on the contrary, provide that Member States shall only permit the marketing of products which comply with the requirements laid down. Frequently, such requirements will be open-ended, providing for example, that Member States prohibit the sale of a product, except where it is ‘sound, genuine and of merchantable quality’.¹³ To the extent that restrictions on the sale or use of certain goods are required by Community

¹⁰ Though the bodies operate at EU level, they comprise a network of national standard-setting authorities, in the same way as the International Standardization Organization at the international level. The main bodies in the EU are CEN (European Committee for Standardization) and CENELEC (European Committee for Electrotechnical Standardization), and ETSI (European Telecommunications Institute). The existence of these bodies is recognized by Directive 98/34 OJ 1998 L204/37, Article 1(7) and Annex 1.

¹¹ New Approach directives take as their legal basis, Article 95 EC. Thus, even though they represent exhaustive harmonization (see discussion below at 323–324) the narrow public interest derogations contained in Article 95(4–8) will continue to apply. Member State autonomy in respect of these is extremely restricted, with the Commission enjoying the ultimate authority to determine the acceptability of the restrictions introduced by Member States pursuant to these (subject to review by the European Court). See, Vos, ‘Differentiation, Harmonisation and Governance’, in B. de Witte, D. Hanf and E. Vos, *The Many Faces of Differentiation in EU Law* (2001).

¹² Three kinds of binding legislative acts exist in Community law. See Article 249 EC. Directives are distinguished by their need for implementation in national law, by a deadline laid down. In the event of a failure to implement by this deadline, directives may be directly enforced in national courts *vis-à-vis* the state or emanations of the state, but only indirectly (by way of directive-friendly interpretation) against private undertakings. See, generally, P. Craig and G. de Búrca, *EC Law: Text, Cases and Materials* (3rd ed., 2002), and G. Bermann, *et al.*, *Cases and Materials on European Union Law* (2nd ed., 2002), at Chapter 7.

¹³ Council Directive 96/25 on the circulation and use of feed materials, OJ 1996 L125/35, Article 3. Where directives are open-ended in this way, two main routes to implementation exist. The first takes the form of a ‘comitology’ committee procedure, and the second involves Member State flexibility in implementation. On the first, see C. Joerges and E. Vos, *EU Committees: Social Regulation, Law and Politics* (1999).

legislation, Member States are relieved of the burden of justifying them.¹⁴ Where Member States are acting pursuant to a Community measure, they need not rely upon the free movement exceptions.¹⁵ Nonetheless, in implementing Community law, Member States remain bound by Community law general principles, including the general principle of proportionality.

It is then apparent that Community instruments of policy coordination — standards and harmonizing legislation — enjoy considerable authority. In the case of European standards, conformity serves as a guarantee of market access. When it comes to harmonizing legislation, this operates to relieve Member States of their burden of justifying restrictions on trade.

Crucially, however, this authority is contingent, not absolute. The instruments in question remain susceptible to contestation.

A Contestation: Standards

In the case of standards, while the presumption of conformity arising from compliance with harmonized standards is not, in principle, rebuttable,¹⁶ ‘new approach’ directives contain a kind of ‘safeguard clause’ which operates to facilitate contestation of European standards. According to this, the Commission or the Member States may bring such standards to the attention of a Community-level committee, where it

¹⁴ Article 30 EC contains an exhaustive list of such exceptions. The European Court has, however, developed a second source of exception, namely the notion of ‘mandatory requirements’. National measures which are necessary (and proportionate) to satisfy a mandatory requirement recognized by Community law, will be considered lawful. This second source is not, in general, available to justify measures which are directly discriminatory on grounds of nationality, though this is an area of considerable confusion, and some evolution, particularly in the environmental sphere. See, in particular, Case C-379/98 *PreußenElektra AG v Schleswig AG* [2001] ECR I-2099. See, generally, Craig and de Búrca, *supra* note 12, at Ch. 15, and Bermann, *supra* note 12, at Chapter 13.C.

¹⁵ It seems that this is true only for legislation laying down product standards. Legislation establishing production process standards is binding on the state in which the good is produced. Failure to comply with these standards will give rise to a breach of Community law on the part of that state. However, it does not seem to be open to one Member State to restrict the importation of goods which have been produced in a manner which is not in keeping with Community legislation laying down production process standards, other than to the extent that this is specifically mandated by the legislation itself, or to the extent that the restriction may be justified on the basis of the Community’s ‘normal’ free movement exceptions. This would seem to follow from cases such as Case C-5/94 *R v Hedley Lomas (Ireland) Ltd.* [1996] ECR I-2533. Here the European Court observed (para. 21) that: ‘A Member State may not unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by another Member State of rules of Community law’. The extent to which the free movement rules/exceptions would permit trade restrictions premised upon production processes rather than product standards remains something of an open question. Recent cases would suggest that the mandatory requirements defence or Article 30 may be invoked in these circumstances. See, for example, *PreußenElektra*, *supra* note 14 and Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV & Others v Minister van Volkshuisvesting* [1998] ECR I-4075. For an excellent discussion of this topic in the context of WTO law, see Howse and Regan, ‘The Product/Process Distinction — An Illusory Basis for Disciplining “Unilateralism” in Trade Policy’, 11 *EJIL* (2000) 249.

¹⁶ Subject to the observation in *supra* note 11.

considers that the standards in question do not entirely meet the directive's essential requirements.¹⁷ The political actor choosing to contest the standards in this way must give reasons for so doing. The Commission is obliged, in the light of the committee's opinion, to determine whether it is necessary to withdraw the standards, thereby denying their power to generate a presumption of conformity.

Assessment and contestation in this setting is ongoing rather than one-off, by virtue of the way in which essential requirements tend to be defined; emphasis is placed upon ends rather than means, and upon relative (for example, best possible or minimum practicable) performance rather than absolute standards. In this way, the framework for standard-setting is intended to be self-adjusting and continuously responsive to technological improvements, or gains in knowledge or understanding. The fact that contestation occurs by way of administrative rather than lengthy judicial proceedings is crucial in this respect. Significantly though, standing to contest standards is restricted to the Commission and the Member States. The exclusion of private parties — including industry actors and consumer groups — may tend to silence those with the knowledge and/or the incentive to seek to induce a 'ratcheting up' in the level of performance required by the standards concerned (in order, for example, to reap the economic benefit of technical innovation). Important too is the fact that contestation is entirely at the discretion of the Commission and the Member States. They are not obliged, when they become (or are made) aware of the shortcomings inherent in the existing standards, to mount an administrative challenge of this kind. It is telling that over a period of nearly two decades, only five Commission decisions concerning the adequacy of harmonized standards have been adopted.¹⁸

We see then that standard-setting in the EU takes shape against the backdrop of political agreement, albeit that the agreement tends to be expressed in terms which are broadly defined as essential requirements.¹⁹ It is, moreover, subject to a degree of ongoing scrutiny and contestation. Positive integration is, in this sense, not unconstrained. This fact of political oversight is reinforced by virtue of the embeddedness of standard-setting in a developed legal and constitutional order which provides for the possibility for judicial review of the acts of the Community institutions. Thus, for example, to take the least troublesome case, the Commission, in exercising its discretion as to whether to withdraw contested standards, would, in principle, be subject to judicial review. It is true that in an area such as this, it is to be anticipated that the European Court would cede the Commission substantial room for

¹⁷ The committee concerned is the so-called notification committee established by Article 5, Council Directive 98/34 (*supra* note 10) and comprising Member State representatives.

¹⁸ Commission Decision 2001/524/EC (packaging and packaging waste); Commission Decision 2003/189/EC (independent gas-fired convection heaters); Commission Decision 2003/190/EC (specifications for dedicated liquefied petroleum gas appliances); Commission Decision 2000/693/EC (agricultural machinery); Commission Decision 2000/361/EC (safety of industrial trucks).

¹⁹ For a proposal at the international level, encompassing some of the same features as the EU system, including a notion of 'common regulatory objectives' much like the EU's essential requirements, see: *UN/ECE Project for an International Model for Technical Harmonization: A Concept for Regulatory Co-operation* (Communication from the UN Economic Commission for Europe submitted to the TBT Committee: G/TBT/W/161).

manoeuvre. Nonetheless it would, at the very least, be constrained by reason-giving requirements.²⁰ Though not bound by the notification committee's opinion, case-law suggests that departure would spark a more searching scrutiny by the Court in this regard.²¹

Though neither the opinion of the notification committee, nor a decision of the European standardization bodies, would be directly susceptible to judicial review,²² it seems probable on the basis of analogies from other spheres, that the European Court would, in assessing the legality of the Commission's decision, have regard to the composition and mode of operation of the committees concerned.²³ Once again, extrapolating from other areas, not only would the Court lay emphasis upon the committee's compliance with Community rules on transparency and access to documents,²⁴ but it would insist upon scrupulous adherence to internal rules of procedure.²⁵ In the light of recent case-law, it may be that the Court would, in certain circumstances, go so far as to look behind the committee's façade and address the question of the robustness of the Members' (range of) expertise.²⁶

To assert that standardization in the EU is embedded in a developed legal and constitutional framework, and that the standards adopted are subject to political and judicial contestation, is not to overlook the shortcomings of the EU legal system. In much the same way as standing is limited in the case of administrative contestation, so too are rights of access to the European courts severely circumscribed. Indeed it would hardly be an overstatement — though it would gloss over the complexity of the Court's case-law — to state that it is difficult, if not impossible, to conceive of circumstances in which it would be open to a private party, or an association (as opposed to a Member State or Community institution) to be in a position to induce the European courts to rule upon the legality of a Commission decision to endorse standards, or to (refuse to) withdraw them.²⁷ It is significant, however, that in the

²⁰ On the existence of a general principle of Community law relating to the requirement to give reasons, see Craig and de Búrca, *supra* note 12, at 117–121.

²¹ See case T-13/99 *Pfizer*, [2002] ECR II-3305, at para. 199. Here the European Court of First Instance insisted that the Council, departing from the opinion of a scientific committee, must give specific reasons for its findings, and that this statement of reasons must be at a scientific level commensurate with the opinion in question.

²² See Article 230 EC concerning the jurisdiction of the European Court in this respect. Not only are these bodies not identified in Article 230 EC, but the measures that they adopt would in all probability not be considered to be 'acts' within the meaning of Article 230 EC.

²³ *Supra* note 21.

²⁴ See T-188/97 *Rothmans v Commission* [1999] ECR II-2463 and T-111/00 *British American Tobacco v Commission* [2001] ECR II-2997.

²⁵ C-263/95 *Germany v Commission* (Construction Products) [1998] ECR I-441.

²⁶ Case C-269/90 *Technische München v Hauptzollamt München-Mitte* [1991] ECR I-5469 and *Pfizer*, *supra* note 21.

²⁷ The awkward language of 'induce' here reflects two different routes available in terms of gaining access to the European courts for actions in judicial review; directly via Article 230 EC, or indirectly by way of a reference for a preliminary ruling from a national court. For an overview of the case law in this area see Craig and de Búrca, *supra* note 12, at Ch. 12 and Albors-Llorens, 'The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat', 61 *Cambridge LJ* (2002) 1. In this regard it is important to note that the Court would nonetheless regard as admissible an action for

wake of the entry into force of the Treaty of Nice, the standing of the European Parliament may not be impugned.²⁸

B Contestation: Harmonizing Legislation

Turning now to harmonizing legislation: while the existence of Community legislation shields the Member States from challenge under the free movement rules, the Community legislation itself remains vulnerable. The European Court insists that this legislation must respect the free movement norms laid down in the EC Treaty. For example, in *Gianni Bettati*, it found that the validity of a Community regulation prohibiting the use and marketing of hydrofluorocarbons (HFCs) was contingent upon compliance with Article 28 EC; the basic free movement norm with respect to goods.²⁹ Recalling earlier case-law, the Court confirmed that environmental protection is an ‘imperative requirement’ (or mandatory requirement³⁰) which may limit the application of Article 28 EC, subject to the principle of proportionality. Thus, while Community legislation is open to contestation, environmental protection may, in a given case, be the tool that is used to ‘save’ the measure.

This shift in the ‘object of attack’ — which flows from the adoption of harmonizing legislation — from national to Community measure has three primary consequences. First, whereas it would be for a Member State to justify any autonomous departure from the free movement norm, it would be for a complaining party to bear the burden in challenging the legality of the Community act.³¹ It thus gives rise to a shift in the burden of proof. Second, though nominally Member State restrictions, and Community acts, are subject to the same free movement rules (including proportionality), in practice the intensity of the review conducted by the Court has tended to be greatly reduced in the case of Community measures.³² Third, though there is considerable overlap in the content of the legal principles according to which the legality of Member State and Community action will be assessed, there are also differences. Certain principles are binding at the Community level only. Subsidiarity is perhaps the clearest example of this, though here the ‘touch’ of the Court has been notably light.³³

judicial review brought by a private party whose request for access to Community documents has been refused. This does not depend upon the requested documents being of individual concern to the applicant within the meaning of Article 230 EC. See, Case T-311/00 *British American Tobacco v Commission*, judgment of 25 June 2002.

²⁸ See amended Article 230 which places the European Parliament alongside the other Community institutions as a fully privileged applicant in this respect. As such it does not need to show any kind of interest in order for it to be able to bring a challenge.

²⁹ Case C-341/94 *Gianni Bettati v Safety Hi-Tech Srl* [1998] ECR II-4355.

³⁰ *Supra* note 14. See, for the recognition that environmental protection is a mandatory requirement recognized by Community law, Case 302/86 *Commission v Denmark* [1998] ECR 4607.

³¹ As noted above, it would still in theory be open to a party to challenge the legality of a national implementing act on the basis of a failure to comply with a Community law general principle. In such a case, it would also be for the complaining party to bear the initial burden of proof.

³² See Bermann, ‘Proportionality and Subsidiarity’, in C. Barnard and J. Scott, *The Law of the Single European Market* (2002) for a discussion of the relevant case law.

³³ See de Búrca, ‘The Principle of Subsidiarity and the Court of Justice as an Institutional Actor’, 38 *Journal of Common Market Studies* (1998) 214.

In the environmental sphere, the Treaty provides that Community policy shall be based on a number of principles including the precautionary principle.³⁴ While binding on the Community institutions, their status *vis-à-vis* Member States remains unclear.³⁵

The European Court's approach to the review of Community 'harmonizing' legislation is such that the Community institutions enjoy a wide margin of discretion. Where the legislature is faced with balancing a number of objectives, or divergent interests, or with complex questions of an economic or scientific nature, review will tend to be limited to an assessment of whether the institution in question has misused its powers, committed a manifest error of appraisal, or clearly exceeded the bounds of its discretion.³⁶ In reality, the Court will lay considerable emphasis upon procedural requirements, focusing upon the processes leading to the adoption of the decision.

