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The removal of Technical Barriers to Trade in the WTO Era.

A cause of Gains and Losses of Power Among National Actors.

"A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements of the degree of LLM."

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Abstract

The implementation of the 1994 GATT accords on technical barriers to trade led to an unprecedented level of trade liberalisation. Most countries have increased their economic interdependence. The role delegated to multinational enterprises has been considerably extended. It is suggested that they could become subjects of international law. Their participation in standardisation, eco-labelling and consultation programs increased. They also adopted private codes of conduct and have modernised the way they dialogue with regulatory authorities. One of the impacts of the Uruguay Round Agreements is a subtle reorganisation of forces within national economies. Tremendous responsibilities are progressively undertaken by private entities in domains where the state used to regulate unilaterally. The shift of power from public entities to private ones is discreet but have effects on all traditional sources of law. New forms of regulation on multinational enterprises need to be created. One of the main sources of innovation is a negotiated self-regulation

L'application des accords du GATT 1994 relatifs aux obstacles techniques au commerce a mené à un approfondissement de la libéralisation du commerce international. La mise en œuvre des obligations souscrites par les états membres en matière de reconnaissance mutuelle et de transparence a renforcé leur interdépendance économique. Le rôle dévolu aux entreprises multinationales s'est considérablement élargi. L'idée selon laquelle elles pourraient, comme les états nations, devenir des sujets du droit international public est fréquemment évoquée. La participation des entreprises aux activités de normalisation, et aux programmes d'éco-labellisation et de concertation est cruciale. L'adoption de codes de conduite privés est relativement courante, elle accompagne une modernisation du dialogue entre entreprises et autorités régulatrices. Un des impacts majeurs des accords de 1994 est une réorganisation subtile des forces internes. D'importantes responsabilités sont progressivement assumées par des entités privées dans des domaines traditionnellement réservés à l'état. Ce transfert discret touche toutes les sources traditionnelles de droit. Il est temps de créer de nouvelles formes de

● réglementation des entreprises multinationales pour compléter les dispositifs existants. Dans cette optique, une source majeure d'innovation devrait être l'auto-réglementation négociée.

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Acronyms

AFNOR	Association Française de Normalisation
ANSI	American National Standards Institute
BIT	Bilateral Investment Treaty
CAP	Conformity Assessment Procedure
CSA	Canadian Standards Association
DC	Developing Country
DSB	Dispute Settlement Body
EC	European Community
ECJ	European Court of Justice
ECN	European
ECP	Environmental Choice Program
EPA	Environmental Protection Agency
ETSI	European Telecommunication Standard Institution
EU	European Union
FAO	Food and Agriculture Organisation
FDA	Food and Drug Administration
FDI	(Foreign Direct Investment
GATT	General Agreement on Tariffs and Trade
GMO	Genetically Modified Organism
ICC	International Chamber of Commerce
IEC	International Electric Commission
ILO	International Labour Organisation
ISO	International Standardisation Organisation
ITU	International Telecommunication Union
LCA	Life Cycle Analysis
LDC	Least Developed Country
MNE	Multinational Enterprise
PPM	Process and Production Methods
SPM	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TNC	Transnational Corporations
TR	Treaty of Rome
TSAC	Telecommunication Standards Advisory Council
UNCTAD	United Nations Commission on Trade and Development
UR	Uruguay Round
WHO	World Health Organisation
WTO	World Trade Organisation

INTRODUCTION

The successful implementation of the General Agreement on Tariffs and Trade¹ culminated in the creation of an international trade institution in 1994: the World Trade Organisation (WTO).² The specific role of the WTO is to promote trade liberalisation. The WTO is successful because it is focused on reaching specific objectives. Nonetheless, one of the ideas that inspired the GATT and now the WTO, is the preservation of the peace of nations. It was believed that economic partners could rarely afford to become political enemies. Furthermore, it should be kept in mind that economic policies cannot be isolated from such issues as development, employment, environmental protection, civil society expectations and world politics. Trade liberalisation has profound impacts on national institutions and internal economic forces.

The recent failure to launch a new round of trade negotiations unveiled important phenomena.³ First, despite the provisions in favour of developing countries in GATT 1994, the latter appeared to be in a weaker position than expected. Their ability to challenge the industrialised countries' leadership seemed very much compromised. Second, the so-called "civil society" appeared to be rooted in a powerful international network that was not well measured until the Seattle conference. It is not certain that this civil society can effectively challenge economic players that have gained an extremely strong leverage in the last decades. Third, all considered the full implementation of the GATT 1994 is not yet realised and its effects barely measured. Apparently there are no solid grounds yet for a new successful round to be launched.

¹ *Final Act, Multilateral Agreement Establishing the WTO, Annex 1A General Agreement on Tariffs and Trade* 15 April 1994 online: WTO <<http://www.wto.org/wto/legal/finalact.htm>> [hereinafter GATT 1994].

² *Final Act, Multilateral Agreement Establishing the WTO*, 15 April 1994 online: WTO <http://www.wto.org/wto/legal/finalact.htm> (date accessed 15 October 1999) [hereinafter WTO].

³ Seattle Conference in Preparation of the Millennium Round, 30 November 1999 - 3 December 1999.

The very first stages of trade liberalisation consisted in decreasing tariffs to allow freer movements of goods among countries. The scope of liberalisation was then extended to other domains. It rapidly appeared that trade barriers resulted not only from tariffs but also from technical regulations, generally used as a substitute to the former tariff protection... for their part, customers increasingly appreciated foreign products and became better acquainted to liberalisation. Nowadays, national consumer preferences themselves are almost defined as trade barriers.

The more negotiation rounds, the more technical regulations appeared as an unjustified obstacle to trade and were increasingly subject to calls for negotiations.⁴ A first Standards Code was adopted at the issue of the Tokyo Round in 1979. Trade liberalisation had already very much progressed. A much more precise and demanding Standards Code, the Agreement on Technical Barriers to Trade⁵, was adopted in 1994, together with a complementary Agreement on the Application of Sanitary and Phytosanitary Measures⁶ on trade liberalisation for plant and food products. The liberalisation of trade in goods has now reached an extremely high degree. Technical barriers are at the core of liberalisation and are the object of many trade disputes, including the beef hormones case⁷ that opposed Europe to North America.

⁴ In preparation of the 1962 Kennedy Round, the 1962 US Trade Act mentioned for the first time technical barriers as one of the negotiation subjects, John H. Jackson, *The World Trading System*, 2nd ed. (Cambridge, Ma.: MIT Press, 1997) at 91 [hereinafter *The World Trading System*].

