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Thematic Studies

Why Would International Administrative Activity Be Any Less Legitimate? – A Study of the Codex Alimentarius Commission

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A. Introduction

This article examines the regulatory activity performed by the Codex Alimentarius Commission (Commission), which is the international body responsible for setting food standards and which has been the object of growing attention by lawyers. The main problem is that Codex standards, although they are not binding, strip national regulators of their discretion. This occurs because the Agreement on the Application of Sanitary and Phitosanitary Measures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement)[1] refer to them as relevant international standards. Furthermore, the World Trade Organization (WTO) Appellate Body has been construing its provisions in a way that makes it virtually impossible for national regulators to set higher levels of protection. From this it follows that, unless national constituencies are afforded the possibility to participate in the regulation of food safety at the outset before the Commission, when it comes down to setting national food standards national regulators are unable to fully respond to their concerns. This is all the more so if one considers that, while being undisputed that science plays a major role in the preparation of Codex standards, many issues the Commission has to address cannot be settled in strictly scientific terms. Instead, the latter enjoys a wide degree of discretion in

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[1] Both the SPS Agreement and the TBT Agreement are multilateral agreements on trade in goods under the World Trade Organization.

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striking a balance between fair trade and consumers' health. The political dimension surrounding the issues the Commission has to address coupled with the legal effect of Codex standards raises questions about its legitimacy. Yet any assessment of the legitimacy of the Commission is necessarily incomplete unless it takes into account the comparative performance of national regulatory authorities.

B. The Institutional Framework of the Commission

I. The Establishment of the Commission

The Commission was established through resolutions adopted at the eleventh session of the Food and Agriculture Organization Conference in 1961 and at the sixteenth World Health Assembly in 1963[2] as a critical component of the Joint Food and Agriculture Organization (FAO) / World Health Organization (WHO) World Food Program. Thus, it was created under a joint program of two international organizations.[3] Its statutes are contained in the World Health Assembly resolution of 1963.[4] Its objectives are broadly formulated, which means that the Commission's mandate is characterized by a wide degree of discretion.[5] It could hardly be otherwise since lack of knowledge to discharge full-blown food safety regulations was the reason the Commission was established in the first place. The substantive program of the Commission and its work priorities are laid down in advance in a strategic plan stating goals, listing program areas and planned activities with a clearly defined timetable.[6] Apart from that, there is no substantive legal instrument narrowing down the scope of its mandate, which seems to be a common feature in international institutional law.[7] However, the Commission adopts principles, guidelines and definitions some of which are of a substantive character such as its

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[2] FAO and WHO, Understanding the Codex Alimentarius Commission, 7, available at: ftp://ftp.fao.org/docrep/fao/008/y7867e/y7867e00.pdf.

[3] Today's international organizations are increasingly being established by other international organizations rather than by governments. *See* Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW (AJIL) 489, note 2 (2001).

[4] WHO, Resolution WHA16.42, para. 1.

[5] An evaluation report proposes the development of a comprehensive and clear mandate for Codex. *See* W. Bruce Trail *et al.*, *Report of the Evaluation of the Codex Alimentarius and Other FAO and WHO Food Standards Work*, para. 76-77, available at: http://www.who.int/entity/foodsafety/codex/en/codex_eval_report_en.pdf.

[6] CAC, ALINORM 07/30/REP, para. 138 and Appendix IV.

[7] Jochen von Bernstorff, in this issue.

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four statements of principle concerning the role of science[8] or the ones relating to risk analysis,[9] all of which are self-binding.

II. The Organizational Structure of the Commission

1. Main Bodies

The Commission elects a chairperson and three vice-chairs from its membership to serve for one ordinary session of the Commission eligible for re-election up to three consecutive years. The work of the Commission and its subsidiary bodies is assisted by a secretariat of six professional and seven support staff housed at FAO Headquarters in Rome within the Food and Nutrition Division[10] and funded jointly by FAO and WHO. The Executive Committee (composed of a chairperson, three vice-chairs and seven representatives from geographical groups[11]) acts on behalf of the Commission as its executive organ between its sessions, which for a long period of time were held every two years.[12] It is incumbent upon each committee session to consider the timing of the following one.[13]

2. Subsidiary Bodies

Solely focusing on the sessions of the Commission might be misleading. In fact, by the time the Commission is scheduled to adopt a standard very little remains to discuss, since all controversial issues have already been addressed at the committee level. One finds committees addressing horizontal issues such as the Codex Committee on Food Labeling, committees that are focused on a single commodity such as the Codex Committee on Milk and Milk Products and one also finds coordinating committees for specific regions or group of countries. Instead of committees, the Commission may decide to establish *ad hoc* intergovernmental task forces that may later give rise to the establishment of a committee.

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[8] CAC, ALINORM 95/37, para. 25 and Appendix 2.

[9] CAC, ALINORM 97/37, para. 28 and Appendix II.

[10] Prior to January 2002, the Codex secretariat was not a clear separate unit within FAO and the Codex secretary was an FAO staff member with responsibilities also for FAO's other food standards work.

[11] Members elected on a geographical basis are expected to act within the Executive Committee in the interest of the Commission as a whole.

[12] The Commission began holding annual sessions from 1963 to 1972. Thereafter, it adopted a biennial meeting pattern until 2003 when it decided to start meeting annually again.

[13] CAC, ALINORM 03/41, para. 150.

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3. Membership

Membership is open to all member states and associate members of FAO and WHO interested in international food standards. Committee membership is open to members of the Commission who have notified the Director-General of FAO or WHO of their desire to be considered as members thereof or to selected members designated by the Commission. Membership of regional coordinating committees is only open to members of the Commission belonging to the region or group of countries concerned.

4. Observer Status

Any other Commission member or any member or associate member of FAO or WHO which has not become a member of the Commission may participate as an observer at any committee if it has notified the Director-General of FAO or WHO of its wish to do so. For instance, before becoming a Commission member in 2003,[14] following an amendment of the Commission's rules of procedure allowing regional economic integration organizations to become members,[15] the European Community had been participating in the work of the Commission and its subsidiary bodies as an observer.[16] These countries may participate fully in the discussions of the committee and shall be provided with the same opportunities as other members to voice their opinions including the submission of memoranda, which excludes the right to vote or to move motions (whether substantive or procedural). International organizations which have formal relations with either FAO or WHO should also be invited to attend sessions of those committees which are of interest to them, albeit in an observatory capacity.[17] Intergovernmental organizations and international non-governmental organizations may attend, upon invitation by the Directors-General of FAO or WHO, all committee sessions as observers.[18] There are at present 46 international organizations, 157 international

[14] EC Council Decision 2003/822 of 17 November 2003, O.J. 2003 L 309.