This is made starkly apparent in one recent case concerning a challenge to a Council Regulation to prohibit the use of virginiamycin (an antibiotic) as an additive in animal feed.³⁷ Here the Court of First Instance (CFI) speaks the language of deference, providing that review must be limited in cases involving scientific assessment and the evaluation of highly complex scientific and technical facts.³⁸ 'The Community judicature is not entitled to substitute its assessment of the facts for that of the Community institutions, on which the Treaty confers sole responsibility for that duty.'³⁹ It concedes that under the precautionary principle, the Community institutions enjoy broad discretion to adopt protective measures, but insists that in such circumstances 'the guarantees conferred by the Community legal order in administrative proceedings are of even more fundamental importance', including the duty to examine 'carefully and impartially all the relevant aspects of the individual case'.⁴⁰ Thus, the Community institutions need not wait for the reality or seriousness of the risk in question to become apparent. They enjoy discretion in establishing the level of protection they deem appropriate for society.⁴¹ Nonetheless, a scientific risk assessment must be carried out before preventive measures are taken. Decisions must be taken in the light of the best scientific information available and based on the most recent results of international research. This research must, in turn, be based on the principles of excellence, independence and transparency. Other than in exceptional circumstances, where there are adequate guarantees of scientific objectivity, the

³⁴ See Article 174 EC and COM(2000) 1 final, *Commission Communication on the Precautionary Principle*. This applies not only to the area of environment, but also in respect of the protection of public health.

³⁵ For a discussion, see Scott and Vos, 'The Juridification of Uncertainty: Some Observations on the Ambivalence of the Precautionary Principle', in C. Joerges and R. Dehousse, *Good Governance in Europe's Integrated Market* (2002). See also N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (2003).

³⁶ Gianni Bettati, *supra* note 29, Pfizer, *supra* note 21, para. 166.

³⁷ Pfizer *supra* note 21. See also T-70/00 *Alpharma v Council*, judgment of 11 September 2002.

³⁸ *Supra* note 21, at para. 169.

³⁹ *Ibid.*

⁴⁰ *Supra* note 21, at paras 170–171.

⁴¹ Though they may not adopt measures on the basis of what the CFI calls a 'zero-risk' approach, by which it seems to mean an approach which demands evidence that the product in question is unequivocally safe.

Community institution in question must obtain the opinion of a competent scientific committee set up at EU level. Though it is not bound by its conclusions, where it disregards its opinion, it must provide specific reasons for so doing and this statement of reasons must be at a scientific level commensurate with the opinion in question.

The language of deference is matched by a reality of intense scrutiny of the epistemic basis of the Council Regulation, in terms of its gathering and appreciation of the (limits of the) scientific findings. It is not simply that the CFI insists that the political institution in question clothe its decision in the garb of science, but it insists also that those with responsibility for providing the scientific evidence be appropriately qualified and independent, and that they operate in an environment which is transparent and hence susceptible to critique and dissent.⁴²

The point here is not to dwell upon the specific issues arising in cases of scientific uncertainty, but rather to highlight the heavy emphasis placed by the European courts upon the procedures underpinning the adoption of contested decisions. The case serves, moreover, to reinforce the point made above, in relation to standards. Authority — in terms of the ability of Community measures to impede lawfully the movement of goods (in this case by prohibiting a particular use) — goes hand in hand with contestability. Member States acting pursuant to Community harmonization are freed from the burden of defending their choices.⁴³ But the possibility of contestation remains, albeit that the focus shifts from the national to the Community level.

C *Flexibility*

Alongside contestation, flexibility emerges as a key feature of policy coordination in the European Union. In the case of standards this operates for the benefit of manufacturers rather than Member States. Manufacturers may choose to ensure that their products conform with European standards, thereby benefiting from a presumption of conformity, or not as the case may be. This offers them the flexibility to innovate.

In the case of harmonizing legislation, subsidiarity and proportionality operate to constrain the scope and intensity of Community-level intervention. Proportionality, in particular, seeks to guarantee that legislation is only as prescriptive as is strictly necessary, having regard to the objective being pursued. Its implications are spelt out in a protocol to the Treaty.⁴⁴ It generates a preference for framework directives, leaving Member States maximum feasible flexibility in implementation. Wherever

⁴² *Supra* note 21.

⁴³ The steps that Member States would be required to take to give effect to a Community measure will depend upon the legal form that the measure takes. In *Pfizer* (*supra* note 21) the contested measure was a regulation and hence would be directly applicable in the Member State legal orders, without the need for transposition. Directives are more commonly deployed, in which case Member States are responsible for implementation, but freed from the burden of defending their implementing measures in so far as the restrictions introduced are required by the directive. Implementing Community law, Member States must respect Community law general principles. Hence, in implementing a directive, in accordance with the proportionality principle, Member States must not go further than is necessary to attain its objectives.

⁴⁴ Protocol on the Application of the Principles of Subsidiarity and Proportionality.

possible, legislation is to leave open alternative routes to the achievement of the results envisaged.

Thus, in Community law, the language of 'harmonization' is somewhat misleading. One of the most striking characteristics of the internal market 'experiment' is the manner in which it seeks to combine market integration with regulatory diversity. This was seen above in relation to 'new approach' directives, which merely establish 'essential requirements', and often in terms which are open-ended. Along with European standardization, a sophisticated system of conformity assessment, certification and product marking has been developed in order to facilitate the free movement of 'new approach' products.⁴⁵

One structural mechanism favouring regulatory diversity is minimum harmonization.⁴⁶ The idea is simple, though the legal reality complex. Minimum harmonization measures establish a floor of obligations below which no Member State may fall. Member States may, however, enact stricter measures, subject to their being compliant with the Treaty, including the Treaty rules on free movement. The minimum harmonization measure constitutes the floor; the Treaty the ceiling.⁴⁷

The question of which measures take the form of exhaustive (as opposed to minimum) harmonization measures is fraught, as is the relationship between these measures and the free movement norms.⁴⁸

As regards the former, this will depend in certain cases upon the legal basis of the measure in question. For example, in so far as measures are enacted on the basis of the Treaty's environment title, these will automatically take the form of minimum harmonization measures. This flows from the wording of Article 176 EC, which explicitly recognizes the power of Member States to adopt more stringent measures.⁴⁹ In other cases, legal basis may not be determinative, and it will fall to the Court to construe the measure in question, having regard to its wording, structure and purpose.⁵⁰

⁴⁵ For a description, see *supra* note 7.

⁴⁶ For a full and up-to-date discussion, criticizing the approach of the European Court in relation to minimum harmonization see Dougan, 'Vive La Différence? Exploring the Legal Framework for Reflexive Harmonisation within the Single European Market', *German Law Journal* (2002), available at <http://www.germanlawjournal.com/>.

⁴⁷ Weatherill, 'Beyond Preemption? Shared Competence and Constitutional Change in the European Community', in D. O'Keefe and P. Twomey (eds) *Legal Issues of the Maastricht Treaty* (1994).

⁴⁸ See Dougan, 'Minimum Harmonization and the Internal Market', 37 *CMLR* (2000) 853.

⁴⁹ Though see Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897, where the Court construed a Community regulation based on the environment title (on the supervision and control of waste shipments) as an exhaustive harmonization measure, thus pre-empting more stringent Member State measures. Contrast this with Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV & Others v Minister van Volkshuisvesting* [1998] ECR I-4075, where legal basis was accepted as determinative in this respect. For a full, critical discussion of these cases see Dougan, *supra* note 46.

⁵⁰ For recent examples see a series of cases concerning the product liability directive (for example, Case C-52/00, *Commission v France*, judgment of 25 April 2002. For the product liability directive, see Council Directive 85/374 OJ 1985 L210/29). Here the Court, having regard to the wording, purpose and structure of the directive, concluded that it was such to entirely determine matters within its sphere, leaving no room for Member States to enact stricter rules offering a higher degree of consumer protection,

As regards the latter, minimum harmonization will, on occasion, be explicitly tied to market access. Thus, a directive may allow stricter measures, but nonetheless demand free circulation for all goods complying with its minimum standards.⁵¹ Where minimum harmonization is not expressly tied to market access, or when the European Court does not construe the measure as being so tied, stricter measures may apply to imported as well as to domestic goods, subject to their being susceptible to justification on the basis of the standard free movement exceptions.⁵² By way of contrast, recourse to these free movement exceptions is precluded in areas in which the Community pursues a strategy of exhaustive harmonization.⁵³

Significantly, in so far as Member States are permitted to adopt stricter standards pursuant to a minimum harmonization directive, they incur a procedural obligation. At the very least this will take the form of a duty to notify the Commission of such measures.⁵⁴ More often, however, in view of the broad reach of the Community's so-called notification directive,⁵⁵ the nature of the procedural obligation will be more far-ranging.⁵⁶ Thus, the notification directive not only requires that Member States communicate draft technical regulations to the Commission, together with specified information, thus providing an opportunity for both the Commission and the Member States to make comments upon it, but also requires that they postpone the adoption of

even *vis-à-vis* domestic rather than imported goods. Occasionally the Court reaches bizarre conclusions in this respect, finding that a measure is exhaustive in nature, notwithstanding clear wording to the contrary. In certain cases, there may be clear policy reasons for its willingness to disregard clear language in this respect (see esp. Case C-169/89 *Criminal Proceedings against Gourmellerie van den Burg* [1990] ECR I-2143, where the Court's finding that the measure in question exhaustively harmonized the field in question allowed it to dodge the controversial issue of the extra-territorial application of the free movement exceptions). See *supra* notes 46 and 48.

⁵¹ See, for a clear example, Case 11/92 *R v Secretary of State for Health, ex parte Gallaher and Others* [1993] ECR I-3545.

⁵² See, for an example in the environmental sphere, Case C-389/96 *Aher-Waggon GmbH v Germany* [1998] ECR 4473.

⁵³ See Case C-2/90 *Commission v Belgium* [1992] ECR I-4431.

⁵⁴ See, for example, Article 176 EC in relation to minimum harmonization in the environmental sphere.

⁵⁵ This concerns all technical regulations, namely: 'technical specifications and other requirements, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions or Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product'. See Article 1(9) and Article 1(2) for an extremely extensive definition of technical specification. Article 10 of the directive releases Member States from the obligations laid down, *inter alia*, in the case of measures which comply with binding Community acts which result in the adoption of technical specifications. This would apply only in respect of the minimum standards laid down as only these may be regarded as 'binding' as a matter of Community law.

⁵⁶ The same is true where Member States seek to derogate from a measure. See, for example, Article 95 EC which establishes a system of notification and prior approval. Here, it is the Commission which enjoys authority to pronounce upon the acceptability of the Member State measure. Such safeguard clauses are often included in individual directives, and frequently the Commission's power to determine Member State recourse to them will operate within the framework of comitology. In this way, the Member States, acting by way of their representatives in committee, or ultimately by virtue of the role of Council, maintain an oversight role *vis-à-vis* the Commission's authorization decisions.

the draft technical regulation for a period of between three months and 18 months.⁵⁷ The precise length of time will depend upon the reaction of the Commission and/or the Member States, and in particular upon whether the Commission announces an intention to propose or adopt legislation on the subject at hand. Crucially, failure to comply with either the notification obligation, or the 'standstill clause' requiring that the introduction of the measure be postponed, will deprive a Member State's technical regulations of any legal effect.⁵⁸

Complex though the above will seem, the underlying idea is straightforward. Member States retain substantial regulatory autonomy, even following the adoption of Community measures, notably minimum harmonization measures.⁵⁹ However, the integrity of the internal market is maintained to the maximum extent possible, by virtue of a system which enables the Commission to anticipate problems arising out of regulatory diversity, and to propose common solutions to them. That this system does not shut down in the wake of Community intervention in the form of minimum harmonization, enables the Commission to maintain a continuous overview of implementation practices in the Member States, and of the regulatory concerns which underpin them. This obligation to communicate with the Commission (and via the Commission, with the other Member States) is designed both to discipline Member States by exposing them to a system of peer review, but also to provide the information base according to which the Commission may target Community level action — and re-action in the sense of the adjustment and adaptation of existing measures — more carefully.

D Conclusion

This brief overview of the role of instruments of policy coordination in the European Union's internal market project provides a backdrop for the analysis of parallel questions in the WTO. The willingness of the European Union, including the European Court, to grant considerable authority to such instruments stands in marked contrast to recent experience in the WTO. Here, the AB has been reluctant to concede authority to international standards. The closest WTO analogy to harmonizing legislation in the EU, takes the form of multilateral environmental agreements. These, unlike international standards, may impose binding obligations on parties. In relation to such agreements, the AB has been largely silent to date.

⁵⁷ *Supra* note 10, Articles 7–9. This duty to postpone adoption is subject to the proviso in Article 7 that it is not applicable in circumstances where, for urgent reasons, a Member State is obliged to prepare the regulations in a short space of time and to introduce them immediately. The Member States must give reasons for this, and the Commission gives its views on a Member State communication to this effect, taking 'appropriate action' in the case of improper use. 'Urgent reasons' are defined as 'serious and unforeseeable circumstances relating to the protection of public health or safety, the protection of animals or the preservation of plants'.

⁵⁸ See Case C-194/94 *CIA Security International SA v Signalson SA and Securitel SPRL* [1998] ECR I-2201 and Case C-443/98 *Unilever SpA v Central Food SpA* [2000] ECR I-7535.

⁵⁹ Though recall that while recourse to the free movement exceptions is precluded in the case of exhaustive harmonization measures, derogations may be permitted either under the Treaty (for example, Article 95) or by virtue of a specific safeguard clause included in the legislation concerned.