⁵ *Final Act, Multilateral Agreement Establishing the WTO, Annex 1A, Agreement on Technical Barriers to Trade*, 15 April 1994 online: WTO <<http://www.wto.org/wto/legal/finalact.htm>> [hereinafter TBT Agreement].

⁶ *Final Act, Multilateral Agreement Establishing the WTO, Annex 1A, Agreement on Sanitary and Phytosanitary Measures*, 15 April 1994 online: WTO <<http://www.wto.org/wto/legal/finalact.htm>> [hereinafter SPM Agreement].

⁷ EC Measures Concerning Meat and Meat Products (Hormones), Report of the Panels Canada (WT/DS47), and United States (WT/DS26) [hereinafter *Beef hormone case*, panels' reports]. EC Measures Concerning Meat and Meat Products (Hormones), Report of the Appellate Body (1998) WTO Doc. WT/DS26/AB/R [hereinafter *Beef hormone case*, AB Report]. Arbitration Award, 29 May 1998 (WT/DS26/15 and WT/DS48/13) [hereinafter *Beef hormone case* Arbitration Award 1998] online: <<http://www.wto.org/wto/dispute.bulletin.htm#/toc463170744>> (date accessed 17 October 1999). In the

Governments face the challenges of economic interdependence. They have to handle a sum of influences on their home policies, which range from regional neighbours and overseas trading partners to all private actors.

Despite the 10-year trend toward globalization, of business that began during the mid-80s and continues into the mid-90s, global corporations operate in a world economy that remains imperfectly integrated and a political system wherein nation-states, pursuing interests that are necessarily national, set regulatory and other policies.⁸

Prof. Graham raises the complex issue of the interaction of global corporations and national economies. The matter is no manner simple. For instance, economic transactions now easily cross borders. Business decisions on investment are taken with regard to the economic atmosphere, institutions or culture of a targeted country at a point in time. Multinational corporations can escape national regulations and gain considerable leverage from this flexibility. In parallel, national governments see their own regulating power erode.⁹ In some cases, private actors act as forces that can lead countries to compete for FDI projects. Governments consequently seek to create regulatory schemes to address this competition and collaborate at the international level.

The collaboration of national states at the international level always leaves room for governments to invoke exceptions that will allow them to legally depart from their commitments. The 1994 Technical to Trade Barriers Agreements set certain exceptions. Together with environmental preferences, national standards are economic policy tools but also mirror cultural habits, consumer preferences and local industries' interests. They

Appellate Body report, judges, contrary to the panellists, do not find that the EU set some disguised restriction on international trade by differentiating among certain food products.

⁸ Edward M. Graham, *Global Corporations and National Governments* (Washington, DC.: Institute for International Economics, 1996) at 3 [hereinafter Graham].

⁹ *The World Trading System* supra note 4 at 8.

are sensitive issues because they are at the crossroads of domestic specificity and international trade imperatives. They are said to be a prerequisite for further liberalisation, but the interference of interest groups in their formulation raises serious questions.

Noneconomic social policy choices might (...) lead a nation to try to preserve or encourage certain types of economic activity for its citizens. For example, perhaps a national preference for "white-collar" work (...) can be observed. A worrisome possibility that often crops up in the context of these types of consideration, is the danger that special interest groups in a particular society can manipulate the governmental processes to favor their own economic well-being, using the excuse of broader national policy goals to buttress their petitions.¹⁰

There are a number of reasons why governments do want or agree to implement international treaties, like the imperatives of reciprocity. But governments may also legitimately opt for plain violations of the obligations they have accepted.

It cannot be ignored that non-governmental interference, i.e. national or regional institutions, have an impact on shaping the international trading system. As Professor Jackson notes, the provisions of the United States' Constitution directly influenced the negotiation of the GATT since 1947. The a basic understanding of the institutional framework and of the spirit of the Constitution of the United States shows that interest groups are carefully listened to. The leverage of economic forces in the USA is totally institutionalised. The US industry has hence participated in shaping the WTO era. Comparable practices exist in other countries, but to a lesser extent.

Non-tariff barriers are myriad, and the ingenuity of man to invent new ones assures us that the problem of trade barriers will never go away. This is why one of the most important problems facing

¹⁰*The World Trading System* supra note 4 at 32.

the world today is institutional – the question of whether national and international governmental institutions (such as the WTO/GATT) have the capacity to meet the challenge of private and governmental behavior that could undermine the world trading system and the prosperity that it bring.¹¹

Institutional questions are extremely accurate in FDI contexts. Given the gap that persists between industrialised and developing countries, the interference of economic powers with internal institutions can have striking impacts. In a liberal approach, both host states and investors should be considered as having legitimate goals and priorities. The approach of the non-aligned countries in the 70s was that the investor could not have legitimate objectives in an investment process. Certain accidents demonstrated that the investor's priorities were not necessarily those of the host countries'. Natural resources exploitation activities gave lieu to much damage not only to the environment but also to local communities.

It is tempting to consider multinational corporations, or groups, as the fifth power, beside the executive, the legislative, the judiciary and, maybe, the press. Such an affirmation should be taken with much precaution. But it is corroborated by the fact that corporations are increasingly becoming new "sources" of rules. This idea is extensively developed in this work. At some point indeed, identifying and isolating economic from political powers can become delicate. The best definition available of multinational corporations is found in the OECD Guidelines for MNEs. :

"usually companies or other entities whose ownership is private, state or mixed, established in different countries and so linked that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge and resources with the others. The degree of autonomy

¹¹ *The World Trading System* supra note 4 at 49.

of each entity ... varies widely from one multinational enterprise to the other."¹²

It is not an easy task to distinguish and isolate one single aspect of corporations' activities to study the role of business enterprises in a legal perspective. Corporations operate in complex contexts. Executives met in the course of preparation of this work all abounded in this sense. They face challenges that are real but that appear contradictory when viewed from only one standpoint. Contradictions fade once the complementary aspects of issues are taken into account, in particular all the commercial, social and human dimensions of an activity.