[15] CAC, ALINORM 03/41, paras. 19-24 and Appendix II.

[16] In 1991, the European Community became a member of FAO alongside EC Member States.

[17] CAC, ALINORM 04/27/41, para. 14 and Appendix II.

[18] CAC, Rules of Procedure, Rule IX-1 and ALINORM 99/37, para. 71 and Appendix IV. However, they may not attend the sessions of the Executive Committee.

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non-governmental organizations[19] and 16 UN organizations enjoying observer status within the Commission.

5. National Codex Contact Points

Finally, reference should be made to the national codex contact points which act as a link between the Codex Secretariat and member countries, coordinating all relevant Codex activities at the national level by giving notice of draft standards to be adopted by the Commission and by providing opportunity for comments from national food industry, consumers and traders, thereby ensuring that national governments are provided with an appropriate balance between policy and technical advice.[20] It also makes it easier for the members of the Commission to exchange information and coordinate activities.

III. The Legal Nature of the Commission

Scholars disagree on the legal nature of the Commission. Some think of it as a hybrid intergovernmental-private administration[21] while others look at it as an intergovernmental structure.[22] In my view, it does not strictly fit either category.[23] The fact that private parties may participate as observers at the standard-setting procedure is not enough to warrant the organization a hybrid legal nature, since only government representatives are allowed to vote as full members. On the other hand, private parties do play an important role reducing member countries' bargaining power and the truth is that standards are frequently adopted by consensus.[24] Yet the adoption of Codex standards does not require unanimity. I

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[19] International Non-governmental Organizations in Observer Status with the Codex Alimentarius Commission, Report by the Secretariat (CAC/30 INF/2), available at: ftp://ftp.fao.org/Codex/CAC/CAC30/if30_02e.pdf.

[20] CAC, ALINORM 99/37, para. 72 and Appendix IV. *See* List of Codex Contact Points, Report by the Secretariat (CAC/30 INF/1), available at: ftp://ftp.fao.org/Codex/CAC/CAC30/if30_01e.pdf.

[21] Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW AND CONTEMPORARY PROBLEMS (LAW & CONTEMP. PROBS.) 15, 22 (2005).

[22] Alexia Herwig, *Transnational Governance Regimes for Foods Derived from Bio-Technology and their Legitimacy, in* TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 199, 204 (Christian Joerges, Inger-Johanne Sand & Gunther Teubner eds., 2004).

[23] Which points less to the singularity of the Commission than to recent developments in the law of international organizations. *See* José E. Alvarez, *International Organizations: Then and Now*, 100 AJIL 324, 333 (2006) (stating that "[international organizations] [...] are for all practical purposes a new kind of lawmaking actor, to some degree autonomous from the states that establish them").

[24] CAC, ALINORM 03/41, para. 30 and Appendix III and ALINORM 04/27/41, para. 14 and Appendix II.

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should further note that the Commission is not entirely independent from its mother organizations. The Directors-General of FAO and WHO are key players in the agenda setting of the Commission.[25] It comes as no surprise that an independent evaluation of the Commission's activity recommended greater autonomy by way of proposing and executing its work program.[26]

C. The Standard-Setting Procedure

I. Sequence

The Commission has adopted its own Rules of Procedure as well as other internal procedures necessary to achieve its objectives that together with other materials such as general principles, guidelines and definitions form the Commission's Procedural Manual[27] intended to help its members and organizations with observer status participate effectively in the work of the Joint FAO/WHO Food Standards Program. This section examines the procedural regime of food standards on a sequential basis. Since the sessions of the Commission are only convened for a short period once a year, it is the Executive Committee that, assisted by the Secretariat, handles the standard-setting process.

1. Eight-step Uniform Procedure

The regular uniform procedure encompasses eight steps. It is up to the Commission to decide whether to establish a standard and initiate the procedure. However, decisions to elaborate standards may also be taken by subsidiary bodies subject to subsequent approval by the Commission (step one). The Secretariat consults the Joint FAO/WHO expert bodies[28] or, in the case of milk and milk products the International Dairy Federation and collects all relevant available scientific data (step two). This provides the members of the Commission and interested international organizations with the necessary information on which to base their comments including possible implications of the proposed draft standard for their economic interests (step three). The Secretariat then receives the comments and forwards them onto the subsidiary body or other body concerned which has the

[25] CAC, Rules of Procedure, Rule VII-1, Rule V-3 and Rule XI-6.

[26] Trail *et al.* (note 5), at para. 87.

[27] CAC, Procedural Manual of the Codex Alimentarius Commission, 15th ed., Rome, available at: ftp://ftp.fao.org/codex/Publications/ProcManuals/Manual_15e.pdf.

[28] Joint FAO/WHO Expert Committee on Food Additives (JECFCA); Joint FAO/WHO Meeting on Pesticides Residues (JMPR); Joint FAO/WHO Expert Meetings on Pesticide Specifications (JMPS).

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power to consider such comments and to amend the proposed draft standard (step four). The proposed draft standard is then submitted through the Secretariat to the Executive Committee for critical review and to the Commission with a view to its adoption as a draft standard (step five). In doing so, the Commission should give due consideration to the outcome of the critical review and to any comments that may be submitted by any of its members regarding the implications which the proposed draft standard may have for their economic interests. Upon adoption, the draft standard is then submitted by the Secretariat to all members and interested international organizations for comment on all aspects, including possible implications of the draft standard for their economic interests (step six). The Secretariat receives said comments and conveys them to the subsidiary body or other bodies concerned, which has the power to consider such comments and amend the draft standard (step seven). Finally, the draft standard is submitted through the Secretariat to the Executive Committee for critical review and to the Commission, together with any written proposal received from members and international organizations for amendments at this stage (step eight).[29]

2. Step 5/8 (with omission of Step 6 and 7) Procedure

The Commission may authorize, on the basis of a two-thirds majority of the total votes cast, the omission of steps 6 and 7. Recommendations to omit steps shall be notified to members and interested international organizations as soon as possible after the session of the Codex committee concerned. When formulating recommendations to omit steps 6 and 7, Codex committees shall take all appropriate matters into consideration, including the need for urgency, and the likelihood of new scientific information becoming available in the immediate future. The Commission may at any stage in the elaboration of a standard entrust any of the remaining steps to a Codex committee or other body different from that to which it was previously entrusted.[30]

3. Five-step Accelerated Procedure

An accelerated procedure can be employed, essentially consisting of steps 1 to 5 at the end of which a text is adopted as a Codex standard. This is generally employed when an immediate need for a standard is identified and/or there is already broad consensus on the issue under consideration. The Commission, the Executive

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[29] At its Thirty-first Session the Commission adopted eighteen standards following the Uniform Procedure (ALINORM 08/31/REP, Appendix VII, Part 1).