3 Standards in the WTO

Opposition to the WTO has been widespread and vociferous. Central to this has been the perception that it undermines the regulatory capacity of states, engendering a ‘ratcheting down’ in levels of protection of vital interests, including environment and public health. One important factor feeding this perspective is the WTO’s attachment to international standards. Not only, we are told, does the WTO ‘provide powerful incentives for governments to harmonize standards and regulations’, but it is said also to permit the adoption of stricter national measures ‘only in very limited circumstances’.⁶⁰ Add to this, deep concerns about the legitimacy of the standard-setting bodies in question, and their vulnerability to capture, and the image of the WTO as an ‘engine’ of ‘corporate-led globalization’ is hard to resist.⁶¹

It is the case that the WTO Agreement seeks to promote the use and development of international standards.⁶² In the Agreement on Sanitary and Phytosanitary Measures (SPS), such standards are deemed to include those emanating from three specified bodies,⁶³ along with ‘appropriate standards’ from ‘other relevant international organizations open for membership to all Members’, as identified by the SPS Committee.⁶⁴ The Technical Barriers to Trade Agreement (TBT) remains relatively more vague, speaking of ‘relevant international standards’,⁶⁵ defining standards on the basis that they derive from a ‘recognized body’, and by virtue of their voluntary nature.⁶⁶ We know from the AB report in *Sardines* that such standards need not be approved by consensus in order to be relevant.⁶⁷

More specifically, and in keeping with Lori Wallach’s observations above, these agreements seek both to create an incentive in favour of states whose measures conform to such standards,⁶⁸ and to create a positive obligation on states to ensure that domestic regulations are based upon them.⁶⁹ As regards the former, this takes the form of a rebuttable presumption in favour of conforming measures. For the latter,

⁶⁰ Wallach, ‘Accountable Governance in the Era of Globalization: The WTO, NAFTA and International Harmonization of Standards’, *University of Kansas Law Review* (2002) (Westlaw version) 5.

⁶¹ *Ibid.*, at 27.

⁶² Recital 6 SPS Agreement, Recital 4 TBT Agreement. The SPS Agreement speaks of international standards, guidelines and recommendations, while the TBT Agreement speaks of international standards, the concept of standards being defined, however, as including rules, guidelines or characteristics for products or related processes and production methods (Annex 1.2 TBT). As a shorthand term ‘international standards’ will be used in relation to both agreements, though where relevant the significance of this difference will be highlighted.

⁶³ The Codex Alimentarius Commission for food safety, the International Office of Epizootics for animal health and zoonoses, and the Secretariat for International Plant Protection Convention for plant health.

⁶⁴ Annex A, SPS Agreement.

⁶⁵ Article 2.4 TBT.

⁶⁶ Article 1.2 TBT. There remains some doubt as to whether for a body to be recognized within the meaning of this, it too must be open for membership on the part of at least all WTO Member States.

⁶⁷ WT/DS231/AB/R, *European Communities — Trade Descriptions of Sardines (Sardines)*, para. 227 AB.

⁶⁸ Article 3.2 SPS; Article 2.5 TBT. The SPS Agreement uses the language of conformity, whereas TBT deploys the term ‘in accordance with’.

⁶⁹ Article 3.1 SPS provides that members ‘shall base’ their SPS measures on international standards. Article 2.4 TBT provides that they shall use such standards ‘as a basis for’ their technical regulation.

states must ensure 'a very strong and close relationship between' domestic measures and relevant international standards, other than in the circumstances laid down.⁷⁰ Nonetheless, the text of the agreements notwithstanding, the AB has been noticeably circumspect in terms of the degree of authority it has been prepared to concede such standards.

First, with regard to the nature of the incentive generated in the event of Member State conformity with the standards in question,⁷¹ the AB has deprived this of some bite.⁷² In the light of its jurisprudence, this incentive emerges as largely illusory. This conclusion flows from the AB's approach to the all important question of burden of proof. Conformity with international standards is said to generate a rebuttable presumption in favour of the measure in question.⁷³ This would seem to imply that, in the event of conformity, it will be for the complaining party to rebut this presumption, by demonstrating a failure to comply with the relevant provisions. No doubt this is correct. However, it does not seem to be a benefit worth having. Already the AB has told us that there is no rule/exception relationship inherent in the relevant provisions of the SPS and TBT Agreements.⁷⁴ Consequently, it is never incumbent upon a Member to justify its regulatory choices until such a time as another state has entered

⁷⁰ *Sardines*, para. 245 AB. The concept of 'based on' has been construed by the AB on two occasions. In *Hormones*, the AB rejected the view of the panel which equated 'based on' with 'conform to'. To equate these two terms would, in the AB's view, be 'to vest such international standards . . . with *obligatory* force and effect' and to 'transform those standards . . . into binding norms', in the absence of any indication of 'any intent on the part of the Members to do so'. 'We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating *conformity or compliance* with such standards . . .' (para. 165). On the contrary, to say that a measure is based on something, is merely to say that it 'stands', or is 'founded', or 'built' upon it, or 'is supported by' it (para. 163). In *Sardines*, in laying down the 'very strong and close relationship' test, the AB seemed a little less reticent than previously in imbuing international standards with some degree of 'bindingness'.

⁷¹ The concept of 'conforming to' has been interpreted by the AB as requiring that the measure in question must 'embody the international standard completely and, for practical purposes, convert . . . it into a municipal standard' (WT/DS26/AB/REC *Measures Concerning Meat and Meat Products (Hormones)*, para. 170 AB). The parallel provision in the TBT Agreement concerning measures which are 'in accordance with' international standards has not yet fallen for interpretation. However, in view of the AB's insistence that the two agreements exhibit 'strong conceptual similarities', it is unlikely that it be accorded a meaning which is different in any important respect. (*Sardines*, para. 274 AB).

⁷² Other than release from the publication and notification obligations in Article 2.9 and 2.10 TBT. However, even where measures conform to international standards under the TBT agreement, members still have an obligation to comply with the information and assistance requirements set out in Article 10 TBT. It remains uncertain as to whether they would have to comply with the Article 2.5 TBT obligation to justify the measure on request in such circumstances, or whether the recognition of a rebuttable presumption in favour of the measure (also in Article 2.5 and hence closely tied to the duty to justify) would at least release the state from this administrative obligation.

⁷³ The substantive scope of this presumption varies as between the two agreements. In the case of the SPS agreement, it extends to all relevant parts of that agreement, as well as to GATT as a whole. For the TBT agreement, it serves merely to create the presumption that the measure in question does not create an unnecessary obstacle to international trade, this clearly being particularly relevant in assessing compliance with Article 2.2 TBT, and Article XX GATT.

⁷⁴ *Hormones*, at para. 169 AB.

a complaint, and established a *prima facie* case of inconsistency.⁷⁵ As such, there is no initial burden resting upon the regulating state, such as is susceptible to being reversed in the event of conformity with international standards. Similarly, non-conforming national measures are not presumed to be invalid; still the initial burden would rest on the complaining state. In the light of this, regardless of conformity with international standards, a complaining party must always demonstrate, *prima facie*, that the measure in question is inconsistent with the agreement concerned.

This realization does not preclude the possibility that the AB will apply a different approach in fact, depending upon whether there is conformity with international standards. It may be that it will adopt a more demanding or rigorous approach in checking the WTO compatibility of non-conforming measures. Thus, the allocation of the initial burden does not shift, but the evidential stringency of the complainant's burden of persuasion might vary. By definition, conforming measures must embody the international standard in question completely, converting it into a municipal standard. As such, any challenge to the national measure will necessarily — albeit indirectly — call into question the underlying international standard; be it in terms of its scientific basis in the case of the SPS Agreement, or on the basis of its necessity to fulfil a legitimate objective in TBT. It is possible that the AB will apply the same criteria in relation to conforming and non-conforming measures, but that its standard of review will vary, implying a 'softer' approach in the case of conforming measures and in relation to the international standards which these embody. As seen above, a similar pattern emerges in the EU, where the European Court adopts a less intensive approach to the review of Community measures restricting trade than it does in relation to Member State restrictions.

What of the nature of the positive obligation attaching to Members to *base* their domestic measures upon relevant international standards? This question is distinct from the point discussed above as to whether *conformity* produces any special benefit. Both the SPS and the TBT Agreements recognize that while there is an obligation to base domestic measures on international standards, there are nonetheless circumstances in which it is legitimate for Members to depart from such standards.

Article 3.3 SPS provides that Members may introduce SPS measures resulting in a higher level of protection than would be achieved by measures based on international standards, if there is a scientific justification, or as a consequence of the level of protection a Member determines to be appropriate, in accordance with Article 5(1–8) of the agreement. The language of this provision is 'involved and layered',⁷⁶ and as such the AB looks not only to the wording of the provision (and a footnote to it) but also to its object and purpose, and the object and purpose of the agreement as a whole:

In generalized terms, the object and purpose of Article 3 is to promote the harmonization of the SPS measures of Members on as wide a basis as possible, while recognizing and safeguarding, at the same time, the right and duty of Members to protect the life and health of their people. The

⁷⁵ A *prima facie* case is one such that in the absence of effective refutation the panel will be required to find in favour of the complaining party. See *Hormones*, para. 184 AB.

⁷⁶ *Ibid.*, at para. 176 AB.

ultimate goal of the harmonization of SPS measures is to prevent the use of such measures for arbitrary or unjustifiable discrimination between Members or as a disguised restriction on international trade, without preventing Members from adopting or enforcing measures which are both 'necessary to protect' human life or health and 'based on scientific principles', and without requiring them to change their appropriate level of protection. The requirements of a risk assessment under Article 5.1, as well as of 'sufficient scientific evidence' under Article 2.2, are essential for the maintenance of the delicate and carefully negotiated balance in the *SPS Agreement* between the shared, but sometimes competing, interests of promoting international trade and of protecting the life and health of human beings. We conclude that the Panel's finding that the European Communities is required by Article 3.3 to comply with the requirements of Article 5.1 is correct and, accordingly, dismiss the appeal of the European Communities from that ruling of the Panel.⁷⁷

As such, Member States may only refrain from basing their measures on relevant international standards to the extent that they comply with the core SPS requirements in Articles 2.2 and 5.1. Thus, compliance with Article 3.3 is contingent upon compliance with other parts of the agreement. This would include the obligation to ensure that measures are based on a risk assessment and supported by sufficient scientific evidence.⁷⁸ Though this is complex, the bottom line is clear.

That conformity with Article 3.3 depends upon compliance with other core aspects of the SPS Agreement raises the broader issue of whether the Article 3.1 obligation to base national measures on international standards constitutes a truly autonomous or additional obligation. If departure is sanctioned wherever there is conformity with the other relevant parts of the Agreement, then the obligation to base national measures on international standards would appear to be a derivative rather than an autonomous obligation. In this sense, the bite of international standards in the WTO is shown once again to be less fierce than many had anticipated.

In seeking to verify this conclusion, it is necessary to ask whether Article 3.3 contains any free-standing requirements, which are distinct from those in other parts of the Agreement, and notably in Article 5.1–5.8. Arguably, the only additional obligation contained therein is the requirement that departure from the international standard in question be such as to result in a *higher level of protection* than would be achieved by measures based on the relevant international standard. Thus, it is conceivable that a national measure not based on available international standards, but consistent with Article 5.1–5.8, would nonetheless fall foul of Article 3.1/3.3 where this results in the same (or a lower) level of protection than the international standard in question.

An acknowledgement of the largely derivative nature of Article 3.1/3.3 is,

⁷⁷ *Ibid.*, at para. 177 AB.

⁷⁸ There remains some doubt as to whether compliance with all of the paragraphs of Article 5 is a necessary precondition for refusing to base measures on relevant international standards, or whether Article 5.1 is somehow distinctive in this respect. At the very least it would not make sense to apply Article 5.1 without reference to Article 5.7 which permits the adoption of provisional measures in the face of insufficient scientific evidence. It seems reasonable also to suppose that Members seeking to invoke Article 3.3 could also invoke Article 5.7 concerning the precautionary principle, in circumstances where the relevant scientific evidence is insufficient. In *Hormones*, however, the EU did not seek to rely upon this provision.

however, not to deny that by basing their measures on international standards (or *a fortiori* conforming to them), Member States may reap an advantage in terms of compliance with the Agreement as a whole. In so doing Member States may ‘piggyback’ on the scientific findings which underpin the international standards, and upon the institutional credibility with which they are imbued, thereby adding sustenance to their claim that the domestic measure is adequately grounded in science.

Turning now to the TBT Agreement, Article 2.4 provides that Members must use international standards as a basis for their measures, except where these would be an ineffective or inappropriate means of fulfilling the legitimate objective pursued. As always, it falls to a complaining party to demonstrate, *prima facie*, that the contested measures are not based on such standards, and that the existing standards would be an effective and appropriate means of achieving the objective pursued. In practice, most of the time, parties will not be called upon to justify departure from international standards.

Unlike the equivalent provisions of the SPS Agreement, Article 2.4 TBT would seem to present a truly autonomous obligation in the sense that compliance is not merely contingent upon conformity with other aspects of the agreement. The concept of a ‘legitimate objective’ in Article 2.4 is to be construed in the context of Article 2.2 and, as such, it encompasses both the objectives listed there, and extends beyond them. There must therefore, in each case, be an examination of, and a determination on, the legitimacy of the objective in question.⁷⁹ ‘Ineffective’, in this setting, has been found to refer to ‘the function of accomplishing the legitimate objective pursued’, and thus to relate to the results of the means employed.⁸⁰ ‘Inappropriate’, on the other hand, is said to pertain to something which is ‘not specially suitable for the fulfilment of the legitimate objective pursued’, and thus to relate to the nature of the means deployed.⁸¹ Though the AB stressed the distinct meaning of these two terms, it accepted in *Sardines* that they were interrelated, the capacity of the standards in question to accomplish the stated objectives (its effectiveness), and the suitability of those standards for the fulfilment of those objectives (its appropriateness) both being decisively influenced by the same evidence (the perception and expectations of consumers in the EU).⁸²

In so far as it is distrust of international standards which drives criticism of the WTO, due to the manner in which it transforms purely voluntary standards into

⁷⁹ This is, presumably, a matter of legal interpretation. In *Sardines*, the panel observed that it could see no reason to disagree with the parties’ own favourable assessment of the legitimate objectives relied upon by the European Union (market transparency, consumer protection and fair competition). See *Sardines* (Panel Report), at para. 7.122.

⁸⁰ *Ibid.*, at para. 285 AB.