The following example is one of the best examples I know of the limits set to the interaction of corporation with their economic and legal environment. Henry Ford, owner of the Ford Motor Company decided one year that no more special dividends would be distributed and that profits "would be put back into the business for the purpose of extending its operations and increasing the number of its employees." The Dodge brothers, two minority shareholders, brought suit to compel the declaration dividends. The ambition of Mr. Ford was to "to employ still more men to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes." We have no doubt that Mr. Ford was inspired by certain philanthropic

¹² OECD, *International Investment and Multinational Enterprises* (1976, revised 1986, 1991 and currently) at 16 online: OECD <<http://www.oecd.org//daf/investment/guidelines/mnetext.htm>> [hereinafter OECD Guidelines]. The UN Commission for Transnational Corporations (CTC), a subsidiary body of the UN Economic and Social Council, drafted the *UN Code of Conduct on Transnational Corporations* which also provided a definition of transnational corporations: ECOSOC, Adoption of the Agenda and Other Organisational Matters: Code of Conduct on Transnational Corporations, U.N. Doc. E/1988/39 Add.1. The CTC and the OECD definitions vary on certain terms but are frequently used for legal definitions. Despite of its interest, the UN CTC Code will not be dealt with extensively in this work. Given the opposition of stakeholders, the project was abandoned in 1992.

sentiments. But the Dodge Brothers contested them. Here is what Mr. Ford's counsel pleaded and what the Court held.¹³

It is said by the counsel that - "Although a manufacturing corporation cannot engage in humanitarian works as its principal business, the fact that it is organized for profit does not prevent the existence of implied powers to carry on with humanitarian motives such charitable works as are incidental to the main business of the corporation."

*"There should be no confusion (of which there is evidence) of the duties which Mr. Ford conceives that he and the stockholders owe to the general public and the duties which in law he and his codirectors owe to protesting, minority shareholders. A business corporation is organized and carried out primarily for the profit of the stockholders. The powers of the directors are to be employed to that end. The discretion of directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself."*¹⁴

Corporations have specific and restrictive objects. The repartition of roles in national economies is strict, and that of corporation is to raise profits. This rule is a protective rule for other economic actors and individuals. It dates back to the XIXth century and remains justified. Stockholders and directors cannot be allowed to carry out all type of activities behind the corporate veil without corresponding liabilities. The Ford illustration is interesting because it shows what interactions can exist between legal frameworks and corporate creativity. Ford's argumentation was extremely ingenuous, and would certainly

¹³ *Dodge v. Ford motor Co.* 204 Mich. 459 (Michigan Sup. Ct. 1919) in V. Brudney, W.W. Chirelstein, *Brudney and Chirelstein's Cases and Materials on Corporate Finance*, 4th Ed. (Westbury, NY: Foundation Press, 1997) at 572.

¹⁴ *Ibid.* at 574.

have given lieu to further profits in the mid-term. But the limits of the firm's initiative as regards to its legal object were firmly applied. For this reason, the current trend of corporate self-regulation must be based on the aim of raising profits. It is the best way to render profit and innovation compatible.

1. SETTING THE STAGE: IMPLICIT DELEGATIONS OF POWER IN THE URUGUAY ROUND TBT AGREEMENTS

Comparing the terms and roles of the Agreement on Technical Barriers to Trade (TBT) on the one hand and of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPM) on the other hand provides insights on different regulatory issues addressed by the GATT 1994 Agreement. It should be kept in mind that these two agreements are complementary, with the TBT Agreement setting general obligations applicable to measures that do not specifically enter into the domain of the SPM Agreement.

The impact of these two agreements renders extremely visible the effects of trade liberalisation on national and regional economies and institutions. The TBT Agreement further opens trade barriers in domains where private actors play the main role, with the explicit or implicit consent from Member governments. The SPM Agreement deals with the sensitive domain of public health and safety, where mandatory regulations and controls over private actors are a prerequisite to consumers' trust.

The adoption of distinct agreements for these two subject matters reflected several ideas. First, the removal of trade barriers in the agriculture field required that the obligations contracted be carefully detailed. Second, in most countries, governmental departments in charge of food/plant regulations and products standards are distinct administrations.

1.1 From Tariffs to the Removal of Technical Barriers

1.1.1 Traditional GATT requirements

The Agreement on Technical Barriers to Trade deals with four important issues. The main part of the Agreement concerns the discipline imposed on WTO Members in the

process of formulating technical regulations¹⁵ and standards.¹⁶ The second part deals with the administration and carrying out of conformity assessment procedures. Two other issues pertain to mutual information assistance and dispute settlement procedures.

The TBT Agreement is mandatory for all WTO Members. It consequently has to set principles that can be carried out effectively in different types of economies and governmental organisations. While some countries have largely delegated the task of designing standards to private or semi-private entities¹⁷ other still retain a centralised administration to this effect. The TBT and SPM Agreements seek to have comparable impacts on both types of administrative organisations. Political regimes that are or used to be based upon powerful, centralised administrations modify their structure under GATT's impact. It is necessary for the WTO to be perennial in as many countries as possible, a vital need implicitly expressed in every single word of the agreements.

The technique used by the GATT to promote trade liberalisation is a technique of policed decentralisation: a high degree of liberty is granted the WTO Members to define and pursue their own policies, with some legal principles set to organise their interdependence. The GATT legal constraints are the usual non-discrimination, sham, transparency or generality requirements. Respect for national specificity and harmonisation of policies world wide are two confronting goals of the accords.

¹⁵ In the TBT Agreement, a technical regulation is defined as a « Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method ». TBT Agreement supra note 5 Annex 1.

¹⁶ In the TBT Agreement, a standard is defined as a « Document approved by a recognised body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. » TBT Agreement supra note 4 Annex 1.

¹⁷ In fact mainly the industrialised countries and the developing countries that follow the liberal economic model: USA, EU Members, Canada, Brazil.

1.1.1.1 Non-discrimination principles

(a) TBT Agreement's requirements

The Tokyo Code and now the 1994 TBT Agreement extend the reach of Article III of the GATT¹⁸ by detailing the modalities of its application. The TBT Agreement's non-discrimination principle refers to the familiar national treatment, most favoured nation and sham principles.¹⁹ Members are encouraged to adopt the "least trade restrictive means" available to attain their own policy objectives.

As regards to technical barriers to trade, violations of non-discrimination principles can be quite visible. Complaining parties that wish to assess that discriminations result from non-tariffs barriers need to access the technical information used the regulating authority to justify its decisions. A lack of objective justification for the regulations attacked can be put in light, frequently with the assistance of experts in the field. Technical regulations that have the effect of trade barriers might signal a voluntary violation of the non-discrimination principle.²⁰

The second part of the TBT Agreement²¹ addresses the issue of conformity assessment procedures (CAPs) as potential barriers to trade. This Agreement reaffirms the non-discrimination principle but also focused on the details of CAPs within Member countries. For instance it sets that positive assurance of conformity required by national laws should be conducted at the site of facilities²², to avoid that transportation costs be erected as trade barriers. From the length of CAPs, to the techniques of selection of

¹⁸ GATT 1994 supra note 1 art. III. Principle of national treatment in internal taxation and regulations.