[30] ALINORM 04/27/41, Appendix II. At its Thirty-first Session the Commission adopted nineteen standards with omission of steps 6 and 7 (ALINORM 08/31/REP, Appendix VII, Part 2).

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Committee or the subsidiary body concerned (subject to subsequent confirmation by the Commission or the Executive Committee) can invoke the accelerated procedure on the basis of a two-thirds majority of the total votes cast.[31]

4. Decision-making by Consensus

Decisions are normally reached by consensus. Only in noticeable politically sensitive subjects can one expect government representatives to push for a voting, as they might otherwise incur in political costs at national level.

5. Publicity

Meetings of the Commission should be held in public, unless the latter decides otherwise.[32] Public voting is utilized where no consensus is reached, unless the Commission determines that a sensitive issue should be decided by secret ballot.[33] The Codex standard is published and issued to all member states and associate members of FAO and/or WHO and to the international organizations concerned.[34] It is also made available to the general public in the Commission's website as a portion of the Codex Alimentarius.[35]

II. Functional Separation Between Risk Assessment and Risk Management

I have briefly described the standard-setting procedure on a sequential basis. I will now examine it against the background of the science-politics divide. I should start by noting that the procedure is embedded in the idea of an analytical distinction between risk assessment and risk management when conducting risk analysis.[36] Risk assessment lies primarily with the Joint FAO/WHO expert bodies and consultations at step two of the standard setting procedure, whereas risk

[31] CAC, Procedural Manual (note 27), 25. At its Thirty-first Session the Commission did not adopt any standard under the Accelerated Procedure (ALINORM 08/31/REP, Appendix VII).

[32] CAC, Rules of Procedure, Rule VI-6, 11.

[33] CAC, Rules of Procedure, Rule VIII-5, 12. That was the case concerning the Standard on Beef Hormones.

[34] CAC, Procedural Manual (note 27), 26.

[35] Available at: http://www.codexalimentarius.net.

[36] Thorsten Hüller & Matthias Leonhard Maier, *Fixing the Codex? Global Food Safety Governance Under Review, in* CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION 267, 281-286 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2006).

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management lies with the Commission and its subsidiary bodies.[37] Such functional separation[38] aims at ensuring the scientific integrity of the risk assessment, avoiding confusion over the functions to be performed by risk assessors and risk managers and to reduce any conflict of interests.[39] Risk assessment should be based on all available scientific data and use quantitative information to the greatest extent possible. The report of the risk assessment should indicate any constraints, uncertainties, assumptions and their impact on the risk assessment. It should also record minority opinions. In turn, risk managers should base their decisions on risk assessment taking into account other factors that might be relevant for the protection of consumers' health and for the promotion of fair practices in food trade. When making a choice among different risk management options, which are equally effective in protecting the health of the consumer, the Commission and its subsidiary bodies should seek and take into consideration the potential impact of such measures on trade among its member countries and select measures that are no more trade-restrictive than necessary.

The functional separation between risk assessment and risk management informs us that it is up to scientific bodies to calculate risk and up to accountable decision-makers to determine what level of risk is acceptable. Whenever risk is not quantifiable, that is in situations of scientific uncertainty,[40] science runs out and it is up to decision-makers to regulate on the basis of what they believe are their constituents' desires. The critical moment of the risk analysis and of the Codex standard-setting procedure generally is the activity performed by the Joint FAO/WHO expert bodies, where science is the official language and member countries are not at all represented. Thus, whatever happens following the scientific report is heavily influenced by the latter, which means that relevant input coming from member countries and organizations enjoying observer status at later stages of the procedure is somewhat neglected. The normative implication of that separation is that whenever one is dealing with risk assessment one only needs to make sure that experts are unbiased and that scientific information is not manipulated whereas risk management and decisions made under uncertainty raise quite different concerns. In the absence of objective scientific support, the members of the Commission will most likely disagree on the level of acceptable risk let alone the very necessity of adopting a Codex standard. Disagreement is perfectly justified given the fact that national delegations respond to the concerns of their respective

[37] CAC, ALINORM 03/41, para. 146 and Appendix IV.

[38] CAC, ALINORM 97/37, para. 28 and Appendix II.

[39] CAC (note 37), para. 9.

[40] FRANK H. KNIGHT, RISK, UNCERTAINTY AND PROFIT (1921).

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constituencies, which may favor different levels of acceptable risk or prefer more or less precautionary approaches under uncertainty. There should be no problem with that but for the fact that national regulators are striped of their discretion in determining what they consider adequate levels of health protection through the Appellate Body's interpretation of the SPS Agreement.[41] Yet I argue that it would be wrong to assume that leaving it up to national regulators[42] settles the issue. I will come back to this in the last section of the article.

D. Codex Standards

I. Classification of Standards

Two basic distinctions should be made in providing a classification of standards. First, one should look at the subject matter addressed by a standard. Second, one should consider its object.

1. Subject Matter

One should distinguish between food safety standards and all other standards. The former contain provisions for maximum levels of pesticide residues, contaminants and food additives. The other category encompasses commodity/product standards that define what a commodity is (*e.g.* species of sardines) or how it is made and what it may contain (*e.g.* cheddar cheese, corned beef), quality descriptors as part of commodity standards which are often grading characteristics (*e.g.* color of different types of asparagus) and non-health related standards. While food safety standards strike a balance between consumers' health and fair practices in trade, all other standards are specifically targeted at fair trade and informed consumer choice. The distinction is important because the SPS Agreement only covers food safety standards. Technical standards fall under the TBT Agreement. On the other hand, the distinction may be misleading suggesting that only food safety standards are controversial.

[41] Robert Howse, *Democracy, Science and Free Trade: Risk Regulation on Trial at the World Trade Organization*, 98 MICHIGAN LAW REVIEW 2329 (2000) (arguing that, quite to the contrary, the Appellate Body has been interpreting the SPS Agreement in a way that enhances the quality of rational democratic deliberation about risk and its control).

[42] Dario Bevilacqua, *The "EC-Biotech Case": Global v. Domestic Procedural Rules in Risk Regulation: The Precautionary Principle*, 6 EUROPEAN FOOD AND FEED LAW REVIEW 331 (2006).