⁸¹ *Ibid.*

⁸² *Ibid.*, at para. 289 AB. It is worth noting that certain aspects of the panel’s findings were dismissed by the AB as ‘moot and without legal effect’ because they were not relevant for the purpose of making a finding under Article 2.4, they might be relevant to a legal analysis under Article 2.2, in relation to which the panel had determined not to make legal findings. In particular the AB was insistent that the panel’s conclusion that the contested regulation was more trade restrictive than the relevant international standard, and thus created an unnecessary obstacle to trade, should be dismissed. This is important because had the AB not done this we might have been left with the impression that a finding under Article

instruments 'with teeth', critics would do well to focus upon Article 2.4 TBT. Key in this respect is the construction and application of the terms 'ineffective' and 'inappropriate', as it is these concepts which will determine the ease with which Members may depart from the standards in question, and block imports even of goods complying with them. Important too is the degree of autonomy which Members are deemed to enjoy in setting their own level of protection (including steps to be taken in the face of uncertainty or disagreement).⁸³ It is notable that the AB has insisted that Members enjoy an 'important' and 'undisputed' 'autonomous right' to determine the level of protection they wish to achieve.⁸⁴ Fine words. Careful scrutiny will, however, be indispensable to ensure that this right is in fact fully respected. Some doubts may be expressed as to whether this was the case in *Sardines*, where the level of protection against which the effectiveness/appropriateness of international standards was assessed, was defined in terms of the protection of consumers 'in most of the Member States' of the EU. Because it was not demonstrated that consumers in *most* of the Member States made an exclusive association between the term 'sardines' and one particular fish species (*Sardinas Pilchardus!*), the effectiveness/appropriateness of the relevant Codex standard was upheld, and the EU found to be in breach of Article 2.4 TBT.⁸⁵ That leaves open the possibility that some consumers in *one* or *some* of the Member States (at any rate fewer than eight) did make such an exclusive association, and for whom the international standard would not secure adequate protection. In view of the EU's undisputed right, under the agreement, to establish its own level of protection, it ought, presumably, to be able to take steps to protect a small minority of the most vulnerable consumers.⁸⁶

The need for continued vigilance aside, it will be apparent in the light of the above, that the AB has been reticent in conceding authority to international standards within the framework of the WTO. Not only has its early jurisprudence weakened the supposed incentive favouring conformity with such standards, but its continued

2.4 regarding the appropriateness/effectiveness of international standards is relevant also to a finding under Article 2.2, in the sense that measures not based on standards regarded as effective/appropriate are unnecessary/not least trade restrictive within the meaning of Article 2.4. As it is, the relationship between those various concepts remains uncertain.

⁸³ Obviously, the range of goals recognized as constituting legitimate objectives is also crucial to the application of Article 2.4 TBT. That said, where a measure is deemed to be in breach of Article 2.4 because of a refusal on the part of the dispute settlement bodies to recognize the legitimate nature of the objective being pursued, that measure would anyway fall foul of Article 2.2 TBT. In this sense, the existence of standards will not be the key determinant (or not the only determinant) of unlawfulness in relation to this kind of measure.

⁸⁴ *Hormones*, at para. 172 AB and *Asbestos*, at para. 168 AB.

⁸⁵ *Sardines*, at paras 290 AB.

⁸⁶ It is true that it was the EU that made the factual claim which came to underpin this approach; namely that consumers in most Member States do make such an exclusive association. However, there is a difference between claiming that something is true, and placing that something at the heart of the definition of the level of protection to be achieved. It would not be inconsistent to claim that this is true, while also insisting that the measure would be regarded as necessary, in view of the level of protection the EU wishes to achieve, even where it serves to protect a significantly smaller number of consumers, concentrated in a smaller number of states.

insistence upon the autonomy of Members in determining the appropriate level of protection to be pursued serves to relax the strictures of the positive duty to use such standards as a basis for domestic measures. The AB's explicit and principled reluctance to vest such standards with obligatory force and effect, in the absence of intent on the part of the 'sovereign' Members to do so, is one thing.⁸⁷ The concept of obligatory effect lies at the extreme end of the authority spectrum. But its reluctance to deploy the burden of proof rules to confer any advantage on conforming measures,⁸⁸ and its ready willingness, in principle, to countenance departure from such standards, is another. Not only are the standards not rendered obligatory but their authority within the WTO would seem, at present, to be modest in the extreme.

A Conclusions

The reticence of the AB to concede authority to international standards stands in marked contrast to experience in the EU. European standards, by contrast, enjoy considerable — though contingent — authority as levers of market access. As seen, contingency in this regard centres upon conformity with a substantive benchmark, together with respect for fundamental procedural prescriptions laid down by Community law, including the giving of reasons and transparency requirements. In the WTO, by way of contrast, there are few constraints upon what counts as a relevant standard. To the extent that these do exist, they focus upon the formal identity of the standard-setting body in question. For those organizations not explicitly mentioned, the key determinant of recognition is access, in the sense of openness to participation by at least all WTO Members or, in the case of the TBT Agreement, by their relevant bodies.⁸⁹ Beyond this, remarkably, the agreements appear to be silent as to composition or mode of functioning. A standard adopted following widespread bribery, or in circumstances in which access to information is so limited as to render it

⁸⁷ *Hormones*, at para. 165 AB.

⁸⁸ One gets a sense from *Hormones* (para. 171 AB) of the manner in which this might have been done. Conforming measures could be rebuttably presumed to be in conformity with the relevant provisions of the SPS/TBT agreements. Measures not conforming to, but based on, international standards could be approached on the basis of the default rule that the complaining party make a *prima facie* case. The initial burden of justifying measures neither conforming to, nor based on, international standards (where these exist) might be deemed to rest with the member adopting the measure. This would be a neat (in the sense of tidy!) solution. It would also greatly enhance the authority of such standards, and it has been categorically rejected by the AB.

⁸⁹ It seems unlikely that this distinction between openness to Members (SPS Agreement, Annex A3(d), and openness to members or their relevant bodies (TBT Agreement, Annex 1.4), will be viewed as a significant one. The TBT version is no doubt written with the International Standards Organization (ISO) in mind, made up as it is by the most representative national standard-setting bodies, many of which will be private as opposed to governmental in nature (such as the British Standards Institute). In the SPS agreement, it is for the SPS committee to 'identify' relevant international organizations open to all members. One question which will be relevant to the later discussion is whether the administrative bodies established by way of a multilateral environmental agreement (for example the Conference of the Parties, or the Meetings of the Parties) are qualifying international standard-setting organizations for these purposes. They frequently enjoy the power to adopt non-binding resolutions and recommendations establishing standards. They are only open to parties to the parent agreement, but the parent agreement

impossible to verify that it was not, would be embraced by the WTO as a relevant international standard. The point here is not to comment critically upon the mode of functioning of the organizations concerned. Others have done so.⁹⁰ It is merely to point out that the existence conditions for 'international standards' in the WTO are parsimonious in the extreme, and that an awareness of this might underpin the marked reluctance of the AB to concede authority to them.

The above observations posit a link between contestability and power in the case of international or European standards. Willingness to concede authority to such standards is seen, in practice, to be contingent upon their being subject to political or judicial oversight, on the basis of benchmarks which are framed in both substantive and procedural terms. In the EU contestability operates at a systemic level, at the point where the Commission grants authority to such standards, or refuses subsequently to withdraw that authority upon request. In view of this, the capacity of Members to depart from such standards in individual cases is excluded. In the WTO, systemic contestation is precluded,⁹¹ and consequently the entitlement of states to depart from such standards is vastly enhanced. Thus, in the TBT Agreement, where the obligation to base domestic measures on international standards represents a truly additional, free-standing obligation, Members may depart from such standards on a case-by-case basis, where these are not an effective and/or appropriate means of achieving the desired level of protection. What remains unclear is whether these concepts — and in particular that of appropriateness — are to be conceived in purely substantive terms, having regard to the Member's own protection benchmark, or whether they could conceivably serve (and this is the basis of the argument here) to embroil the AB in scrutiny of the standardization process.

Though there is nothing in the existing case-law to suggest that the latter may be so, the argument in favour of this proposition is not hard to make. Members are required to base their domestic measures upon international standards, except when these are not adequate to the task at hand. This implies that they may be called upon, though only where the complaining party has established a *prima facie* case, to justify their departure from such standards. In the face of uncertainty as to the level of protection which such standards purport to achieve, or ignorance as to the epistemic basis upon which they rest, the adequacy of the standards will be difficult, if not impossible, to assess. In the absence of such information as is necessary to evaluate or

will, in many cases, be open to all WTO Members. If such bodies qualified, such non-binding standards, often enacted by a majority of the parties, could end up having more authority (though as argued here, limited authority nonetheless) in relation to non-parties than the parent agreement itself. This would seem somewhat paradoxical.

⁹⁰ Victor, 'The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment after Five Years', 32 *New York Journal of International Law and Politics* (2000), 865 Roht-Arriaza, 'Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment', 22 *Ecology LQ*, (1995) 479, Rosman, 'Public Participation in International Pesticide Regulation: When Codex Commission Decides, Who Will Listen?', 12 *VA. Env'tl. LJ.* (1993) 329 and S. Shapiro, *International Trade Agreements, Regulatory Protection and Public Accountability* (2002).

⁹¹ This is subject to the requirement, noted above, that such organizations be open to all WTO Members or, in the case of the TBT, their relevant bodies. See *supra* notes 62–67.

substantiate the standards' claim to authority, it would hardly be responsible for a government to regard these standards as an *appropriate* basis for domestic law. As such, claims to appropriateness may be seen to depend in part upon the mode of functioning of the international organization in question and, in particular, upon access to information as to the level of protection pursued by the international standards, and relating to their effectiveness in achieving this level of protection.⁹² Thus reason-giving and transparency — including access to dissenting opinions in the standard-setting process — may be viewed as essential prerequisites for any assessment of 'appropriateness' or adequacy.

Further, it is relevant to recall that measures conforming to international standards are deemed to benefit from a presumption of consistency with the specified parts of the WTO Agreement. The concept of 'conforming to' international standards has been interpreted by the AB as requiring that the measure in question must 'embody the international standard completely and, for practical purposes, convert . . . it into a municipal standard'.⁹³ While, as explained above, the benefit of this presumption has been dissipated by virtue of the AB's more general approach to the allocation of burden of proof, it is apparent that where a domestic measure merely converts a domestic standard into national law — essentially a mechanical act of incorporation or translation — any complaint levelled against that national law will *de facto* have as its object of attack, the international standard concerned. Thus, the dispute settlement bodies, in assessing the WTO compatibility of domestic measure conforming to international standards will, *de facto*, be subjecting the international standard to scrutiny. If the domestic measure merely embodies the international standard, any pronouncement on the WTO compatibility of the former will also reflect on the WTO compatibility of the latter. It does, however, remain the case that, strictly, any such pronouncement will not affect the validity of the international standard, the WTO dispute settlement bodies enjoying no jurisdiction in this regard. Thus, for example, in assessing the scientific basis of a measure, the AB would be required to examine the evidence relied upon by the international organization in question. Where the measure is based upon a minority scientific viewpoint it would be required to look, as in *Hormones*, to the identity of the scientists concerned and to the question of whether they may be considered to be well qualified and respected.⁹⁴ Thus, indirectly, the AB

⁹² This information would serve not only the defending state, but also the complainant, upon whom the initial burden of demonstrating adequacy rests. In commenting upon this paper, George Bermann drew the familiar distinction between 'input' and 'output' legitimacy. This is helpful I think in understanding the proposal here, in that the invitation to the AB is to look to both, rather than merely the latter, in endowing (or not) international standards with authority within the WTO.

⁹³ *Hormones*, at para. 170 AB.

⁹⁴ This example assumes a coincidence between the level of protection pursued by the international organization in the promulgation of the standards, and that pursued by the member concerned. Where a domestic measure conforms to an international standard, but pursues a level of protection which is different from it, an assessment of the lawfulness of the domestic measure will proceed on a different basis as it may be necessary to achieve the level of protection pursued by the Member, but not that pursued by the international organization.

may come to pass judgment upon international standards from the point of view of the obligations laid down in TBT and SPS.

It is clear that the WTO Agreement presents the dispute settlement bodies with opportunities to scrutinize, and in some cases to pass judgment upon, the institutional settings in which international standardization occurs. These opportunities are not explicitly acknowledged by the agreements, but may be regarded as inherent in the open-ended concepts deployed. It does not imply a stretch of the positivist imagination to conclude that 'appropriateness', for example, may be judged on the basis of process as well as outcome. The point here is that it is the covered agreements which seek to confer authority on international standards. It is the AB which has been reluctant to endorse this. So sensitive is the AB to the sovereignty concerns of Member States in the face of international standards that, arguably, it has strained the meaning of the relevant texts in downplaying the authority of such standards. Certainly it has been deferential to its Members, but deference should not be equated with fidelity to text.

It is thus open to the AB, in a manner which is consistent with the text, not merely to treat the authority claims of international standards with hesitation, but also to use them as a means of opening the lid on the many governance processes which underpin their adoption. By rendering the authority of such standards contestable in the WTO, and by inviting scrutiny of their claim to authority and of their epistemic basis, the AB might play an important role in stimulating much needed reform in the organizations concerned.⁹⁵

In so far as this might be seen to imply the emergence of a quasi review function on the part of the WTO dispute settlement bodies, *vis-à-vis* international standards, it is bound to be controversial. It may be thought to give rise not only to an unjustified augmentation of WTO authority, but also an incipient 'constitutionalization' of its functions, in relation to other international orders. In this setting the criticism might be subdued, in view of the deep distrust with which such standard-setting bodies are regarded, and the widespread acceptance of the need to enhance their accountability. Nonetheless, if the price to be paid is the servicing of the constitutional pretensions of the WTO, that price might well be regarded as too high. The constitutional theme is one to which we will turn below, in a setting in which the authority claims of the WTO are likely to be greeted with even greater reserve.

⁹⁵ Significantly, David Victor observes that the perception that international standards have acquired greater importance in the wake of the establishment of the WTO has generated considerable conflict over their activities. This has led in the case of the *Codex Alimentarius* to a 'systematic effort to streamline and harmonize the Codex system' with a view to achieving greater transparency about the safety levels assured by the relevant standards, and to assure their capacity to achieve the intended level of protection. See Victor, *supra* note 90, at 30 (Westlaw version). What is being suggested here is that WTO law, as well as the pressure of WTO-associated politics, could also play a role in disciplining governance processes associated with international standardization. It is clear that such reason-giving and transparency requirements would also constitute an essential underpinning for any system of political oversight instituted at the level of such organizations. Here the EU model could provide inspiration, at least in so far as it constructs an ongoing process of contestation and revision of standards.

4 Multilateral Environmental Agreements and the WTO

A *Trade-related Environmental Measures*

The previous section explored the relationship between Community ‘harmonizing’ legislation and the Community’s free movement rules. It highlighted, albeit briefly, the circumstances in which the existence of Community legislation will operate to relieve Member States of the burden of justifying resulting restrictions on the movement of goods. This section will examine a parallel question at the international level. This concerns the relationship between multilateral environmental agreements (MEA) and the WTO free movement rules, and the status in the WTO of national trade restrictions premised upon multilateral rules.⁹⁶ As noted in the introduction, the analogy with the EU is not exact. Harmonizing legislation and MEAs are each distinct from European and international standards by dint of their ability to impose binding obligations. Nonetheless, MEAs, unlike Community harmonizing legislation, will bind only the parties thereto, and not all Members of the WTO. Whereas there is a total coincidence in terms of membership between EU free movement rules and EU harmonizing legislation — each deriving from the EC Treaty — this coincidence is lacking in the WTO. In terms of membership, the legal orders in question (WTO and MEAs) are partially overlapping.