¹⁹ TBT Agreement supra note 4 art. 2.

²⁰ Exporters carry out market inquiries prior to deciding to export their products. They gather a considerable amount of information pertinent to product regulations in the state of exportation. At this stage, discriminations can be detected when objective justifications for additional costs on exporters lack or are difficult to access.

²¹ TBT Agreement supra note 4 art. 5 to 9.

²² TBT Agreement supra note 4 art. 5.1.1.

samples or the confidentiality of information, all stages are dealt with and potential disguised barriers identified.

(b) Assessing violations

Technical barriers to trade can be extremely efficient in protecting national producers. The TBT Agreement refers to the sham principle but when violations are identified, interested parties may not be able to effectively denounce them. For instance, a panel arbiter scrutinising the regulations of state S and identifying a disguised barrier to trade could hardly denounce the attitude of the national government of S without disregarding basic diplomatic rules.²³ He might rather mention the violation of other requirements of the Agreement, and reach a similar conclusion by denoting that the regulations scrutinised are more trade restrictive than necessary to achieve the policy objectives pursued.

In the beef hormone battle that recently opposed the United States and Canada to the European Union²⁴, arbiters would have been indelicate if they had stated that the EU was merely protecting its beef producers. It is not within the functions of an arbiter to issue such critics, not to say blames, to national governments. Only politicians in their own forums can denounce such policies, and still with the idea of preserving trading relations with their partners. On the other hand, for the European consumer (not necessarily for the beef producer) the question at stake was not the protection of regional breeders but the protection of their own health.

1.1.1.2 Harmonisation and mutual recognition

(a) Standards

The TBT Agreement encourages the recognition of international standards by national governments. Governments “shall use” existing or upcoming international standards

²³ *Beef hormone case* supra note 7.

²⁴ *Beef hormone case*, AB Report supra note 7. The controversy between the two groups of countries continues.

*as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographic factors or fundamental technological problems.*²⁵

The exceptions referred to in par. 2.4 leave an important margin to countries as regards to international standards adoption. Further interpretations of these terms will have to be provided through the decisions of WTO Panels or national trade courts.

A number of key international organisations play a fundamental role in the application of this article of the TBT Agreement. For instance, the ITU is a needed, almost unchallenged organisation, and one of the 5 examples of harmonisation efforts carried out by the WTO Members.²⁶ ISO also plays a crucial role at the international level.

The need for product compatibility on global markets increases with the ability of foreign producers to access these markets. For national producers, it is frequently a prerequisite to access foreign markets. For multinational enterprises, increased economies of scale can foster benefits. Product compatibility is also taken into account by governments to design economic policies with worldwide impacts. All considered, private actors themselves will ensure that adequate international standards apply to their products, either through firm-to-firm co-operation, or through private standard setting entities that gather a lot of players.

At the present time, despite the fact that the number of international standards is growing, national and regional standards are still needed. Though, when a regional or

²⁵ TBT Agreement supra note 4 art. 2.4.

²⁶ All regional telecommunication organisations are involved in the ITU operations. The Asia-Pacific Telecommunity organisation has recently created a program for the development of standardisation activities within the region the Asia-Pacific Telecommunity Standardisation Program), and participates in the work of the ITU. On ITU see Section 2.2.1.1(a). It is interesting to note that ITU now faces competition, see interview with Pekka Tarjanne, ITU Secretary General in 1998, ITU News 8/98.

national organisation is about to adopt a standard where no international standards exist, par. 2.9 of the TBT Agreement imposes some publication and notification procedures and the consultation of interested countries. Such requirements foster transparency in regulation processes, but do not totally prevent the development of distinct standards for peculiar regions.²⁷ When standards are needed, they are rarely formulated at the international level first.

Another crucial element of the TBT Agreement pertains to the preference for performance standards, as opposed to design standards.²⁸ Design standards may indeed cause important restrictions to trade, but the question is more complex. Indeed, because they are attached to certain cultural specificity, consumers worldwide may not yet accept a comprehensive standardisation of consumption products. The pre-eminence of five global computer producers on a key global market suggests that this preference vary with the type of products considered: there is no cultural preference for computers. For their part, producers themselves may not benefit from producing standardised goods because their own clientele can be attached to specific characteristics.²⁹ A respect for the specificity of the client's preferences may be more profitable than an aggressive attempt to transform its tastes. For instance, Nordic countries successfully preserve their preference for quiet computers (almost a record in today's market). Hewlett Packard produces low decibel computers designed specifically for the Swedish-Finnish-Norwegian market. Working areas being extremely quiet there, powerful personal computers are a noise nuisance that would not be noticed in the United States.³⁰

(b) CAPs

²⁷ Moreover such steps can be omitted under certain emergency/health circumstances. TBT Agreement supra note 4 art. 2.10.

²⁸ Member "where appropriate" "shall" prefer performance standards to design standards (TBT Agreement supra note 5 art. 2.8).

²⁹ See for instance the specific clienteles of PC's and McIntosh computers.

³⁰ Interview with Theo Dirksen, Consumer Assistance Manager, Hewlett Packard Eybens, France (7 August 1999) [hereinafter Interview HP].

In addition to being important to the implementation of the principle of non-discrimination, the mutual recognition of CAPs promotes harmonisation. This is a continuation of the will to harmonise standard formulation processes. Once standards and regulation harmonised, the conformity of products to these or equivalent standards should be assessed at any location. The telecommunication working group of the Asia-Pacific Economic Cooperation (APEC) has been one of the first to reach an agreement on the mutual recognition of telecommunications terminal equipment among its members. In this area, exporting countries can assess the conformity of exported equipment to the requirements of importing countries.³¹³²

The guides or recommendations issued by international standardisation organisations referred in the TBT Agreement³³ are widely used by both developing and developed countries, in particular the ISO/IEC Guides.³⁴ The interpretation of these Guides by conformity assessment bodies world wide still differs. The harmonisation of the interpretation of these guides appears as a new challenge. Such a degree of harmonisation would be a great progress in the removal barriers to trade: a progress just about to be achieved. Experts of standards and CAPs though admit that the operation and pace of creation of conformity assessment bodies do not meet the markets' needs. With further co-operation of these bodies, CAPs crucial to the entry of products in foreign markets should become more visible. Experts also call for impartial, harmonised and transparent procedures and point out that they will benefit the market.³⁵

³¹ "Weathering the Change", ITU News 8/98 at 44.