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2. Object

One should also distinguish between standards containing substantive requirements and standards containing merely procedural requirements. The latter are adopted in the form of guidelines on processes and procedures (*e.g.* codes of practice) which are intended to augment the application of core standards rather than act as principal standards themselves and which may be adopted whenever an agreement is not possible on a commodity or residue standard.[43]

II. Legal Effect

The most controversial issue is the legal effect of Codex standards. Under the founding instrument of the Commission one can find no requirement for member countries to adopt national regulatory measures conforming to Codex standards, which means that they were initially conceived of as a non-binding instrument. Member countries are free to decide whether to adopt them or not. At present, following the abolition of the Acceptance Procedure,[44] member countries are no longer required to notify the Commission of the implementation of standards and since the notification procedure provided for in the SPS Agreement only applies to SPS measures not covered by international standards,[45] monitoring of member countries' compliance seems to depend largely on trade disputes. But there is more to it than that. In fact, as one scholar puts it, "[Codex standards] now potentially have binding application through the SPS Agreement".[46]

1. SPS Agreement

The SPS Agreement covers national sanitary and phytosanitary measures which may, directly or indirectly, affect international trade.[47] When adopting SPS measures WTO members are required either (i) to base them on international standards, guidelines or recommendations where they exist, (ii) to conform them

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[43] David G. Victor, *The Sanitary and Phitosanitary Agreement of the WTO: An Assessment After Five Years*, 32 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 865, 886 (2000).

[44] CAC, ALINORM 05/28/41, para. 34 and Appendix IV.

[45] SPS, Annex B, 5. The SPS Committee has recently adopted revised recommended procedures on implementing the transparency obligations of the SPS Agreement. One significant change in the revised recommendations encouraged WTO members to notify new or changed measures which conform to international standards.

[46] Victor (note 43), 892.

[47] SPS, Art 1.1.

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with such instruments or (iii) to provide scientific evidence demonstrating that stricter measures are required for an adequate level of protection.[48] If national measures fall short of meeting at least one of these requirements they may be challenged before the WTO dispute settlement bodies. If one considers that the Appellate Body has been interpreting the relevant provisions of the SPS Agreement in a way that strips national regulators' discretion to deviate from international standards and that members may eventually face sanctions if non-compliance persists, Codex standards might be undergoing a hardening process.[49] In *EC – Hormones*, while rejecting the idea that international standards, guidelines and recommendations are binding norms[50] and stating that "[...] a Member may decide to set for itself a level of protection different from that implicit in the international standard",[51] the Appellate Body makes clear that the right of a member to define its appropriate level of protection is not, however, an absolute or unqualified right.[52] In fact, while being at first sight friendly to an interpretation of Art 5.1 SPS, which refers to the scientific risk assessment on the basis of which states may determine higher levels of protection, which allows for other than quantifiable evidence to be included,[53] by requiring "a rational relationship between the measure and the risk assessment",[54] even if mitigated by disagreements within the scientific community,[55] the Appellate Body makes it virtually impossible for a member to set a higher level of protection.[56] This is all the more so if one considers that Art 5.5 SPS requires each member to "avoid arbitrary or unjustifiable distinctions in the levels it

[48] *Id.* at Art 3.1-3.3. Annex A 3(a) expressly recognizes the Commission as the relevant standard-setting organization for food safety.

[49] Christine Chinkin, *Normative Development in the International Legal System*, *in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 21, 31-34 (Dinah Shelton ed., 2000).

[50] AB Report, *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R and WT/DS48/R, para. 165. On this critical issue the Appellate Body reversed both panel reports finding international standards to be binding via Art 3.1 SPS. US Panel Report, WT/DS26/R/USA, para. 8.44 and Canada Panel Report, WT/DS48/R/CAN, para. 9.47.

[51] *Id.* at para. 172.

[52] *Id.* at paras. 173-177.

[53] *Id.* at paras. 186-187.

[54] *Id.* at para. 193.

[55] *Id.* at para. 194.

[56] *See* Howse (note 41), at 2349 (stating that "sufficiency" of scientific evidence does not refer to some threshold of scientific proof or certainty [...] but rather to the extent of the obligation of a Member to engage in scientific investigation *within* the process of rational democratic deliberation").

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considers to be appropriate in different situations" and providing a justification of different levels of protection across the range of comparable risks may be too costly.[57] Therefore students of the Commission seem to agree on characterizing its standards as *de facto* binding norms.[58]

2. *TBT Agreement*

The TBT Agreement does not expressly refer to the Commission but the Appellate Body has decided that Codex standards are "relevant international standards" under Art 2.4 and Annex 1.2.[59] Even if it is up to the complaining party to demonstrate that the Codex standard is not ineffective or inappropriate to achieve the objectives pursued by the TBT measure,[60] deference to a Codex standard is most likely to occur. It would be wrong to assume that standards falling under the TBT Agreement do not raise concerns when compared to standards falling under the SPS Agreement. Notwithstanding important differences,[61] standards falling under the TBT may also incorporate a delicate balance between efficiency and distribution to the extent that they may relate not only to product characteristics but also to related process and production methods.[62]

3. *European Law*

The multi-level dimension of Codex standards is impressive. Aside from their legal effect in the international legal order, they penetrate into European law not only through their implementation by EC foodstuffs legislation[63] but much more interestingly when referred to by the European Court of Justice (ECJ) and the Court of First Instance in clarifying the meaning of provisions contained therein.[64] Thus

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[57] *Id.* at 2352 (arguing that by failing to justify different levels of protection national regulators impede their citizens' ability to engage in informed rational democratic deliberation about regulatory choice).

[58] Dario Bevilacqua, *Il principio di trasparenza come strumento di* accountability *nella* Codex Alimentarius Commission, 57 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 651, 657 (2007).

[59] AB Report, *EC – Trade Description of Sardines*, WT/DS231/AB/R, para. 227.

[60] *Id.* at para. 275.

[61] Joost Pauwelyn, *Non-Traditional Patterns of Global Regulation: Is the WTO 'Missing the Boat'?, in* CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION (note 36), at 199, 208-215.

[62] TBT Agreement, Annex 1(2). Yet the presumption of conformity of Art 2.5 seems to cover only technical regulations.

[63] EC Regulation 852/2004 of 29 April 2004, O.J. 2004 L 139.

[64] Sara Poli, *The European Community and the Adoption of Food Standards within the Codex Alimentarius Commission*, 10 EUROPEAN LAW JOURNAL 613, 616-617 (2004).

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far Codex standards have only been referred to in support of administrative decisions – made either by the EU Administration[65] or by national administrative authorities[66] – implementing EU legislation. It remains to be seen how the European Courts will decide in those much more interesting cases where a private party invokes a Codex standard against EU legislation containing stricter requirements.[67] Another interesting question is whether, in the absence of EC legislation, compliance with Codex standards may be invoked by Member States to justify – under Article 30 EC – national legislation otherwise in breach of the free movement of goods. Confronted with the issue, the ECJ decided that a Member State may not impose additional requirements – even if conforming to Codex standards – on products of the same type imported from another Member State when those products have been lawfully manufactured and marketed in that Member State and consumers are provided with proper information.[68] However, in a later case,[69] the EU Commission seems to signal that it will consider national administrative practices conforming to Codex standards to be justified under Article 30 EC. That position alone is meaningful since it informs us that the EU Commission will not initiate proceedings against a Member State under Article 226 EC. Nonetheless, because a case may also be brought before the ECJ for a preliminary ruling, whether the ECJ will endorse the EU Commission's deference to Codex standards or stick to its decision in *Deserbais*[70] is not yet clear.