Of the hundreds of MEAs in force, it is estimated that one in seven explicitly deploy trade instruments.⁹⁷ Many of these regulate trade in dangerous substances.⁹⁸ Others restrict trade in scarce natural resources, or in endangered species of flora and fauna.⁹⁹ Others pursue mixed objectives; environmental, public health and socio-economic.¹⁰⁰

The best known of all trade-related environmental measures is the Montreal Protocol to the Vienna Convention.¹⁰¹ This established progressive production and consumption limits for the controlled (ozone-depleting) substances set out in the

⁹⁶ This raises the question of ‘linkages’ between trade and environment. For a comprehensive taxonomy of such linkages in relation to the environment and other issues, see Leebron, ‘Linkages’, *AJIL* special issue, edited by José E. Alvarez, ‘The Boundaries of the WTO’, 96 *AJIL* (2002) 5.

⁹⁷ See S. Barrett, *Environment and Statecraft* (2003), at 162 and the appendix to Chapter 6. For a list of those administered by the United Nations Environment Programme (UNEP) see <http://www.unep.ch/conventions/geclist.htm>.

⁹⁸ See, for example, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (for details and full text see: <http://www.basel.int/>); Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (for details and full text see: <http://www.pic.int/index.html>); Stockholm Convention on Persistent Organic Pollutants (for details and full text see: <http://www.pops.int/>).

⁹⁹ See, for example, Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean (for details and full text see <http://www.mfmr.gov.na/seafo/seafofotext.htm>); Convention on International Trade in Endangered Species of Wild Fauna and Flora (for details and full text see: <http://www.cites.org/>); Agreement on Conservation of Polar Bears (for details and full text see: <http://sedac.ciesin.org/pidb/texts/polar.bears.1973.html>).

¹⁰⁰ See especially the Cartagena Protocol on Biosafety (for details and full text see <http://www.biodiv.org/biosafety/>).

¹⁰¹ For details and full (amended) text see: <http://www.unep.org/ozone/montreal.shtml>.

(evolving) annexes, pending their complete elimination. While this permits, within certain parameters, transfers in production as between parties,¹⁰² trade in the controlled substances with non-parties is banned.¹⁰³ This ban extends to goods containing controlled substances.¹⁰⁴ In addition, the parties to the Protocol were charged with determining the feasibility of banning, or restricting, the importation from non-parties of products produced with, but not containing, controlled substances.¹⁰⁵ No such ban has been effectuated. Had it been so, the Montreal Protocol would have taken the form of a hybrid product come process measure.

Certain restrictions introduced pursuant to an MEA will be compatible with the GATT. It may be, for example, that they will be justified under the GATT, Article XX exception, and/or that they are deemed to be 'necessary' according to the TBT Agreement.¹⁰⁶ Nonetheless, considerable uncertainty remains. Particularly vulnerable are measures adopted pursuant to agreements which restrict trade with non-parties more than with respect to parties. Thus, whereas the Montreal Protocol permits some trade between parties, trade with non-parties is, in principle, prohibited.¹⁰⁷ Problematic too, is the tendency of such agreements to prohibit all trade from non-parties, even where a given batch of the product concerned poses no threat to the environmental or other interest at stake. Thus, the Stockholm Convention would not permit the export of the specified chemicals to a non-party,¹⁰⁸ even where for the purpose of environmentally sound disposal at a state of the art facility. Because the ban is country-wide, rather than case by case, the 'necessity' of the measure may be in doubt.

In the face of a clash between the WTO and a trade-related MEA, the question of relative timing may be important. The Montreal Protocol predates the WTO which entered into force on 1 January 1995.¹⁰⁹ Other MEAs restricting trade were of course agreed later in time. Thus, for example, the Stockholm Convention opened for signature in 2001, and though signed by 151 states, has not yet entered into force.¹¹⁰

¹⁰² *Ibid.*, at Article 2(5), subject to a notification requirement in Article 2(7).

¹⁰³ *Ibid.*, at Article 4.

¹⁰⁴ *Ibid.*, at Article 4(3).

¹⁰⁵ *Ibid.*, at Article 4(4). This could include, for example, computers, the circuits of which are sometimes cleaned using the controlled substances. See Barrett, *supra* note 97, at 313.

¹⁰⁶ Article 2.2 TBT provides that technical regulations must not create unnecessary obstacles to international trade. To this end they must not be more trade restrictive than necessary to fulfil a legitimate objective, taking into account the risks that non-fulfilment will create. The Agreement lays down an indicative list of legitimate objectives. We know from *Sardines* (*supra* note 67) that this list is not closed.

¹⁰⁷ Awareness of this vulnerability led to the inclusion of an 'equivalence' clause in the Montreal Protocol. Article 4(8) provides that imports may be permitted from non-parties if the state in question is determined, by a meeting of the Parties, to be in full compliance with Article 2 of the Protocol and to have submitted the data to that effect as specified in Article 7.

¹⁰⁸ Other than those certified in accordance with Article 3(2)(b)(iii), which is the Stockholm Convention's 'equivalence clause'.

¹⁰⁹ This includes the GATT 1994, which is legally distinct from GATT 1947.

¹¹⁰ For details, including full text, see <http://www.pops.int/>. The Convention is due to enter into force on 17 May 2004.

As between states which are party to both the WTO and the MEA concerned, the Vienna Convention provides that:

When all parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended . . . the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.¹¹¹

The Vienna Convention would seem to sanction trade restrictions adopted pursuant to an MEA post-dating the WTO, at least in so far as the WTO Members concerned are also party to the relevant MEA. There are those who would go further, arguing that MEAs take precedence over the WTO, regardless of which is earlier in time. Thus, Joost Pauwelyn, concludes that ‘irrespective of the actual timing of the two norms, in the event of a conflict between a WTO rule *of the reciprocal type* and a human rights or MEA obligation *of an integral nature*, the human rights or MEA obligation must . . . prevail in the relationship between two parties that are bound by both norms’.¹¹² He argues that WTO norms are, in the main, reciprocal, while MEAs, by contrast, being established for the protection of the collective interest of the group, and giving rise to obligations of the *erga omnes partes* type, are appropriately conceived as integral in nature.¹¹³ This viewpoint is by no means uncontested.¹¹⁴ Significantly though, even Pauwelyn — in his bid to enhance the authority of MEAs *vis-à-vis* the WTO — stops short of arguing that an MEA would prevail over the WTO where only one of the parties to the dispute is privy to the MEA. Thus the status of MEAs in relation to the WTO remains uncertain; above all in disputes involving a non-party to the MEA in question, but perhaps also where the MEA came about earlier in time.

B Shrimp/Turtle: *The Duty to Negotiate and Beyond*

It is only recently that the AB has allowed itself to become embroiled in the MEA fracas, and even then only obliquely and with extreme caution. Nonetheless, its recent report in *Shrimp/Turtle* forms an essential backdrop to any discussion on this theme.¹¹⁵ Here, in construing the ‘chapeau’ to the GATT, Article XX exception, one factor ‘bear[ing] heavily’¹¹⁶ in its appraisal was the failure of the United States to engage its trading partners in ‘serious, across-the-board negotiations’ with the objective of concluding bilateral or multilateral agreements for the protection or conservation of sea turtles, prior to the institution of the contested trade regime:

¹¹¹ Article 30(4). For details, including full text, see <http://www.un.org/law/ilc/texts/treaties.htm>. Note that there is no suggestion here that the terms of the MEA would be constrained by the WTO, in the same way as the content of Community legislation would be scrutinized for compatibility with the EC Treaty.

¹¹² Pauwelyn, ‘The Nature of WTO Obligations’, Jean Monnet Working Paper 1/02 at: <http://www.jeanmonnetprogram.org/papers/>, at 71 (emphasis in original).

¹¹³ See the International Law Commission’s Articles on State Responsibility, adopted in 2001 under the leadership of special rapporteur, James Crawford. See <http://www.law.cam.ac.uk/RCIL/ILCSR/Statresp.htm> for text and discussion of the project.

¹¹⁴ See Mavroidis and Palmeter, ‘The WTO Legal System: Sources of Law’, 92 *AJIL* (1998) 398.

¹¹⁵ *United States — Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R: AB-1998-4).

¹¹⁶ *Ibid.*, at para. 166 AB.

Clearly, the United States negotiated seriously with some, but not with other Members. . . . The effect is plainly discriminatory and, in our view, unjustifiable. . . . The [US] system and processes of certification are established and administered by the United States agencies alone. The decision-making involved in the grant, denial or withdrawal of certification to the exporting Members, is, accordingly, also unilateral. The unilateral character of the application of Section 609 heightens the disruptive and discriminatory influence of the import prohibition and underscores its unjustifiability.¹¹⁷

In reaching this conclusion, the AB stressed that ‘the very policy objective of this measure’ is such as to demand ‘concerted and cooperative efforts’ on the part of the many countries concerned. Thus its insistence on prior cooperation is contingent rather than absolute. The key feature of the problem at hand — such as to oblige states to pursue such an approach — was its ‘global’ or ‘transboundary’ nature, flowing in this case from the migratory nature of the species at hand. Nonetheless, ‘it is one thing to *prefer* a multilateral approach in the application of a measure . . . it is another to require the *conclusion* of a multilateral agreement’.¹¹⁸ The conclusion of an agreement is not as such a prerequisite for recourse to the GATT, Article XX exception, though the attempt to negotiate one is.

The facts of the case serve to exemplify the advantages associated with such an approach. Where the United States had tried to negotiate, this had led to the conclusion of the Inter-American Convention for the Protection and Conservation of Sea Turtles.¹¹⁹ This required the parties to put in place regulations providing for the use of such turtle exclusion devices in shrimp fishing, such as were ‘jointly determined to be suitable for a particular party’s maritime area’.¹²⁰ This stood in stark contrast to the unilateral rules applied by the United States in the absence of any such agreement. These were characterized by profound inflexibility, obliging the relevant trading partner to adopt a regulatory programme not ‘merely *comparable*, but *essentially the same*, as that applied by the United States’.¹²¹

The proposition established by *Shrimp/Turtle*, establishing a duty to cooperate, is vastly under-specified. The breadth (global and transboundary problems) and depth (serious negotiations) of the obligation are barely defined, nor its capacity to extend beyond GATT, Article XX. For all that, it is immensely important. It represents one of a number of procedural checks instituted by the AB in this case,¹²² on the basis of which it seeks to frame the manner in which the relevant national actors approach the problem at hand. Impetus is added to the incentive to cooperate by the AB’s insistence

¹¹⁷ *Ibid.*, at para. 172 AB.

¹¹⁸ *United States — Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia* (WT/DS58/AB/RW: AB-2001-4) (AB compliance report) (emphasis in original).

¹¹⁹ For details and full text see <http://www.seaturtle.org/iac/>.

¹²⁰ *Supra* note 115, at para. 170.

¹²¹ *Supra* note 115, at para. 163 (emphasis in original).

¹²² *Supra* note 115, at paras 181–183 AB. Others included reason-giving and transparency requirements, and procedural fairness in the administration of the regulations. So ‘singularly and informal and casual’ was the manner in which the United States approached the task of assessing certification applications, that exporting members could not be certain whether the relevant rules and guidelines were being applied in a fair and just manner.

that even unilateral measures must attain a sufficient level of flexibility, such as will allow for the taking into account of the specific conditions prevailing for the exporting member.¹²³ This duty to negotiate may be seen as of considerable importance in facilitating international cooperation. Not only is communication sometimes seen to contribute to the (partial) resolution of prisoner dilemma type ‘games’, especially in repeat player situations,¹²⁴ but the willingness of one party to negotiate seriously will tend to reinforce the credibility of threatened unilateral action, thereby adding impetus to the talks. It will do so both by enhancing the likelihood of its being accepted by the WTO, and by underlining the seriousness of the intention to introduce unilateral restraints.

Significant though this clearly is, it may represent a cautious reading of *Shrimp/Turtle*. It may in addition stand for something more. The origins of the obligation to cooperate, outlined above, remain uncertain. The AB points both to the fact that the US Congress had itself expressly acknowledged the importance of reaching such agreements, and to the recognition of the need for, and appropriateness of, such efforts by the WTO and in a ‘a significant number of other international instruments and declarations’.¹²⁵ In the absence of any attempt, on the part of the AB, to disentangle these various sources, it is not possible to assert with any confidence that one or other of them would, individually, have sufficed to ground this obligation.¹²⁶ More particularly, it remains unclear as to whether such a duty could arise merely by virtue of its inclusion in one or more MEAs. In this case the duty would arise *merely* by virtue of its being included in a relevant MEA. According to this reading, it would not be the nature of the specific obligation concerned (duty to negotiate) which is critical in this case, but rather the more general fact that compliance with treaty-based environmental obligations, served to facilitate justification of a trade restriction under the Article XX exception. This point may seem a little obscure. It is, however, significant. Were the AB prepared to deduce such a duty from an MEA, and to posit it as a prerequisite for lawful recourse to the GATT environmental exceptions, this would imply that the MEA(s) in question bears directly upon the scope and application of these exceptions. More specifically, it would imply that behaviour which conforms to the terms of the MEA(s) will be relatively more

¹²³ *Supra* note 118, at para. 149 AB compliance report. This seems to imply a preference for measures which condition market access on the adoption of regulatory programmes which are comparable in effectiveness to those of the importing state, rather than essentially the same. In this way the member will be able to adopt a programme which is suitable to the specific conditions prevailing in its territory (see para. 144 AB compliance report).

¹²⁴ See Barrett, *supra* note 97, at 75–76, 93.

¹²⁵ *Supra* note 115, at para. 168 AB. It is important to note that the DSB have accepted all those international agreements explicitly referred to in the WTO Agreement. Explicit reference might thus be seen to give rise to the inference that the WTO Agreement was not intended to depart from the agreement in question.

¹²⁶ At first glance it might seem as though MEAs enter the equation only by virtue of their being cited by the WTO Decision on Trade and Environment (for the text of this, see http://www.wto.org/english/tratop_e/envir_e/issu5_e.htm). However, the AB refers not only to international instruments cited in this way, but also to two additional instruments. See *supra* note 115, at para. 168 AB.

susceptible to justification in the light of these. Significantly too, this conclusion would appear to arise regardless of timing as between the WTO and the MEAs in question, and irrespective even of membership.¹²⁷ Thus, one of the instruments cited by the AB is the Rio Convention on Biological Diversity.¹²⁸ Not only is this not an instrument cited by the WTO Decision on Trade and Environment (it thus not being possible to infer indirect consent on the part of all WTO Members), but the US is not a party and it predates the WTO.