³² See also as regards to mutual recognition of CAPs in the EU Florence Nicolas, Jacques Repussard *Des normes communes pour les entreprises* (Luxembourg: Office des publications officielles des CE 1994) [hereinafter Nicolas] at pp152 & seq.

³³ TBT Agreement supra note 4 art. 5.4, 6.1.1

³⁴ Summary Report of the Symposium on Conformity Assessment Procedures, Geneva, 8-9 June, 99 online: <<http://www.wto.org/wto/new/chair.htm>> and <<http://www.wto.org/wto/new/prog.htm>>, (last updated 11 June 1999) [hereinafter CAPs Symposium].

³⁵ *Ibid.*

1.1.2 Transparency requirements

1.1.2.1 Terms of the requirements

(a) Sharing information

Article 2.5 of the TBT Agreement requires Members to justify the technical regulations they adopted upon request of a Member affected by these regulations. The justification requested pertains to the respect of the obligations defined in par.2.2 to 2.4, namely the standards should comply with the “less trade restrictive measure” and with the “no more trade restrictive than necessary to fulfil legitimate objectives” criteria.

Paragraph 2.9 sets further requirements on the transparency of standards design and application procedures. These requirements only apply to standards that depart from international existing standards, if they can have a significant effect on trade for other Members. The terms of par. 2.9 suggest that transparency requirements mainly consists in (i) providing trading partners with an opportunity to comply to the standards notably through the release of adequate notice to the interested parties at an early appropriate stage and (ii) allowing other Members to issue comments.

(b) Implementing requirements

The authority and implementation of notice and comments requirements imposed on standard setting bodies might cause difficulties. Nonetheless, standard-setting entities can benefit from carrying out these requirements. For instance, when the government of Germany decided to formulate the Blue Angel eco-labelling program, it consulted several interested parties. To define criteria for the labelling of plastic computer components, it gathered some representatives of the industry, as well as distributors, consumer and environmental associations. This was a costly process from a financial as well as from a political viewpoint. It is almost certain that the Ministry, which is liable before Parliament, did not dedicate time and budget credits to formulate standard criteria susceptible of being successfully challenged by trade partners on the ground of the TBT Agreement. In this context, the standardisation entity – here the German government - benefits from transparency. At this occasion, the producers present promoted their own

existing components so that their company avoids the costs of redesigning these components.³⁶

1.1.2.2 *Impact*

(a) On existing structures

Transparency requirements are a significant part of the TBT Agreement because they create a basis for controlling standardisation processes. Indeed, *in the public eyes*, technical bodies in charge of standardising products are obscure even if they are public in nature. Private parties acting as standard setters are not popular. Companies are viewed as actors that can seek benefits at the detriment of the public and consumers. The Japanese techniques carried out in international trade was a case in point of “behind the closed door” administration. In Japan until the adoption of the 1994 Administrative Procedure Act, non-tariff barriers to trade were imposed informally.³⁷ A practice called *gyosei shido* consisted in defining unwritten requirements binding on producers. This practice allowed The Ministry of International Trade and Industry to dissimulate a considerable amount of information hardly accessible to foreign parties. “In these bureaucracies and elsewhere in the Japanese administrative state, formal procedures of adjudication, notice and comment, private rights to government information, and limitations on *ex parte* communications were non existent.”³⁸

³⁶ Several computer manufacturing companies participated in the definition of the Blue Angel criteria on the invitation of the German government. The committee served as tacit negotiation platform for the companies: only some of them being required at the issue of the process to redesign their products. It was up to each company to prove that its products, already designed and produced, should serve as the criteria for the award of the standards in question. Interview HP *supra* note 30.

³⁷ M.D. Rosenbaum, “Domestic Bureaucracies and the International Trade Regime: the Law and Economics of Administrative Law and Administratively-imposed Trade Barriers”, Harvard Olin Research Center, 1999 Discussion paper. Online: <http://www.law.harvard.edu/programs/olin_center> (date accessed 27 August 1999) [hereinafter Rosenbaum].

³⁸ Rosenbaum *supra* note 37 at 17.

On their part, most standard setting entities, mainly - and necessarily - animated by private entities, lack public legitimacy. This public legitimacy is nonetheless a condition to the expansion of their activities, influence and power. Recent events that affected the European food production, such as the mad cow disease, the dioxyned chickens or the Coca Cola scandal, stressed the need for further transparency and legitimacy in the formulation of food regulation, standards and the assessment of conformity.

By institutionalising internationally agreed upon transparency requirements, WTO Members encourage national governments to increase the legitimacy of the standard setting entities they delegate tasks to, and to improve the transparency of their administrations. In particular, CAPs may be conducted by third party's. But a reliable accreditation of their technical competence by the government cannot be avoided.³⁹ Hidden memoranda or directives conceived in the dark corridors of vast, bureaucratic administrations are directly targeted by the terms of par. 2.9. Open doors could accelerate delegations of tasks to non-governmental entities. The progressive aspect of the GATT philosophy is surfacing between the lines. Countries like Japan (and possibly soon China) and to a certain extent the European Union, with huge bureaucracies are still indexed.

In developing countries, the creation of transparent standard setting entities responds to different constraints. These countries adopt standards in force in industrialised countries the foreign investors introduced in their economy. DCs are also assisted by international organisations, e.g. ISO, to set up their own standardisation and CAPs bodies. In theory, DCs avoid to deal with the old, heavy administrations within their borders as industrialised countries do. On the contrary, they should have the opportunity to build up systems specifically adapted to their needs. In the current state of affairs, the more industrialised the country, the most protected the competitive advantages and the most discreet (and possibly discrete) the design of technical regulations.

(b) For foreign parties

³⁹ Third party's evaluation may be conducted by private entities. The issue is further addressed in paragraph 2.1 below. CAPs Symposium *supra* note 34.

Beside institutional objectives, transparency requirements pursue other goals. They reduce the costs to foreign producers to obtain information on local labelling and quality requirements, thus facilitating access to foreign markets. Moreover, a good understanding of the national technical requirements can generate a good understanding of specificity of the market targeted (e.g. consumers' preferences). Costs incurred by national bodies to improve transparency directly benefit foreign exporters.