E. Accountability

This section discusses the extent to which the activity performed by the Commission is held accountable. One should start by noting that, when compared to other international standard-setting organizations, the Commission is at first sight fairly accountable. Most countries are represented and NGOs may participate as observers. In addition, meetings are held in public, fully documented and made public in the Commission's website.[71] Its activity is guided by strict procedural rules and relies heavily on scientific assessments. It has to report to FAO and WHO. One also needs to consider that it would be a mistake to require from global

[65] Case C-236/01, *Monsanto Agricoltura Italy and others*, 2003 ECR I-8105, para. 79.

[66] Case C-196/05, *Sachsenmilch*, 2006 ECR I-5161, paras. 29 and 34.

[67] I am grateful to Dario Bevilacqua for pointing out this important difference.

[68] Case 286/86, *Ministère public v. Deserbais*, 1988 ECR 4907, para. 15.

[69] Case 192/01, *Commission v. Denmark*, 2003 ECR I-9693, para. 27.

[70] Case 286/86 (note 68).

[71] Available at: http://www.codexalimentarius.net.

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governance institutions to exhibit the same kind of accountability that one finds at the state level.[72] Global power-wielders have no corresponding public they might be accountable to, which means that an electoral system would prove inadequate. Furthermore, one should bear in mind that there is no "single problem of global accountability"[73] and that what might constitute an abuse of power relies heavily on the subject area, institutional framework and legal instrument at stake.[74] However, following the public awareness of food-related trade disputes and the reference made by the SPS Agreement to Codex standards, at some point it became clear that the standard-setting activity performed by the Commission was not subject to law to a satisfactory degree. An independent expert evaluation was fixed to carry out a comprehensive study on necessary adjustments of the Commission to the changed circumstances since its establishment in 1963.[75] I will proceed by reviewing the most important proposals made by students of the Commission, beginning with non-judicial accountability mechanisms and then turning to judicial review.

I. Non-judicial Accountability Mechanisms

1. Notice-and-Comment

One author has suggested that right at the outset, when the Executive Committee is reviewing a proposal draft coming from a subsidiary body or from a member country, it is necessary to introduce a notice-and-comment requirement.[76] At present there is no requirement to give notice and private parties are only eventually offered the possibility to participate and comment on the draft proposal depending on their awareness. Another problem concerns the way in which national industries and consumers are consulted by the time each member country is notified for comment at step 3 of the standard-setting procedure. First of all, members should, according to domestic administrative procedures, keep national publics informed of draft standards proposed for discussion when they have yet to be discussed at Codex committees and not only after already scheduled for adoption by the Commission. Second, while it is virtually impossible to ensure that

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[72] Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AMERICAN POLITICAL SCIENCE REVIEW 29, 34 (2005).

[73] *Id.* at 41.

[74] Daniel C. Esty, *Global Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE LAW JOURNAL 1490 (2006); Stein (note 3).

[75] Trail *et al.* (note 5).

[76] Bevilacqua (note 58), at 663.

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national contact points reach out to all potentially affected interests, governments should at least provide information to national constituencies of which interests are being consulted. One way of accomplishing this is to require a public docket on each draft standard to be kept within the secretariat of national contact points and also made available online for consultation. The docket would also mention the names of the persons comprising the national delegation attending Codex meetings. Such a mechanism would raise public awareness of what is being negotiated and pressure governments to better respond to national constituencies' desires. In turn, that would strengthen national delegations' bargaining power within the Commission. Since the political costs of disregarding national interests would be higher, member countries might use that argument to oppose other countries' regulatory strategies and pressure for their own solutions.[77] On the other hand, that might polarize what would otherwise be more consensual positions on any particular subject and eventually impair the adoption of important standards. The truth is that, since Codex committees, together with the scientific report and other political factors, are required to take into account the economic interests of the states, the information gathered by national delegations regarding national economic interests should be fully disclosed.[78] This is all the more so given the fact that national delegations are easy targets for industry capture. National delegations attending Codex meetings are composed not only of government officials but also of industry representatives. While understandable to some degree, given regulators lack of knowledge on technical issues, the line might be crossed at some point and national economic interests might be taken for national industry's interests. In order to avoid that, national delegations should include consumer representatives. While there are considerable costs involved, it is the only way of bringing into the standard-setting procedure a democratic legitimating ground.

2. Observer Status

Widening the debate implies a much more cautious selection of organizations as observers. The expert report pointed out that the eligibility criteria for NGOs to obtain observer status falls short of ensuring that they really speak on behalf of an international community.[79] It only requires NGOs to have membership in three or

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[77] Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INTERNATIONAL ORGANIZATIONS 427, 440 (1988) (showing how the domestic constraints under which a negotiator operates amount to a bargaining advantage that can be exploited at the international level). *See also* THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 19-28 (1960).

[78] Bevilacqua (note 58), at 669.

[79] Trail *et al.* (note 5), at para. 147.

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more countries and these can be from the same geographic region[80] whereas they should consist of general representation, impartiality and protection of common interests.[81] When applying, candidates should be required to document their activity, membership and purposes in order to avoid conflicts of interest.[82] By allowing the Commission to better identify which public candidates really represent, the application materials could also be used as a source of information to make sure that there is a genuine balanced representation among observers not only geographically but also regarding economic interests. If one has a look at official data one realizes that NGOs representing the industry largely outnumber consumer NGOs.[83]

3. Participation of Developing Countries

Due to the fact that developing countries face severe financial constraints, a Codex Trust Fund was launched in 2003 to enable low-income and lower-middle-income countries to both prepare for and participate effectively in the Commission and its subsidiary bodies' meetings.[84] A small portion of funds is also made available to enable developing countries to prepare and present technical/scientific positions and data related to Codex work. Applications are channeled through the national contact points. Another strategy is to make arrangements for Codex committees to be hosted by developing countries. While generous, the Trust Fund gives rise to the awkward situation of allowing the international community to determine developing countries regulators' incentives thereby disempowering national governments. Whether to fight malaria first or negotiate the labeling of foods containing GMOs will be decided by funds made available by the international community and not by national constituencies. In fact, one might perceive the willingness of rich countries to fund developing countries participation not as a generous act but rather aiming at smuggling more industry representatives into their delegations. Furthermore, the Trust Fund may turn out to be ineffective. The importance given to science in the standard-setting procedure eventually diminishes the contribution of developing countries because even with unlimited funding developing countries lack the knowledge and skill to provide sufficient scientific evidence on any given level of protection. Funds would be better allocated

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[80] CAC, ALINORM 99/37, para. 71 and Appendix IV.