Significant too from this perspective was the willingness of the AB to look to a range of international environmental conventions in construing the concept of 'exhaustible natural resources' in Article XX(g). This concept is to be read, the AB insisted, 'in the light of contemporary concerns of the community of nations about the protection and conservation of the environment'.¹²⁹ It is an evolutionary, rather than a static, concept. As such it deemed it 'pertinent to note' that MEAs make frequent references to natural resources embracing both living and non-living resources. It supports this observation by reference to a number of international conventions, none of which had been ratified by all of the (five) parties to the dispute.¹³⁰ It observes:

Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the *WTO Agreement*, we believe it is too late in the day to suppose that Article XX(g) ... may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources.¹³¹

Similarly, in assigning sea turtles to the category of 'exhaustible natural resources', the AB observed that such a conclusion would be hard to 'controvert' in view of the fact that all seven recognized species are listed in Annex 1 of CITES, as threatened with extinction.¹³²

The point here is not to dwell on the question of whether this is a credible reading of the AB report in *Shrimp/Turtle*, but rather to make visible the issue raised by it. This concerns the possible impact of an MEA on the interpretation and application of the WTO, in disputes involving a non-party to the MEA. This could, as in this reading of *Shrimp/Turtle*, imply the imposition of additional duties prior to recourse to a unilateral act. This would flow from the positive nature of the obligations constituted

¹²⁷ Thus going further than envisaged by Article 31(3)(c) of the Vienna Convention, which concerns the taking into account, in the interpretation of agreements, of relevant rules of international law applicable in the relations between the parties.

¹²⁸ For details, including full text, see <http://www.biodiv.org/>. The AB referred specifically to Article 5, which provides that 'each contracting party shall, as far as possible and as appropriate, cooperate with other contracting parties directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity'.

¹²⁹ *Supra* note 115, at para. 129.

¹³⁰ The AB explicitly notes which of the parties to the dispute had signed and/or ratified these various conventions. It does not, however, clarify the significance of this.

¹³¹ *Supra* note 115, at para. 131.

¹³² *Ibid.*, at para. 132.

by the agreement in question. More often, in practice, it would tend to imply a relaxation of WTO constraints, where the contested measure has been introduced pursuant to a right established by an MEA.¹³³

Similarly, the objective here is not to consider, according to the structure and text of the WTO Agreement, where and how, and to what degree, this impact might be felt.¹³⁴ It is instead to explore some of the issues and dilemmas to which the idea gives rise. Of course, the objections are plain to see. In the absence of consent, the source of an agreement's authority *vis-à-vis* a state not party to it is hard to fathom. Other than to the extent that the agreement in question is reflective of custom, there appears to be no legal basis for its application. After all, '[t]he consent of the parties is the basis of treaty obligation'.¹³⁵ This continuing emphasis upon consent in international law, 'strains in the system' notwithstanding,¹³⁶ reflects more than an attachment to sovereignty, but also 'the social conditions of a society which has no *volonté générale* but only the sum of values and interests which are in many respects conflicting'.¹³⁷

C MEAs and the Problem of Consent

It is, of course, true that all around we see holes in the practical application of the doctrine of consent.¹³⁸ The proliferation of no-reservations possible, 'package deals',

¹³³ It is important to note, as others have, that the concepts of unilateralism and multilateralism are not fixed, but encompass shades or degrees. To say that a trade restriction is adopted pursuant to a multilateral agreement may imply different degrees according to whether it is merely the objective being pursued which is laid down by this agreement, or whether the agreement also establishes an agreed norm and agreed mechanisms for the enforcement of that norm. See Bodansky, 'What's so Bad About Unilateral Action to Protect the Environment?', 11 *EJIL* (2000) 339, at 342–343. Thus, for example, the International Whaling Convention does not provide for trade restrictions but the IWC has passed (mostly unanimously) a number of resolutions encouraging parties to restrict imports of whale products from non-parties, and not to transfer to them goods necessary for the conduct of whaling operations. Consequently these restrictions are not required by the Convention, or even by the non-binding resolutions, but are nonetheless multilateral in spirit if not form. This discussion will rest upon the assumption that we are dealing with the most 'extreme' form of multilateralism, namely an MEA explicitly providing for recourse to trade instruments and clearly defining the basis upon which, and the circumstances in which, these may be used.

¹³⁴ The existence of an MEA could clearly be relevant not only in the context of GATT, Article XX as in *Shrimp/Turtle* but also in relation to Article 2.2 TBT. The wording of Article XX and the relevant parts of the TBT Agreement are sufficiently open-ended to allow for the AB the required textual room for manoeuvre. Conformity with an MEA might, subject to the argument regarding AB oversight thereof, be regarded as in itself sufficient to justify a measure, or it may be viewed simply as contributing to (rather than exhausting) the task of justification.

¹³⁵ Joint Dissenting Opinion of Judges Guerrero, McNair, Read and Hsu Mo to the Advisory Opinion of the ICJ on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports (1951), at 31 *et seq.*

¹³⁶ See Simma, 'Consent: Strains in the Treaty System' in R. St. J. Macdonald and D. M. Johnston, *The Structure and Process of International Law* (1983).

¹³⁷ Zamanek, 'Majority Rule and Consensus Technique in Law-Making Diplomacy' in *ibid.*, 879.

¹³⁸ Many would claim that the holes are of a more fundamental nature, inherent in the very concept itself. See, for example, Penalver, 'The Persistent Problem of Obligation in International Law', 36 *Stan. J. Int'l L.* (2000) 271. See also Tomuschat, 'Obligations Arising for States without or against their Will', 241 *RdC* (1993, IV) 195.

such as the WTO itself; the emergence of governance regimes predicated upon majority voting not consensus; the emergence of (quasi-judicial) frameworks for binding adjudication together with the deep textual ambiguity characteristic of so many international agreements, serve to illustrate this. But it is hardly normatively compelling to mount a defence on the basis that one is proposing merely to dig a deeper hole.

Karl Zamanek regards it as 'irritating' that arguments for departing from consensus as a basis of decision-making in international law have tended to be presented in utilitarian as opposed to dogmatic terms.¹³⁹ In the environmental sphere this is certainly so. Such arguments focus, predictably, upon the disjuncture which has grown up separating the statist premises of international law from the functional demands of effective eco-system management. As acknowledged by the AB in *Shrimp/Turtle*, and almost a truism, environmental problems more often than not necessitate a collaborative approach to problem-solving. The collaboration required must cross disciplines, levels of governance, and state boundaries. States perceive, often correctly, that their own individual efforts will fail to contribute significantly, or even at all, to the resolution of the problem at hand.¹⁴⁰ Even where this is not so, states may be reluctant to step forward on a unilateral basis, especially where the costs are concentrated, but the benefits widely dispersed in time or space, or even largely exported.¹⁴¹ Yet such is the 'inhibiting effect of traditional rules based on sovereignty and consent',¹⁴² that the international system neither demands cooperation, nor penalizes failure even in the face of free-riding.

Significant too, in contemplating the benefits associated with a cooperative approach, are the information synergies generated by the monitoring and reporting requirements commonly established, and by the activities of the scientific networks spawned and consolidated by virtue of their ongoing role in the elaboration and adjustment of environmental norms. Equally, the negotiation of MEAs provides an opportunity to confront the all important question of the distribution of responsibility for pollution abatement and conservation. Again, the Montreal Protocol constitutes a leading example. Here, special provision is made for developing countries, delaying compliance obligations for a ten-year period, and the 1990 London Amendments led to the establishment of a Multilateral Fund to cover the 'incremental costs' of compliance incurred by developing country parties.¹⁴³ Thus, the principle of common but differentiated responsibilities is given concrete meaning by way of asymmetrical

¹³⁹ *Supra* note 137, at 868.

¹⁴⁰ This is particularly true in the case of those environmental problems which may be considered 'lumpy public goods'. Here efforts must transcend a particular threshold in order to make any difference at all to the outcome. See Taylor and Ward, 'Chickens, Whales and Lumpy Public Goods: Alternative Models of Public Goods Provision', 30 *Political Studies* (1982) 350.

¹⁴¹ This takes us full square into the territory of game theory and prisoner dilemma type models. See Barrett, *supra* note 97 for a really excellent account of the various 'games' that states have to play, and for a discussion of why and when unilateralism tends to fail. One of the reassuring things about Barrett's approach is that he does take on board the fact that game theory does not always coincide with real life!

¹⁴² Simma, *supra* note 136, at 487.

¹⁴³ *Supra* note 101, Articles 5 and 10.

obligations and accompanying side payments. This is not to suggest that multilateral agreements will inevitably, or even regularly, strike an equitable balance between countries in distributing the burden of adjustment, but merely that in a multilateral forum this is more likely.¹⁴⁴

Unsurprisingly, we find efforts to ground arguments promoting a departure from consensus in concepts capable of dislodging, or at least destabilizing, the grip of sovereignty. Talk of international community looms large and is said to find expression in a series of constructs defining common objectives, and severing or attenuating the link between environmental goods and the state. Concepts of ownership are replaced by concepts of trust and common concern, and states are said to incur global responsibilities for current and future generations. A ‘universal law’ is born,¹⁴⁵ founded upon community (not parochial) interest, and reflecting the common good, not merely the aggregate will of self-interested sovereign states.

The point here is not merely that rhetoric has outpaced reality,¹⁴⁶ but that such talk of international community carries within it the seeds of ‘Empire’.¹⁴⁷ It is this fear that leads thoughtful observers — even those who admit that sovereignty is ‘broke’ — to balk at the prospect of sacrificing the ‘normative inhibitions’ which it continues to

¹⁴⁴ EU experience is telling in this respect. Every major Treaty revision exercise has been accompanied by financial ‘deals’ to compensate the perceived losers. This led, following the accession of the UK, Ireland and Denmark to the establishment of the European Regional Development Fund in 1975, to a major revision of the so-called structural funds following the Single European Act in 1985, and to further increases in their size and to the establishment of the Cohesion Fund, following the Maastricht Agreement which entered into force in 1994. On the connection between Treaty revision (including enlargement) and side-payments see Allen, ‘Cohesion and the Structural Funds’, in H. Wallace and W. Wallace, *Policy Making in the EU* (3rd ed., 2000).

¹⁴⁵ See Charney, ‘Universal International Law’, 87 *AJIL* (1993) 529.

¹⁴⁶ This is not to suggest that the concept of international community has no place in positive international law, or that it ought to have no place in its future evolution, but merely that there is a danger that the international community is trying to pull itself up by its own bootstraps, positing its existence in a bid to consolidate its existence. Perhaps the clearest concrete expression of international community in international law is in relation to treaty obligations which are owed to the international community as a whole (*erga omnes* obligations). See, Simma, ‘Bilateralism and Community Interest in the Law of State Responsibility’, in Y. Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989). For a discussion of some of the core concepts which would feed such claims of community in international environmental law (such as common concern, common heritage, common but differentiated responsibility) see P. Birnie and A. Boyle, *International Law and the Environment* (2nd ed., 2002), Ch. 3. For a discussion of the manner in which international environmental law can get ahead of itself see, Bodansky, ‘Customary (and Not So Customary) International Environmental Law’, 3 *Ind. J. Global Legal Studies* (1995) 105, where (at 116) he talks about the ‘myth system’ based on ‘fictions or half-truths’ to which it gives rise. The point is that the concept of community may coalesce around universally accepted principles, but the concept remains paper thin, in view of radical disagreements about what these principles mean and what they entail, and radically different perceptions of what an equitable distribution of the burden for their attainment might look like.

¹⁴⁷ This language of ‘Empire’ is of course taken from the title of Michael Hardt and Antonio Negri’s *Empire* (2000), where they argue that we are witnessing a transition from old public international law to ‘the new public law of Empire’, implying an abandonment of the Westphalian system, with its emphasis upon contractual relations between sovereign states, in favour of a new relatively autonomous centre acting to tame the ‘new barbarians’ in the name of universal values. See Chs 1.1 and 1.3.

present, in the name of fundamental values.¹⁴⁸ Thus, Benedict Kingsbury warns that visions of community, in their 'aspirational but unrealized state ... serve in the interim to legitimate an extraordinary range of interventionist or otherwise coercive activities in other countries that reflect struggles and dilemmas in the politics in the West'.¹⁴⁹ Though he accepts that the 'traditional sovereignty system is flawed', he argues that 'it remains a more realistic [and the only viable] system for the management of enduring inequalities, and of other pathologies'.¹⁵⁰ Even the most vigorous proponents of community and of its underlying tools, such as the common heritage of humankind, accept that the community 'we imagine could only be pluralistic and decentralized' as 'centralization and representation would be confiscation by some'.¹⁵¹

The dilemma we confront poses formalist nightmare against realist dystopia; the system disabled against the system abused. We need community to tame the selfish interests of the sovereign, and sovereignty to tame the moral posturings of hegemonic 'community'. It is this dilemma which underlies the question concerning the impact of MEAs in WTO disputes involving a party which is not a signatory to that MEA. It is a dilemma which may be disguised, but ultimately not resolved, by reference to customary international law, or to the ever forgiving notion of sustainable development as expressed in the preamble to the WTO Agreement.

In the face of this dilemma it may be thought that the AB succeeded in *Shrimp/Turtle*, according to the cautious reading at least, in walking a commendable middle line. By obliging states to endeavour to conclude agreements when confronted with transboundary or global environmental problems, the AB succeeded in enhancing the leverage of the international system in favour of international cooperation, while leaving in tact the concept of consent. Already this is an important step. It might however be strongly argued that the AB should go further, and that it should do so by being more permissive of trade restrictions adopted pursuant to an MEA. 'More permissive' might even imply, subject to the comments below, that such measures be regarded as automatically lawful. Were the AB to adopt such an approach, and thus to be seen to be more forgiving of multilateral restraints on trade, this would generate a powerful incentive in favour of transnational cooperation. This is borne out by the Montreal Protocol. It is widely accepted that the trade regime instituted therein was one of the most important determinants of the success of this agreement. '[I]n deterring non-participation [and preventing "trade leakage"], the trade ban would simultaneously deter free-riding and thus do what a strategy of reciprocity perhaps could not do: sustain full cooperation'.¹⁵² According to Barrett (and others¹⁵³), the effect of the trade regime built into this agreement was to

¹⁴⁸ Kingsbury, 'Sovereignty and Inequality', 9 *EJIL* (1998) 599, at 618.