The notice period allows foreign parties to adapt their products to the market targeted before new technical requirements enter into force. The risk that a temporary monopoly position is created in favour of the leading company in a given field is reduced. Low-cost suppliers are also given a chance to adapt their standards on time. These delays impose a fair and synchronised adaptation "break" at a global level. This is a pause that allows the respect of the national treatment and of the most favoured nation principles in a row. How well can such delays requirements be implemented? The question is posed at several levels: international and national bodies, governmental agencies. Moreover, notice and comment procedure can unveil disrespects of other requirements, such as the adoption of standards that are not justified by acceptable regulatory objectives or differ without justification from standards adopted in other countries or international standards as mentioned earlier.⁴⁰

1.2 Impact of the Sanitary and Phytosanitary Measures Agreement

Substantive provisions in the SPM Agreement are close to those of the TBT Agreement. A number of points nonetheless differ. This confirms that these Agreements are meant to be detailed, adapted to their purpose, i.e. maximum progress of world trade liberalisation.

The national treatment and the most favoured nation principles are more stringent in the SPM Agreement than they are in the TBT Agreement. Indeed, the former prohibits

⁴⁰ Alan O. Sykes, *Product Standards for Internationally integrated Goods Markets* (Washington D.C.: Brookings Institution, 1995) at 115 & seq. [hereinafter Sykes].

discrimination for products coming from countries where “identical or similar conditions”⁴¹ exist. The key point of the Agreement is the requirement according to which measures should not be maintained without “sufficient scientific evidence” justifying them. Canada and the United States quickly took the opportunity to challenge the EC ban on beef products treated with growth hormones on the ground of this requirement. This requirement can nonetheless be waived when evidence is lacking and when a party wishes to take preventive measures while scientific investigation is conducted.⁴² Parties are as well encouraged to take into account the cost effectiveness of alternative solutions to the solutions reflected in their regulations.

1.2.1 Transparency

According to knowledgeable WTO experts, the implementation of the Agreement has resulted in a net improvement of transparency.⁴³ This is important because scandals pertinent to sanitary security are difficult to handle. Public opinion is extremely sensitive to these issues, as show current debates over hormones treated beef products and genetically engineered agriculture products. These two issues are dealt with in the following paragraphs to illustrate the call for better transparency in international trade in food and plant products. Both issues were at the heart of the proposed Seattle round negotiations.

⁴¹ SPM Agreement supra note 6 Article 2(3).

⁴² SPM Agreement supra note 5 art. 2(2) and 5(7).

⁴³ WTO Committee on SPM, *Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures, Report of the Committee*, WTO G/SPS/12 11 March 1999 at par. III. Available at <<http://www.wto.org/wto/goods/gspsl2.htm>> (last updated 4 April 1999) [hereinafter SPM Committee Report 1999].

*1.2.1.1 The growth hormones case and scientific evidence under the SPM Agreement*⁴⁴

The Community regulatory scheme for certain growth hormones administered to bovines was established in the beginning of the 1980's and maintained in 1996 and 1998. Following the WTO decision on this matter, the European Union should abandon this scheme, or face retaliation from its trade partners. Indeed, the ban has been challenged both within the Communities and at an international level. At the European level, in cases launched by manufacturers, distributors and beef breeders, the E.C.J.'s solutions mainly paid deference to the political choices of the Community's institutions.⁴⁵ By contrast, the WTO panels focused on the validity of the ban as regards to its justification by sufficient scientific evidence.⁴⁶

(a) Risk assessment and scientific evidence

The SPM Agreement applies to the EU ban on bovine meat treated with growth hormones. The conclusions of the Panels and of the Appellate Body differ on several matters. The Panels have mainly tried to enhance the provisions of the Agreement. On the contrary, the Appellate Body gave further deference to the political choices of the parties. All in all, requirements on scientific justification of measures have been strictly enforced. The issue retained consolidates the authority of the WTO and of the GATT Agreements.

For the Appellate Body, contrary to the Panel's findings, the EC measures are incompatible with the SPM Agreement. Though, according to the Appellate Body, they are not a disguised restriction on international trade, and do not result in discrimination among products. But there is no sufficient risk assessment provided to justify the

⁴⁴ *Beef hormone case*, panels' reports; *Beef hormone case*, AB Report; *Beef hormone case* Arbitration Award 1998 *supra* note 7.

⁴⁵ E.C.J. 160/88 *Fédération Européenne de la santé animale and others v. Council* [1988] ECR 6399; E.C.J. 34/88 *Coopérative agricole de l'Anjou et du Poitou and others v. Council* [1988] ECR 6265; E.C.J. 376/86 *Distrivet SA v. Council* [1988] ECR 0209; E.C.J. C-331/88 *R. v. Secretary of State for Health ex parte Fedesa and others* [1990] ECR I-4023.

⁴⁶ *Beef hormone case* Arbitration Award 1998 *supra* note 7. *Beef hormone case*, AB Report *supra* note 7.

measures. Indeed, basic rights and obligations of the WTO Members are defined in article 2.2 of the SPM Agreement:

Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.⁴⁷

In Article 3 on harmonisation, the Agreement defines a criterion for the evaluation of the legitimacy of national measures. Harmonisation issues are further addressed in par. 1.2.2 below. As regards to transparency and scientific justification, Article 3.3 sets a requirement pertinent to the degree of scientific evidence necessary to justify measures not based on international standards. This scientific evidence must itself be based upon a risk assessment procedure referred to in Article 5 of the SPM Agreement.⁴⁸ The notion of risk assessment is thus the central and main common element of the solutions retained by the Panels and the Appellate Body. The insufficiency and imprecision of the scientific evidence provided is the ground used by the Appellate Body to decide that the EC measures violate the SPM Agreement's obligations.

Beside Article 3 and 5, scientific justification is also referred to in the definitions of Annex A. The Appellate Body's conception of the notion of risk assessment differs from that of the Panel. The Appellate Body rejects the Panel's distinction between risk management and risk assessment, setting aside the former and finding no textual basis in the Agreement for such a differentiation.⁴⁹ The Appellate Body decides that "policy choices" alone (what the Panels referred to as "risk management") should not enter into

⁴⁷ SPM Agreement supra note 5 art. 2.2. Article 5.7 sets the precautionary principle.

⁴⁸ The Appellate Body to reach this conclusion refers to the last sentence of art. 3.3 and to the footnote that refers to the level of "protection" deemed necessary by the regulating country. Also, art. 3.3 directly refers to the risk assessment procedure referred to in art. 5. *Beef hormone case*, AB Report supra note 7, par. 175.