[81] Bevilacqua (note 58), at 663-664.

[82] *Id*.

[83] CAC (note 19). Only 9 out of 157 are consumer representatives.

[84] It is hoped that approximately USD 4 million per year will be made available.

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in capacity building programs[85] rather than on participation. In fact, developing countries may prefer, based upon reasons other than trade-related, lower but effective standards of protection to higher but unenforceable ones. Efforts are underway for the Joint FAO/WHO expert committees to include experts from developing countries.[86]

4. Transparency

Considering the role risk assessment plays in the standard-setting procedure, ensuring transparency in the selection of experts becomes critical. Thus, all experts are required to declare any interests that could constitute a real, potential or apparent conflict of interests.[87] While it is very difficult to find experts without any industry contact whatsoever, information on each case should be disclosed. It is also important to make sure that FAO and WHO pay honoraria and not only cover the attendance costs of meetings in order to avoid capture by the food industry.[88] Documenting scientific conflicts through the publication of minority reports and making summary reports available online for public comment and peer review[89] provide valuable material for Codex committees to base their decisions on. While time-consuming it should not take as long as a "second opinion" expert consultation procedure would. While transparency in the selection of experts leads to impartial performance in risk assessment, which is meaningful given their crucial role in the standard-setting procedure, it does not solve the problem of how to bring into account decisions made by risk managers regarding the establishment of levels of acceptable risk and judgments made under uncertainty. Furthermore, even if unbiased professionals, experts, just like any other individual, cannot avoid bringing value-laden choices into their judgments. Transparency alone provides no solution for that concern.

[85] FAO, WHO, OIE, the World Bank and the WTO have established a global program in capacity building and technical assistance called the Standards and Trade Development Facility, available at: http://www.standardsfacility.org/.

[86] FAO and WHO, Enhancing developing country participation in FAO/WHO scientific advice activities, available at: ftp://ftp.fao.org/docrep/fao/010/a0873e/a0873e.pdf.

[87] FAO and WHO, FAO/WHO Framework for the Provision of Scientific Advice on Food Safety and Nutrition, available at: http://www.fao.org/ag/AGN/agns/files/Final_Draft_EnglishFramework.pdf, 18-19.

[88] Herwig (note 22), at 220.

[89] FAO and WHO (note 87), 22.

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II. Judicial Review

1. Constraints of the International Legal System

The mechanisms put forward thus far, such as "notice and comment", "statements on conflicts of interests", "public docket" and "public interest funding", bear a resemblance to the legal regime underpinning administrative activity in many different national legal systems.[90] Yet at the domestic level individuals are entitled to challenge administrative decisions before courts, whereas at the international level judicial review is generally unavailable. In most cases, because international norms are not ripe and still need to be implemented by national regulatory authorities it makes perfect sense not to have them immediately reviewed. Individuals may later challenge the national implementing measures before domestic courts. Furthermore, it is difficult to determine exactly which interests are affected by international norms, which makes it a long shot for individuals to meet standing requirements. Yet, while falling short of corresponding to judicial review witnessed in domestic legal systems, proposals have been made which credit for forging a doctrinal consistent solution for independent review of Codex standards under the constraints of the international legal system.

2. Institutional Differentiation

Scholars have suggested that the WTO dispute settlement bodies and mainly the Appellate Body might provide an adequate legal framework under which the standard setting performed by the Commission might be scrutinized.[91] The most interesting idea behind the gatekeeper function of the Appellate Body is the expansion of the object of disputes brought before WTO tribunals. In fact, the WTO Dispute Settlement Understanding (DSU) is conceived of to challenge trade-restricting *domestic* measures and not *international* norms. On the other hand, its interpretation of the scope of the SPS/TBT Agreements as well as of Codex standards themselves determine the extent to which the latter become *de facto* binding which means that, if WTO tribunals start making requirements concerning Codex's standard-setting procedures for standards to gain the legal effect that raises the cost of enacting non-conform domestic regulation, the Commission will be under pressure to start meeting those requirements. It is argued that such form of institutional differentiation would enhance the legitimacy of the activity

[90] Kingsbury, Krisch & Stewart (note 21); Esty (note 74).

[91] Joanne Scott, *International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO*, 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW (EJIL) 307, 311-312, 330-333 (2004); Michael Livermore, *Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation and the Codex Alimentarius*, 81 NEW YORK UNIVERSITY LAW REVIEW 766, 789 (2006).

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performed by the Commission. While the interplay between standard-setting international organizations and the WTO has been acknowledged,[92] I find it difficult to expect from the DSU, the interpretation of which keeps avoiding weighing public values against international trade, to compensate for the internal deficiencies of representation and equality one can find at the Commission. Even if one could find within the DSU a fair balance between competing public values,[93] one would still run up against what Koskenniemi calls "structural bias"[94] let alone the admissibility of using non-WTO law in the WTO dispute settlement mechanism.[95] [96]

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[92] Armin von Bogdandy, *Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship*, 5 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 609, 633-641 (2001) (arguing that the incorporation of non-binding standards set up by international organizations might be a way to meet WTO's mismatch between politics and law).

[93] Robert Howse, *From Politics to Technocracy-And Back Again: The Fate of the Multilateral Trading Regime*, 96 AJIL 94, 109-112 (2002) (arguing that recent decisions of the Appellate Body, instead of a trade bias, "do justice to the delicate interrelationship of values and interests").

[94] Martii Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, available at: http://daccess-ods.un.org/TMP/6371023.html, 143.

[95] Markus Böckenförde, *Zwischen Sein und Wollen – Über den Einfluss umweltvölkerrechtlicher Verträge im Rahmen eines WTO-Streitbeilegungsverfahrens*, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 971 (2003) (arguing against the direct applicability of non-WTO law while making room for the possibility of having the latter be referred to when clarifying provisions of the covered agreements). *See* Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AJIL 535, 561-562 (2001) (arguing that the wording of the DSU does not exclude the application of non-WTO law); Lorand Bartels, *Applicable Law in WTO Dispute Settlement Proceedings*, 35 JOURNAL OF WORLD TRADE 499 (2001) (claiming – on the basis of a distinction between jurisdiction and applicable law – for prima facie applicability of a variety of sources of international law subject to the rule that the dispute settlement body may not add to or diminish the rights and obligations provided in the covered agreements). *See also* Koskenniemi (note 94), at 65-101 (claiming that the rationale of special regimes such as the WTO is the same as that of *lex specialis* and arguing against the possibility of there being any self-contained regime "[...] completely cocooned outside international law").