¹⁴⁹ *Ibid.*, at 624.

¹⁵⁰ *Ibid.*, at 625.

¹⁵¹ Chemillier-Gendreau, 'The Idea of the Common Heritage of Humankind and its Political Uses', 9 *Constellations* (2002) 377, at 388.

¹⁵² Barrett, *supra* note 97, at 314.

¹⁵³ R. E. Benedict, *Ozone Diplomacy: Science, Politics, and International Negotiation* (1998).

restructure incentives in favour of cooperation, thus encouraging (over time, almost universal) participation. It is notable in this respect that:

... the pace of ratification by developing countries accelerated markedly after the 1990 London decision put teeth in the trade restrictions. ... It was surely no coincidence that although only 4 of the 13 larger countries ... for which trade was critical — Brazil, Mexico and Nigeria and Venezuela — had ratified before the London Amendment, all the remaining nine ... joined by early 1993, before the trade restrictions became fully effective.¹⁵⁴

As Barrett also cautions, trade restrictions hurt the restricting states as well as those who suffer the restrictions. This fact will often undermine the credibility of threats to disrupt trade. For this reason, such restrictions, as in Montreal, will tend to be tied to minimum participation requirements, whereby a substantial majority of ‘polluters’ must sign on in order for them to become effective.¹⁵⁵ In this way, recourse to such instruments is subject to a degree of internal constraint.

Crucially, however, in the case of the WTO, as in the EU, it is not necessary to trust entirely to the good sense of participating states in making recourse to trade instruments to promote participation, and to deter free-riding. This flows from the institutional capacity of the AB. Its identity and role make it well adapted to perform a gatekeeper function in relation to MEAs; at any rate in cases concerning a non-party. In this way, although formally it enjoys no judicial review jurisdiction in relation to such agreements, it may serve to guard against the dangers outlined above. In being willing to extend the impact of such agreements to a new category of cases, in a bid to provide an inducement in favour of *successful* multilateralism, the AB is in a position to exercise judgment in relation to these, and to scrutinize at some level their claims to authority. In this way, as in the EU, the authority of MEAs would be contingent and not absolute. Authority and oversight (contestability) would go hand in hand, albeit that formally the oversight function would be performed in the guise of interpretation as opposed to review.

An insight into the nature of this putative oversight function may be gained from *Shrimp/Turtle*. Two principles were developed by the AB in this case which are exemplary of the kind of bases according to which oversight may proceed.

First, the AB’s report is highly suggestive in that it seeks to delineate, albeit in a manner which is vastly under-specified, the circumstances in which the duty to cooperate will bite. Two concepts are deployed to this end, one spatial (transboundary) and one more amorphous (global). It is only within the parameters constructed by these concepts that a duty to cooperate will arise. We see here the emergence of a conception of global subsidiarity although, it is necessary to insist again, its operational premises are barely defined.

To the extent that the proposal under discussion here — to extend the authority of MEAs to disputes involving non-parties — is functionally motivated, subsidiarity

¹⁵⁴ *Ibid.*, at 243.

¹⁵⁵ In the case of the Montreal Protocol this required that 11 countries, together accounting for at least two-thirds of the 1986 level of global consumption of the controlled substances, ratify, prior to entry into force. United States efforts to set this at a 90% level failed.

serves as an appropriate benchmark for analysis. In this setting, however, focus will be on the 'global' nature of the environmental problem at hand. Predicated upon considerations of comparative effectiveness in the attainment of policy goals, subsidiarity provides a lens through which the level of governance question may be assessed. In that it militates against intervention at a higher level, in the absence of specific justification, it operates to guard against an excessive centralization of power. Its normative appeal is reinforced in a setting such as this, where higher level action results not merely in an increasing remoteness between governors and governed but, viewed at the level of states, in a rupturing of the link.

In applying subsidiarity in this setting, existing (and evolving) categories of international environmental law offer a framework for analysis.¹⁵⁶ Thus, the doctrine of common property applies in respect of areas beyond national jurisdiction, and to the living resources situated within these. The common heritage doctrine is more confined, concerned specifically with the mineral resources of the deep sea-bed, and of the moon. More controversial, and less clearly circumscribed, is the doctrine of common concern, set forth in the Rio treaties. Global environmental responsibilities are said to arise in respect of these matters of common concern. Paradigmatic in this sense are the issues of climate change, ozone protection and the conservation of biological diversity.

Second, great emphasis was placed by the AB upon the value of flexibility. The measure in question was characterized as establishing in practice a rigid and unbending standard, thus operating to demand of trading partners' policies which were essentially the same, as opposed to merely comparable in effectiveness, as those of the United States.

It may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, it is not acceptable, in international trade relations, for one WTO member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal.¹⁵⁷

It is, however, it would seem, acceptable to condition market access upon the institution of a regulatory programme which is comparable in effectiveness to that of the importing state.¹⁵⁸ By emphasizing ends not means, the exporting state is able to adopt a programme which is 'suitable to the specific conditions prevailing in its territory'.¹⁵⁹

¹⁵⁶ In the EU, see de Búrca, 'Reappraising Subsidiarity's Significance after Amsterdam', *Jean Monnet Working Paper*, No. 7/99 available at <http://www.jeanmonnetprogram.org/papers/papers99.html> and A. Estella, *The EU Principle of Subsidiarity and its Critique* (2002). For discussion of the principle in a WTO setting, though not specifically with regard to the relationship between WTO norms and externally generated rules and standards, see Trachtman, 'Trade and . . . Problems: Cost-Benefit Analysis and Subsidiarity', *Jean Monnet Working Paper* 1/97 available at <http://www.jeanmonnetprogram.org/papers/papers97.html>.

¹⁵⁷ *Supra* note 115, at para. 164 AB (emphasis in original).

¹⁵⁸ *Supra* note 118, at para. 144 AB compliance report.

¹⁵⁹ *Ibid.*

Flexibility here, as applied to MEAs, could come also to encompass an equivalence dimension. Thus, in the same way as the Montreal Protocol allows non-parties to be certified as fully conforming, and hence as included in the trading regime, other agreements could be similarly required to provide for possibility of the certification of non-members.¹⁶⁰

If subsidiarity and flexibility are the kind of principles which the AB might develop and apply in performing an oversight function in relation to MEAs in disputes involving a non-party, the question then arises as to whether they alone would suffice in guarding against the dangers alluded to earlier. The problem at hand might be one eminently suitable for multilateral resolution. The ends in question might be defined in a manner which is supremely flexible. Yet still the goals established might reflect the priorities and interests of only one section of the international 'community'. It is here that the AB would face its toughest challenge. In view of this, it seems improbable that it could entirely eschew the doctrine of consent — as opposed to diluting or transforming it.

The challenge here for the AB would be to assess the sufficiency of an MEA's claims to authority, absent the consent of one of the parties to the dispute. In performing its oversight function, it would be obliged to evaluate the extent and breadth of support for the agreement in question. Clearly relevant in this respect would be the number of states party to it and, crucially, the identity of the states concerned. As regards the latter, the relative balance of support as between developed, developing, and least developed states would be of critical importance. Though it may be that the AB would not want to reduce this to a purely arithmetic question, other factors bearing upon the credibility of a given agreement's claim to authority, experimentation with non-consensus based models of voting in international environmental regimes may offer insights in this respect. Thus, for example, the Montreal Protocol permits — albeit as second best — the adoption of decisions by meetings of the parties on the basis of a two-thirds majority. The decisions adopted are binding on all parties. However, in a

¹⁶⁰ This of course raises the more general issue of compliance on the part of the parties to the MEA. 'Equivalence' in terms of performance, is only meaningful in practice if the parties, like the non-party equivalent, are actually properly implementing and complying with the agreement in question. It may well be that the AB would want to add an effectiveness criterion to the list of principles according to which the agreement would be assessed. This would most probably be enunciated at a systemic level, perhaps by way of scrutiny of the mechanisms for implementation review included in the agreement. For an excellent discussion of emerging 'systems for implementation review' at the international level see the 'Conclusions', in D. Victor, K Raustiala and E. Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments* (1998) 659. They point out that such systems are becoming more common and more elaborate, and that implementation review is being performed 'by a decentralized array of institutions and procedures' (677). This is most apparent in relation to fauna and flora agreements, with such agreements including 'regular reporting, regular reviews of implementation, regular review of the adequacy of commitments, and opportunities for non-state actors and experts to contribute information and participate in implementation review'. They accept that these 'appear to be making an increasing contribution to the effectiveness of agreements' (679).

bid to safeguard the interests of different constituencies, it demands the two-thirds support of both developed and developing country members.¹⁶¹

One important, but difficult, question arising relates to the extent to which indices of support, other than explicit state consent, may be viewed as relevant in the assessment of such agreements by the AB. Crucial in this respect is the issue of participation by non-state actors. Recent years have seen important changes in this respect, with an expansion in the opportunities for access for organized civil society in multilateral environmental regimes.¹⁶² This broadening of access is said to be justified in that it contributes both to the effectiveness¹⁶³ and to the legitimacy of the relevant regime.¹⁶⁴ While access may be gauged to some extent on the basis of the formal rules, influence and attitudes are hard to measure. At a minimum, the AB could examine the extent to which NGOs enjoy observer status within the regime in question, though this speaks more to transparency than to support. In a more ambitious vein, the AB could seek to gauge the extent of NGO support for the environmental regime in question. Ideally, it would be for the relevant international secretariat to evince evidence of this, on the basis of procedures which also leave open room for dissent.

Like other aspects of this proposal, these observations remain under-specified, and require elaboration. This is, in part, due to limitations of space and limitations of imagination. It also flows, however, from an argument to be made below. Any oversight function on the part of the AB must be conducted in a manner which is responsive to the environmental regime in question. Oversight is intended to guard against hegemonic abuse, not to render the AB master of all that it surveys. Nonetheless, there will be those who fear that oversight of this kind, be it in relation to standards or MEAs, would mark a definitive step in the direction of a constitutionalization of the WTO, feeding any putative claim to supremacy. It is to this argument that the next section will turn.

5 'Constitutionalizing' the WTO?

Recent years have seen much talk of the 'constitutionalization' of the WTO, giving rise to (sometimes heated¹⁶⁵) debate about the empirical and normative validity of a vision

¹⁶¹ *Supra* note 101, Article 2(9). Innovative techniques for balancing different categories of interest have also been developed in certain NGOs. See, for example, the voting rules of the Forest Stewardship Council at: <http://www.fscoax.org/> and its attempts to balance different (social, economic and environmental) constituencies.

¹⁶² Raustiala, 'The Participatory Revolution in International Environmental Law', 21 *Harvard Environmental Law Review* (1997) 537.

¹⁶³ Though see *supra* note 160, for a heavily qualified conclusion as regards the impact of participation on the effectiveness of regulation (at 663–668 for a summary of the findings of the case studies in this respect).

¹⁶⁴ R. Falk, *On Humane Governance: Towards a New Global Politics* (1995).

¹⁶⁵ Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', 13 *EJIL* (2002) 815.

of the WTO as a constitutional polity.¹⁶⁶ Though the very concept of constitutionalism in this setting remains obscure, Neil Walker has helpfully set out a series of indices according to which ‘degrees of constitutionalisation can be measured’.¹⁶⁷ For Walker, sovereignty emerges as a key determinant of (graduated) constitutionalism. This he understands in a post-Westphalian guise to be concerned with autonomy (or ultimate authority) as opposed to the exclusivity associated with territorial rather than functional delimitations of power. Autonomy, he argues, encompasses a subjective and an objective dimension, tied up as it is with the constitutional self-consciousness of the putative polity, and the plausibility of that polity’s claim to exercise ultimate, non-dependent, authority. The doctrines of direct effect and supremacy are identified as crucial markers of EU law’s credible claim to autonomy. On the contrary, the absence in the WTO of any ‘doctrine of supremacy’ is viewed as indicative of its relatively weaker claim.¹⁶⁸

In thinking about the WTO’s claim to autonomy it is necessary to have regard not only to its relationship *vis-à-vis* its Member States, but also its place in the international system as a whole, comprising multiple, shifting, and overlapping sites of legal authority. The AB’s propensity to present the WTO Agreement as embedded in this system has been remarked upon.¹⁶⁹ Numerous difficult questions remain in charting the relationship between the WTO and additional sources and instruments of international law, including its relationship with customary international law.¹⁷⁰ As things stand, however, the AB has not seemed inclined to characterize the WTO Agreement as more than merely another international agreement,¹⁷¹ or to imbue it

¹⁶⁶ Howse and Nicolaidis, ‘Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far’, in R. Porter (ed.), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (2001); 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* (2001) 33; Cass, ‘The ‘Constitutionalization’ of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade’, 12 *EJIL* (2001) 39.

¹⁶⁷ Walker, *supra* note 166, identifies seven such indices: the development of an explicit constitutional discourse; sovereignty or foundational legal authority; jurisdictional scope; interpretative autonomy; constitution and regulation of an institutional structure to govern the polity; the specification of the conditions and incidents of membership or association with the polity; and terms of representation of the membership.

¹⁶⁸ *Ibid.*, at 41.

¹⁶⁹ Pauwelyn, ‘The Role of International Law in the WTO: How Far Can We Go?’, 95 *AJIL* (2001) 535.

¹⁷⁰ The AB has made repeated recourse to the Vienna Convention on the Law of Treaties — widely accepted as codifying customary international law on this subject — in its construction of the WTO Agreement. See *Hormones*, WT/DS26/AB/R, at paras 122–125, concerning the status of the precautionary principle as a principle of customary international law. Though the AB considered it unnecessary (and ‘probably imprudent’) to address this issue, the clear implication of its report is that, regardless, the precautionary principle is not capable of overriding the provisions of the SPS Agreement.

¹⁷¹ This contrasts with the early case law of the European Court (Case 26/62 *Van Gend en Loos v Netherlands Inland Revenue Administration* [1963] ECR 1), where it characterized the EEC Treaty as ‘more than an agreement creating mutual obligations between the contracting states’ and as constituting a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals’. In this way the Court developed the doctrine of direct effect and, subsequently, the concept of supremacy.

with special status or a superior claim to authority. On the contrary, even WTO sceptics are forced to concede that the dispute settlement bodies have exhibited 'institutional sensitivity' and that recourse to 'interpretative norms of general public international law' serves to enhance their legitimacy.¹⁷²

It is against this backdrop that the relationship between the WTO and MEAs must be viewed. The manner in which this is approached is of *constitutional* salience, shedding light upon both the subjective and objective dimensions of the WTO's claim to authority. The argument above — that the AB might play a gatekeeper role in relation to MEAs — judging them in the light of criteria developed by it, might appear to endorse a constitutionally pre-eminent role for the WTO and for its quasi-judicial institutions of governance. It might appear to posit WTO-derived norms as hierarchically supreme, as a benchmark against which the validity of other measures may be assessed. Such arguments would likely be greeted with reserve by those who impugn the constitutional pretensions of the WTO.