⁴⁹ *Beef hormone case*, AB Report supra note 7 at par. 181.

the notion of assessment. But mere quantitative scientific elements should not be the unique criteria for risk assessment.

According to the Appellate Body, risks should be evaluated with regard to laboratory standards but also with regard to effective risks in the “real world”. Quantitative elements in the assessment of risk should be taken into account, but within certain limits. For instance, no quantifiable “probability” of risk should be required, but a “potential” risk should be detected.⁵⁰ Indeed, requiring a “probability” would set a higher threshold of risk detected before a government could take protective measures. Furthermore, the term “based on” international standards (par. 5.1) refers to a substantive and not to a procedural obligation for the Member states, as opposed to what the Panels argued.⁵¹ Consequently a reasonable and rational relationship between the SPS measure at stake and the relevant standards suffices.

According to the Appellate Body, Article 5.1 and Article 2.2 must be read in parallel. It decides “that the results of the risk assessment must sufficiently warrant – that is to say reasonably support – the SPS measure at stake”.⁵² Interestingly though, the Appellate Body concedes that dominant scientific opinions should not be the only ones considered. Divergent opinions could also guarantee the appropriateness of the link between risk assessment and the measures adopted. The Appellate Body cannot but concede that there is always a degree of scientific uncertainty: no scientist can guarantee, unless the risk is patent, a total absence/existence of risk. The key point is that the qualitative aspects of risk assessment, as well as scientific studies referred to justify the measures should be focused enough. The Appellate Body insists on a need for the specificity and precision of the studies that gave lieu to the measures.⁵³ The studies referred to by the EU were not

⁵⁰ *Beef hormone case*, AB Report supra note 7 at par. 184.

⁵¹ *Beef hormone case*, AB Report supra note 7 at par. 189.

⁵² *Beef hormone case*, AB Report supra note 7 at par. 180.

⁵³ *Beef hormone case*, AB Report supra note 7 at par. 198.

considered as being specific enough and were not based upon an appropriate process of assessment.

The report of the Appellate Body in conclusion sets the following rule: Members cannot adopt SPM measures without justifying specifically that potential risks exist for consumers. Because of the inherent limits of scientific evidence - i.e. there is no absolute scientific certainty that a risk exists or does not exist at a certain in point time - it is normal that Members should keep a political margin in taking, as the EU alleged. The GATT Agreement impose that measures be scientifically justified, according to a recognised assessment process. What used to be pure political choices are now defined as technical barriers, measured to the criteria of scientific evidence.

(b) Enforcing the decision

The arbitration award of 1998⁵⁴ interprets the report of the Appellate Body. It defines the reasonable period granted to the EU to implement the decision of the Dispute Settlement Body. This period of time does not include the time the EU claimed to be necessary to conduct appropriate scientific inquiry on the effect of growth hormones on human health. It only includes the time considered necessary for the EU to totally lift up the prohibition to use the hormones in Europe and to import meat from bovines fed with such products. For the arbiter, compliance consist in implementing all obligations set by the Agreement.

This award is extremely interesting because the Appellate Body's report insisted that the cause of violation of the SPM Agreement was a lack of appropriate scientific justification. This decision was the very first interpretation the WTO provided on the terms of the agreement as regards to risk assessment and scientific justification requirements. The EU stressed this point. Despite that, the 1998 award emphasised that the EU should have complied with the SPM Agreement since 1995. That is to say that the EU should have lifted the ban since that date. The arbiter acted as an enforcement

⁵⁴ *Beef hormone case* Arbitration Award 1998 *supra* note 7.

authority, with no further consideration for scientific justifications and political opportunity.

The EU maintains its ban on the import of hormones treated beef meat. Indeed, the EU announced in April 1999 that it would not be able to comply with the deadline. Canada and the United States have consequently been authorised the suspension of concessions to the EC for amounts equivalent to the amount of nullification suffered by them.⁵⁵ The EU will suffer this retaliation until it can provide appropriate scientific evidence that hormone residues create risky for human health. In parallel, negotiations are conducted between the United States and Europe on the possibility of labelling hormones treated beef products.⁵⁶

1.2.1.2 Genetically Modified Organisms⁵⁷ and product labelling

Labelling requirements are subject to the terms of the SPM Agreement. They constitute a less trade restrictive measure than mere prohibitions on uses or imports of products. Nonetheless, they can result in considerable differences of treatment of products at the border. Their impact on consumers' choices remains unmeasured.⁵⁸

(a) Security at stake

Trade in agriculture products is under the strict scrutiny and control of governmental authorities. At the present time, the food production and processing sector is extensively operated by private parties. Profits are drawn from the use of genetically modified plants that better resist insects and yield production rates. These plants and their upstream

⁵⁵ The DSB meeting of 26 July 1999 defined the amount of nullification suffered by Canada and the United States respectively. The procedure of Article 22 DSU was followed.

⁵⁶ Béatrice Marre, *De la mondialisation subie au développement contrôlé – Les enjeux de la conférence de Seattle 30 novembre 1999/ 3 décembre 1999*, Rapport d'information de l'Assemblée Nationale Française n°1824, Délégation pour l'Union Européenne (Paris: Le Kiosque de L'Assemblée Nationale, 1998) [hereinafter Marre] at 153.

⁵⁷ Also referred to as GMOs.

⁵⁸ Marre *supra* note 56 at 57.

products are controversial. Once again, we lack scientific evidence on the impact they have human health and on their potential side effects on the environment.

The use of GM crops is already common in the USA, Canada, Mexico, China, Argentina and Australia but is the object of stricter regulation in Europe. The European Union has approved the use of a small number of species but member countries are authorised to ban their use within their frontiers if they present evidence of risk.⁵⁹ On their part, consumers are said to disregard products that contain genetically modified components.⁶⁰ EU authorities are defining specific labelling requirements for products with GMOs inputs. Still, can consumers effectively know what they are buying? All transparency requirements of the SPM Agreement are at stake. World wide, only Europeans have expressed a strong opposition to these products: are they being themselves manipulated in a new trade war against North America or is there a real cultural issue?

European experiences in the domain of food products set dark memories both for the consumers and the producers who lost credibility.⁶¹ Had the standardisation and certification bodies prevented or justified these events, they would have proved their reliability and certainly gained further independence from regulatory authorities. Americans trust their regulating agencies possibly because Congressional debates on GMOs were extensively held in the beginning of the 90's. On the contrary, Europe has a deficit in transparency and public participation in the process of legalising and then accrediting food products.

⁵⁹ France, Austria and Luxembourg have banned certain crops.