[96] In *EC – Approval and Marketing of Biotech Products*, US Panel Report, WT/DS291/R; Canada Panel Report, WT/DS292/R and Argentina Panel Report WT/DS293/R, the panel admits the use of non-WTO law for interpretative purposes whenever the relevant rules of international law are applicable in the relations between all WTO Members (para. 7.68), yet leaving open the question whether admissibility extends to those cases where the relevant rules of international law are applicable in the relations between all parties to the dispute but not between all WTO Members (para. 7.72).

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F. The Legitimacy of International Administrative Activity

I. Models of Administrative Law

This section starts by discussing three different conceptions of administrative law.[97] This digression is important in order to demonstrate that the problems raised by the activity performed by the Commission perfectly match the ones addressed by administrative lawyers in domestic legal systems.

1. The Formalist Model

According to established wisdom administrative law evolved from the liberal project of subjecting public power to law. Yet what lies behind nineteenth century European public law scholarship is its own agenda of being accepted as science by mainstream positivist legal thought.[98] One was led to believe that administrative activity could be traced back to legislative intent expressing people's will and the growth of bureaucracies was accepted as a means to rationalize subjectivity.[99] Administrative law was therefore designed under a transmission belt to ensure that the administration actually effectuated constituents' desires.[100] Ingenious versions of non-delegation doctrines were invented. Yet while apparently placing limits on what legislatures might pass on to the administration to rule on, such doctrines were in fact a powerful legitimating source of administrative activity within the authorized range of delegation, the confines of which were in turn far from being precise and easily manipulable.[101] Administrative lawyers are aware of the fact that lawmaking is not a province of parliament both because national governments and regulatory authorities with broad mandates are also engaged in rulemaking activity and the parliament itself is limited by constitutional principles.[102] While German public law scholarship, being heavily influenced by the classic article by

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[97] JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 16-24 (1985).

[98] Michael Stolleis, *Verwaltungsrechtswissenschaft und Verwaltungslehre 1866-1914*, 15 DIE VERWALTUNG (DV) 45, 49-50 (1982).

[99] MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT 565 (1921). *See* Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARVARD LAW REVIEW (HARV. L. REV.) 1276 (1984) (arguing that the stories of bureaucratic legitimation are based on failed attempts to combine-yet-separate objectivity and subjectivity, whereas, since each is a "dangerous supplement" of the other, no line between the two can ever be drawn).

[100] Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1675 (1975).

[101] Frug (note 99), at 1303-1305.

[102] ARMIN VON BOGDANDY, GUBERNATIVE RECHTSETZUNG (1999).

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Böckenförde,[103] for the most part, works under the formalist model – also known as the classic model[104] – at the same time there is a widespread understanding that the latter is falling apart.[105]

One could try to analyze the activity performed by the Commission under this model simply by conceiving it as an extension of national regulatory activity. On the other hand, given its broad mandate one cannot escape recognizing the Commission's virtually unfettered discretion and consequently the need to abandon a formalist model of administrative law. Yet that tells us less about the specificity of the Commission than of the inability of the formalist model to adequately capture administrative activity. In fact, even at the domestic level one can find broad delegation of rulemaking powers to administrative bodies, which equally raises the question of the extent to which the latter respond to constituents' desires.

2. The "Expertise" Model

Alternatively, one might try to analyze the Commission under an "expertise model" of administrative law, which essentially relies on the special knowledge of experts rather than lay politicians to legitimate administrative activity.[106] Under this model administrative law lays down strict rules of eligibility for the appointment of experts making sure that they are in fact high-qualified professionals and establishes accountability mechanisms aiming at ensuring unbiased professionalism such as statements on conflicts of interests and peer review. It also sets procedural requirements by imposing a duty on the administration not only to hear all interested parties but, more importantly, to effectively address all relevant issues by undertaking a study of possible

[103] Ernst-Wolfgang Böckenförde, *Demokratie als Verfassungsprinzip, in* I HANDBUCH DES STAATSRECHTS 887 (Josef Isensee & Paul Kirchhof eds., 1987) (the author made some minor changes to the original version of the article in: II HANDBUCH DES STAATSRECHTS 429 (Josef Isensee & Paul Kirchhof eds., 2004)).

[104] EBERHARD SCHMIDT-AßMANN, DAS ALLGEMEINE VERWALTUNGSRECHT ALS ORDNUNGSIDEE 89 (2006) and *Verwaltungslegitimation als Rechtsbegriff*, 116 ARCHIV DES ÖFFENTLICHEN RECHTS (AÖR) 329 (1991) and Hans-Heinrich Trute, *Die demokratische Legitimation der Verwaltung*, *in* I GRUNDLAGEN DES VERWALTUNGSRECHTS 307, 311-317 (Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann & Andreas Voßkuhle eds., 2006).

[105] Ulrich R. Haltern, Franz C. Mayer & Christoph R. Möllers, *Wesentlichkeitstheorie und Gerichtsbarkeit. Zur institutionellen Kritik des Gesetzesvorbehalts*, 30 DV 51 (1997). *See also* Wolfgang Hoffmann-Riem, *Gesetz und Gesetzesvorbehalt im Umbruch – Zur Qualitäts-Gewährleistung durch Normen*, 120 AöR 5 (2005); Karl-Heinz Ladeur & Tobias Gostomzyk, *Der Gesetzesvorbehalt im Gewährleistungsstaat*, 36 DV 141 (2003).

[106] JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938).

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alternatives before reaching its decision ("hard look" doctrine[107]). A duty to give reasons is also to be understood as an important legal tool developed by the expertise model.

There are no real proponents of the "expertise model" anymore at least in its original form, but it would be wrong to assume that it has been altogether abandoned.[108] Deliberative conceptions of democracy[109] – much in vogue concerning the debate on the legitimacy of the European Union[110] but also easily adjustable to the economic rationale of international trade law[111] – simply reproduce the technocratic narrative of the "expertise model."[112] They do so by arguing that individual preferences need to be liberated from institutional constraints within the market on the basis of which they were shaped through a truly autonomous process of preference formation.[113] That process relies heavily on technical expertise.

As I pointed out, when analyzing the standard-setting procedure, scientific assessments are a critical component when setting the appropriate level of risk for a food product. Furthermore, when discussing the accountability mechanisms of the Commission, one could find several rules and procedures representative of an expertise model of administrative law. However, no matter how important it is to ensure that food experts are not captured by the industry, the main problem with analyzing the Commission under the expertise model is, once again, the model

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[107] STEPHEN G. BREYER AND OTHERS, ADMINISTRATIVE LAW AND REGULATORY POLICY 347-357 and 383-384 (2006).