To mount criticisms in constitutional terms would, however, be to overlook the more modest scope of the suggestion at hand. The role of the AB is conceived here not as endemic but as confined; as bounded in one crucial respect. AB scrutiny would be restricted to circumstances in which the MEA in question is asserting authority which goes *beyond* that which it would be entitled to claim as a matter of international law. More particularly, it would be confined to disputes involving a non-party to the MEA, and hence in which the MEA in question has no legal basis upon which to ground its claim to authority.¹⁷³ The AB would not in any sense be reviewing the validity of the MEA, merely evaluating the credibility of its claim to *extended* authority within the WTO.

Similar observations may be made in respect of international standards. By definition, such standards are voluntary in nature, intended according to the system from which they derive to be endorsed or rejected at will. For the WTO, in embracing such standards — conferring additional authority upon them — to exercise a gatekeeper role, having regard to the processes according to which they were adopted, may be to render supreme certain values originating within the WTO system, but only in so far as it is this system which operates to endorse an extended role for such standards.

The above proposal, far from advocating improper constitutional usurpation on the part of the WTO, may be viewed as serving to enhance its responsiveness. According to this, the WTO ought to have strong regard to other institutions and instruments of transnational governance, and to accept that its own norms and world view ought to be shaped in the light of these.

In formal terms then, any insistence on the part of the AB that it play a gatekeeper

¹⁷² Howse and Nicolaidis, *supra* note 166.

¹⁷³ As noted previously, it might also extend to circumstances in which the MEA is earlier in time to the WTO. This question would arise if the AB were to reject the solution suggested by Pauwelyn, *supra* note 112, where he draws a distinction between 'reciprocal' and 'bilateral' agreements and on this basis posits MEAs as generally hierarchically superior as compared to the WTO, regardless of which came first in time.

function in relation to international standards and/or MEAs should not be regarded as evidence of constitutional aggrandizement, at least in so far as AB scrutiny is confined to the circumstances described above. Thus, where the AB is contemplating extending the authority of such instruments — beyond their ‘normal’ (intrinsic) limits — for it to seek to do so on its own terms is in no sense to propound a doctrine of supremacy.

Though powerful, it is clear that objections may be raised to this response. Thus, even if, formally, AB scrutiny is confined in this way, *de facto*, the impact of its findings will tend to spill over to the functioning of the international organization more generally. The AB may only insist upon compliance with ‘its’ principles, where the instruments in question are being accorded authority beyond that which they usually command, but frequently compliance with these principles will ‘taint’ the decision-making process as a whole. For example, in the case of standard-setting, transparency is not something which can be switched on and off in respect of a single measure which is simultaneously voluntary and (potentially) more than this. Indeed, this spill-over effect may be regarded as one of the strengths of the proposal at hand; the idea being that the AB might play a constructive role in enhancing the legitimacy of transnational governance. Nonetheless, it muddies the constitutional waters, bringing to the fore doubts about the appropriateness of the AB performing this oversight role. Such doubts may be nourished by emphasizing the strongly creative function which would be accorded to the AB in this setting, in calling forth and applying the principles according to which extensions in the authority of international standards and MEAs are to be assessed.

Drawing inspiration from the work of a number of Columbia colleagues,¹⁷⁴ it is essential to emphasize that, in performing its oversight function, the AB need not adopt a stance which is all-knowing and highly prescriptive. On the contrary, as these colleagues have sought to demonstrate across a wide range of diverse settings, the epistemic and accountability challenges which confront courts may be mitigated by an approach which is more flexible and responsive to context. We see shades of this in *Shrimp/Turtle* discussed above. Here the AB laid emphasis upon due process and procedural fairness in the administration of import restrictions. It did not, however, seek to establish a blueprint according to which this concept was to be adjudged. Similarly, as noted above, it emphasized an obligation of flexibility, whilst leaving the US free to determine how this might be achieved. Moreover, the design of the dispute settlement system is such that the panels and the AB may be called upon to perform ongoing monitoring, their ‘compliance reports’ serving to verify Member State conformity with these broad objectives.¹⁷⁵ In this sense, an element of iteration is in-built, albeit that it is sparked only at the behest of the complaining party.

From this perspective, the open-ended nature of the indicative principles high-

¹⁷⁴ Sturm, ‘Law, Norms and Complex Discrimination’; Dorf, ‘Problem-Solving Courts and the Judicial Accountability Deficit’; and Sabel and Simon, ‘Destabilization Rights: How New Public Law Litigation Succeeds’ (all on file with the author).

¹⁷⁵ See Article 21 DSU, on surveillance on implementation of recommendations and rulings, and particularly Article 21.5.

lighted above — subsidiarity, flexibility, transparency, and so on — seems entirely appropriate. They leave room for variation and innovation in governance, such as is fitting in a setting characterized by diverse problems and diverse problem-solving processes. They place the dispute settlement bodies in a position of inquiry rather than a position of pronouncement. In keeping with this, these bodies may be anticipated to make full use of the procedural mechanisms at their disposal to solicit and to receive information, including from the institutions concerned (for example the Codex), and from those participating (or wishing to participate) in their activities.¹⁷⁶

In the case of MEAs it may be feared that this emphasis upon flexibility — upon ends and not means, and upon ends which are drawn as widely as possible having regard to the underlying objective — might threaten the effectiveness of environmental regimes. Here, it is important to recall that such agreements provide for minimum standards of protection only. Higher standards will continue to be susceptible to justification according to the ‘normal’ rules. It is merely proposed that trade restrictions enacted pursuant to a ‘qualifying’ MEA be looked upon more favourably, in view of the wide range of advantages flowing from international cooperation in this sphere.

Equally, it is important to recall the manner in which, in the EU, procedural scaffolding is constructed in support of environmental objectives which are broadly defined. As seen above, environmental directives now routinely lay down procedural demands; reporting, participation (including transboundary participation) and peer review being called upon to create ‘community’ and to diminish opportunities for exit. Celebrated by some — merely endured by others — EU experience attests to the enduring appeal of flexibility in a system of multi-level environmental governance, and to the role of procedural instruments in guarding against the deregulatory dangers which this might be thought to present.¹⁷⁷

¹⁷⁶ The DSB enjoys broad-ranging powers to solicit information, and to receive unsolicited information, such as *amicus* briefs from non-participating countries and non-governmental actors. That these powers exist is not contested, merely the general unwillingness of the AB to make use of unsolicited briefs from non-governmental actors. These powers provide a basis upon which linkages with the relevant environment regimes could be established. See Howse, ‘Membership and its Privileges: The WTO, Civil Society and the Amicus Brief Controversy’ available at http://faculty.law.umich.edu/rhowse/Drafts_and_Publications/Howse17.pdf.

¹⁷⁷ See *supra* note 160 for an overview of the nature and role of parallel ‘systems for implementation review’ emerging in international environmental regimes. See also their discussion of ‘institutionalized flexibility’ and of the value of ‘escape clauses allowing bounded deviation’. This would suggest that for cooperating states it is desirable for a regime to be capable of ‘bending’ without ‘breaking’, thus giving ‘strength and resiliency over time and allow[ing] for deeper commitments’ (693). In an MEA making recourse to TREMs, such escape clauses might imply a higher tolerance of ‘wrong-doing’ on the part of state parties as compared to non-parties, thus exacerbating tension with the WTO by giving rise to, or exacerbating, discriminatory treatment. Though there might, as Raustiala and Victor argue on the basis of empirical investigation, be good reasons for this, it serves again to exemplify the importance of viewing trade restrictions in context, and in particular in the light of the multilateral regime of which they form a part.

6 Conclusion

The idea that the WTO could look to, and even learn from — the EU may seem counter-intuitive; so different are these two organizations in terms of scale and ambition. Likewise, it may be difficult to accept the suggestion that the AB might play a role in the elaboration of ‘entrance conditions’ for international standards and international agreements in the WTO system.¹⁷⁸ By seeming to propose a comparison with a constitutional polity which is quasi-federal in nature, and by contemplating an enhancement in the power of the AB, it may be thought that the author was sleeping rather than sleepless in Seattle.

For the EU, the invitation here is to look below the surface. Europe has had its own ‘Seattles’, albeit until recently at the ballot box rather than at the barricades. Europe’s own legitimacy crisis has forced it to confront two challenges.

The first is associated with the fact of diversity. Be it at the level of national identity, or in terms of widely differing preferences — cultural, environmental and social among them — the EU has had to learn to respect legitimate difference. Paradoxically perhaps, as the EU moves closer to a constitutional settlement — to a moment of constitutional finality — its willingness and structural capacity to accommodate diversity has been enhanced. The emphasis is upon flexibility not uniformity, coordination not centralization, shared governance not pre-emption. Doctrines have emerged and evolved — subsidiarity and proportionality prominent among them — which constrain the EU in the name of legitimate difference. Recognition of the many advantages which flow from collective action is tempered by checks upon its scope and its intensity.

The second challenge takes the form of enduring scepticism as to the legitimacy of the EU’s power. Divorced from the taken-for-granted authority reserves associated with established state polities, the EU has to justify its claim to authority. To its cost, the EU has discovered that there is no easy answer for this. To be sure, the European Parliament has progressively acquired more powers. But this has done little to silence the *no demos* brigade, or to disguise the multiplicity of sites of non-majoritarian governance within the EU; sites made all the more necessary by virtue of the scale and complexity of the problems to be addressed. This has led the EU to experiment with new modes of governance, and new models of accountability.¹⁷⁹ Often absent any treaty basis, a wide variety of modes of governance have evolved, and over time these

¹⁷⁸ Relevant in this respect is the EC’s generalized system of preferences, focusing upon the labour and environmental conditionality inherent in it. Though the EC scheme is unilateral in form, it has a multilateral dimension in that the labour and environmental conditions applied derive from ‘internationally acknowledged standards and guidelines’ (on tropical forest products) and International Labour Organisation conventions establishing core labour standards. The environmental dimension of the scheme is considerably narrower than the labour dimension. Whereas the former is concerned merely with tropical forest products, the latter applies across the board. See Council Regulation 2501/2001 applying a scheme of generalized tariff preferences for the period from 1 January 2002 to 31 December 2004, OJ 2001 L346/1 and especially Articles 14–24 thereof. See *EC-Tariff Preferences*, December 2003.

¹⁷⁹ See C. Harlow, *Accountability in the European Union* (2002).

have been codified and disciplined.¹⁸⁰ The European Courts have played a central role in this latter respect. Regardless of form, and institutional origins, it has increasingly come to regard a wide variety of instruments of governance as contestable; with contestation proceeding on the basis of the EU's core but evolving values. Flexibility is such a value. So too is transparency, including the giving of reasons. In the case of EU committees, independence, transparency and excellence have emerged as benchmarks for contestation, against which the legality of their actions will be assessed. Though there will be variation according to (legal) context — legislative or administrative, for example — and though there is much room for improvement and critique, the basic point is sound. No authority without contestability.

In looking to the EU, with an eye to the WTO, it would be naïve and misconceived to claim any exact analogy. The setting is distinct, not least in terms of scale. The institutional configuration is vastly different, as are the legal texts on the basis of which judicial decisions are to be adopted. Nonetheless, it is the argument of this paper that the basic proposition 'No authority without contestability' holds good.

For the WTO, the proposition put forward will play out differently in the case of international standards on the one hand, and treaty-based rules of international law on the other.

Ostensible authority has been ceded to international standards by the texts of the SPS and TBT Agreements. It was argued that the reluctance of the AB to confirm, let alone consolidate, this authority may be explained by virtue of the 'thin' nature of the existence conditions laid down by these agreements in respect of such standards. Against this backdrop the idea that such standards would serve to curtail the regulatory autonomy of states seems startling. For as long as the AB desists from exercising an oversight function in relation to the operation of the international organizations in question, it is to be anticipated, and indeed hoped, that it will continue to desist also in granting authority to international standards. In so doing, however, the AB will eschew the benefits as well as the risks associated with international standardization.

In the case of MEAs, the issues raised are complex and contentious. It is proposed that the AB adopt a more forgiving approach to trade restrictions adopted pursuant to such agreements. This position rests principally upon the instrumental value of transnational policy coordination, and in view of the many benefits capable of flowing from it. However, to the extent that the MEA in question cannot look inside itself for the necessary authority — for example, where one party to the WTO dispute is not a party to the MEA — it is argued that the AB might play an oversight role in relation to such agreements. In so doing it would be required to elaborate criteria according to which their authority could be assessed. It was suggested that, in much the same way as the AB has succeeded in combining a high level of 'vertical' deference *vis-à-vis* the regulatory choice of Member States, with close scrutiny of the governance processes which underpin their adoption, so too 'horizontal' deference to multilateral regimes could come together with scrutiny of the governance processes which underpin these.

¹⁸⁰ 'Comitology' would represent the classic case study here. See Joerges and Vos, *supra* note 13.

To this end, a number of loose criteria were adumbrated. Drawing upon the EU, emphasis was placed upon functional considerations in the guise of subsidiarity, and upon the value of maximum feasible flexibility having regard to the objective being pursued. Breadth and diversity of support would also be critical in view of the absence of the consent of one of the specific parties to the dispute. Further work is required in elaborating and justifying the relevant core values in the WTO.

Once again, the suggestion may seem counter-intuitive. It may seem strange to advocate such a role for the AB, when its own legitimacy is so strongly contested. One defensive, but accurate, response was set out above. This role for the AB may smack of judicial supremacy, but this supremacy would be bounded. It would arise only where the international standards or rules have exhausted their own internal reserves of authority. In a more assertive vein, it was suggested that scrutiny may be conducted in a manner which is responsive to context. Hence for the AB to establish 'entrance conditions' for access to the WTO system is not for it to lay down a blueprint for 'good governance'. It is rather, on the basis of broad principles, for the AB to invite the organization or regime in question to justify its own particular claim to extended authority, having regard to the processes which underpin the adoption of the standards or norms in question.

For those who seek comfort in order, the international system is no place to be. It is characterized by a multiplicity of partially overlapping legal regimes. Boundaries are contested, linkages constantly under construction, and hierarchies unclear. Yet, as this paper illustrates, it is precisely in the contested border terrain that the possibilities for innovation through mutual oversight take shape.