[108] STEPHEN G. BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993).

[109] What follows would not apply to strictly procedural versions of deliberative democracy. The problem with those versions is that democratic deliberation cannot be legitimate by itself, that is without reference to any procedure-independent standard. David Estlund, *Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority, in* DELIBERATIVE DEMOCRACY, 173, 181 (James Bohman & William Rehg eds., 1997).

[110] Christian Joerges & Jurgen Neyer, *Transforming Strategic Interaction into Deliberative Problem-Solving*, 4 JOURNAL OF EUROPEAN PUBLIC POLICY 609 (1997).

[111] Howse (note 41).

[112] Martin Shapiro, *"Deliberative," "Independent" Technocracy v. Democratic Politics: Will the Globe Echo the E.U.?*, 68 LAW & CONTEMP. PROBS. 341, 351 (2005).

[113] CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION. RECONCEIVING THE REGULATORY STATE 40-41 (1990).

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itself. Even if unbiased professionals, experts, just like any other individual, cannot avoid bringing value-laden choices into their judgments.[114]

3. The "Interest-representation" Model

Pluralist theorists[115] sought to bring back to the administrative process a democratic legitimating ground. The "interest-representation" model of administrative law consists in neutralizing agency bias towards regulated industries by making it bestow adequate consideration to all relevant interests differently affected by possible policy alternatives.[116] Instead of shielding administrative activity against organized interests as the expertise model did, administrative law now supports interest-group participation in administrative decision-making. In fact it desperately needs it as the legitimating source of its activity now understood as a surrogate political process through legal procedures rather than through electoral mechanisms.

The standard-setting activity carried out by the Commission could be presented in light of this model. Member countries – in coalition with national industries – pressure for a food standard that resembles national regulatory practices. Administrative law is not about pursuing the common good and invalidating standards based on national or industrial biases but about making sure that there is a balanced representation of interests in the standard-setting procedure and keeping a record of all activity so that at the end of the day everyone knows which interests are reflected in the food standard. Yet the "vital cockpit" in administering this conception of administrative law is the judiciary, which is precisely lacking to a satisfactory degree at the international level.[117] Once again, I argue that that tells us less about the specificity of international administration than about some imperfections within the "interest-representation" model.[118]

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[114] MASHAW (note 97), at 18; Andreas Voßkuhle, *Sachverständige Beratung des Staates*, *in* III HANDBUCH DES STAATSRECHTS 425, 437-438 (Josef Isensee & Paul Kirchhof eds., 2005).

[115] DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS (1951).

[116] Stewart (note 100), at 1760-1813.

[117] Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 L. & CONTEMP. PROBS. 63, 75 (2005).

[118] MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? – JUDICIAL CONTROL OF ADMINISTRATION 74-75 (1988); Stewart (note 100), at 1770-1781.

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II. Why Would International Administrative Activity Be Any Less Legitimate?

It follows from our discussion of different models of administrative law that when extending each conception of administrative law to international administrative activity one is struck by the fact that there always seems to be something lacking. Something that, at the domestic level, one holds dear, be it electoral mechanisms under the formalist model, mechanisms that guarantee impartial and objective scientific findings under the expertise model or judicial review under the "interest-representation" model. However it also follows that the actual role those elements play in domestic administrative law needs qualifications.

One easy reaction to the deconstruction of each model of administrative law would be to argue that by doing so one misses the aggregate value of the different mechanisms, which, if combined, might legitimate administrative activity. A different strategy that goes in the same direction comes from the scholarship on Global Administrative Law and consists in regarding the fact that, at the global level, no single constituency can claim for itself absolute legitimacy for controlling regulation as something positive and normatively defensible.[119] The institutional disorder of global regulation, the argument goes, by leaving open the question of ultimate authority and balancing accountability to the different constituencies gives rise to the mutual accommodation of the concerns of each while allowing for smooth functioning of the global system. The problem is that behind fragmentation lies a calculated effort on the part of powerful states to protect their dominance and discretion.[120] There is nothing legitimate about that.

Which institution should one trust regulatory activity depends on the relative strengths and weaknesses of all potential institutional alternatives.[121] Hence any assessment of the legitimacy of the Commission is necessarily incomplete unless it

[119] Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EJIL 247, 262-274 (2006).

[120] Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STANFORD LAW REVIEW 595 (2007) (arguing that fragmentation makes it difficult for weaker states to create coalitions through cross-issue logrolling and increases the transaction costs that international bureaucrats and judges face in trying to rationalize the international system or to engage in bottom-up constitution building).

[121] What follows draws heavily on the scholarship of Miguel Poiares Maduro on European constitutionalism. *See* MIGUEL POIARES MADURO, WE THE COURT – THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION 103-149 (1998); Miguel Poiares Maduro, *Europe and the constitution – What if this is as Good as it Gets?*, *in* EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 74 (Joseph H. H. Weiler & Marlene Wind eds., 2003). *See also* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES. CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY (1994) (developing the framework for comparative institutional analysis).

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takes into account the comparative performance of national regulatory authorities. Accomplishing this requires further research. In the remaining part of the article I put down some thoughts that I hope might serve as inspiration to students of the Commission. The point is that if one considers that the national regulatory process is severely imperfect and likely subject to capture by the national food industry, the case for a stronger democratic legitimacy chain looses some of its appeal. In fact, the stakes of national food industry are high enough for it to do all it can to pressure national regulators to set food standards at any given level that most benefits its interests. One can expect the adoption of national regulatory measures that harm consumers both by limiting the variety in food products and by increasing prices. Domestic courts may, on occasion, depending on the pedigree of the national administrative system, invalidate some measures but they are more likely to defer to administrative discretion backed-up by scientific findings. Those negative effects on consumers can only be prevented by the WTO regime, which closely examines national regulatory measures containing higher levels of health protection than the ones set in Codex standards. Yet, as previously noted, the adjudicative process of the WTO also suffers from biases which render it unlikely for a fair balance between free trade and consumers' health to take place. While insufficiently responsive to consumers' concerns, the standard-setting activity of the Commission removes most costs of national regulation. It also channels consumers' preferences in a much more effective way than what one otherwise achieves through the adjudicative process before the WTO. At the same time, it maximizes resources by pooling the expertise and regulatory instruments of all member states. Furthermore, being an organized institutional setting pursuing long-term goals, the Commission reduces the transaction costs of cooperation between states thereby avoiding the costs of litigation before the WTO. The Commission may be highly imperfect and yet still superior to any other alternative in the regulation of food safety. As Komesar puts it "[i]nstitutional superiority is not always obvious, and superiority is often a choice of bad over worse."[122]

[122] KOMESAR (note 121), at 255.

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