⁶⁰ *The Economist* (19 June 1999) "Who is afraid of genetically modified food?" at 19 [hereinafter *The Economist* June 99].

⁶¹ During the summer 1999, European consumers have been confronted to a series of scandals involving the food industry. In Belgium and surrounding areas, sales of chicken were banned because dioxine residues had been found in most of them. Public opinions were also marked by the cases of KJD disease in both France and UK in the mad-cow context. Coca-Cola took back some cans from the market because of dangerous ingredients

A number of American lobby groups are insisting that further information be released to the public.⁶² These groups are sceptical about GM food or at least require transparency. They can be groups of producers seeking to reassure consumers on the product they deliver to their shops.⁶³ In fact, it is quite possible that an evolution takes place in North America, notably in response to the European outcry on GM food. Not only the National Economic Council is devising strategies to tactfully avoid a new trade dispute but also the Agriculture Department announced the creation of a multi-party advisory committee. This committee is given the task of studying the social, scientific and economic impacts of new food products.⁶⁴

(b) Regulatory background

The confrontation between Europe and the United States results from a difference of regulatory requirements over GMOs. EU labelling regulations require that food products that contain residues of modified elements be recorded as GM products.⁶⁵ Harmonised rules set detailed requirements on the labelling of foods that are produced from genetically modified maize and soybeans. The following indication must in this case appear on the packaging: "produced with genetically modified soy/maize inputs" (when the food is produced from one or more GM ingredient). But only food that contains

contamination. Public opinions focused on controversies on GMOs. Finally, French farmers raised their voice at the Seattle conference held early December.

⁶² The International Centre for Technology Assessment launched a suit against the Food and Drug Agency. According to the Centre, GM food should be redefined as food containing additives, and consequently be labelled and regulated as such, i.e. testing prior to market access. *The Economist* June 99 supra note 60 at 21.

⁶³ Grocery and food manufacturers are also launching campaigns to convince consumers. Protein Technology International, a member of DuPont group, has isolated part of its processing chain to make a GM free lecithin branch of products. Monsanto announces it does not supply markets with GM products anymore.

⁶⁴ *The Economist* June 99 supra note 60 at 20.

⁶⁵ EC, *Council Regulation 1813/97 of 19 September 1997* [1997] O.J. L 257. This regulation has been abrogated and replaced by the following measure: EC, *Council Regulation 1139/98 of 26 May 1998 concerning the compulsory indication of the labelling of certain foodstuffs produced from genetically modified organisms of particulars other than those provided for in Directive 79/112/EEC* [1998] O.J.L 159.

genetically modified DNA or proteins are submitted to the labelling requirements (residue problem, point of input in the process chain issue). EU laws require prior approval of food products on environmental and safety grounds before they enter the common market.

FDA⁶⁶ regulations do not require any labelling or indication on products, provided the modified food is no more toxic or allergenic than, and is substantially equivalent to, an unmodified product.⁶⁷ This difference of approaches is crucial. No American food can actually reach the European market before accreditation of the products by the EU Commission. Some American GM products can now access the EU market, but purity criteria for the award of “GM free” labels are being defined. In case these criteria do not allow American products to be awarded the label, a whole harvest might have to be either lost or reshipped (where?).

1.2.2 Mutual recognition and harmonisation

1.2.2.1 Co-operation and mutual recognition

(a) Principle

The SPM Committee works with the Codex Alimentarius, the International Office of Epizootics and the Secretariat of the International Plant Protection Convention.⁶⁸ It is a forum for Member governments to exchange information and negotiate further SPM obligations for the next decades. Members that have an observer status at higher levels in the WTO organisational framework are eligible to be observers within the SPM

⁶⁶ US Food and Drug Administration.

⁶⁷ US Nutrition Labelling and Education Act – Code of Federal Regulations Title 21 Vol. 1 Parts 1 to 99 revised as of April 1, 99 Cite 21 CFR 1.21.Food and Drugs

⁶⁸ SPM Agreement *supra* note 5 art. 12.

committee: a key status that they use to promote their interests on a permanent basis.⁶⁹ Co-operation and mutual recognition are both at stake. The SPM Agreement refers to mutual recognition as follows:

*Members shall accept the sanitary and phytosanitary measures of other Members as equivalent (...) if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary and phytosanitary protection.*⁷⁰

(b) Limits

The USA and the EU launched a project for the promotion of scientific dialogue. They are about to allow a simultaneous application for accreditation of crops on both continents so that co-operation be reinforced and costs reduced.⁷¹ Among other trade partners, negotiations over mutual recognition of equivalence of measures multiply. Some negotiations were successful, but the SPM Committee calls for further efforts.⁷²

It is not an easy task to negotiate mutual recognition agreements on food and plant products. The consequences of these agreements as regards to mutual access to markets are tremendous. The control maintained over the certification bodies designated by the negotiating parties are also crucial: they should be totally independent and suspicion free as regards to their relations with international exporters. It should be kept in mind that the food transport and processing market worldwide is dominated by small number of multinationals with powerful leverage at national levels.

⁶⁹ The SPM Committee gathers at least three times per year. Beside that, the SPM and the TBT committees co-operate on a regular basis. The Codex Alimentarius, the IOE, the Secretariat of the International Plant Protection Convention, ISO, the WHO, and UNCTAD are observers.

⁷⁰ SPM Agreement supra note 5 art. 4(1).

⁷¹ The Economist June 99 supra note 57 at 19.

⁷² SPM Committee Report 1999 supra note 43, at par. VII.

1.2.2.2 International Standards

(a) International standards and burden of proof

The beef hormone case findings confirmed that par. 3.1 of the SPM Agreement requires Members (use of “shall») to base national measures on international standards except when as otherwise provided in the Agreement and in particular in par. 3.3. According to the Panels, the terms “based on” and “conform to» found respectively in par. 3.1, 3.2 and 3.3 are equivalent. This assumption would give a specific effect to the terms of par. 3.1 and 3.3, and consequently increase considerably the authority of the SPM Agreement. The conditions defined in par. 3.3 would be given more importance: all measures not conforming to international standards would have to be justified as required by the Agreement (risk assessment). The Appellate Body refused such an interpretation. It decided that only measures not “based on” international standards should be justified according to par. 3.3. The Appellate Body expressed his view in the following terms:

To read Article 3.1 as requiring Members to harmonise their SPS measures by conforming those measures with international standards (...) in the here and now, is, in effect to vest such international standards (...) (which are by the terms of the Codex recommendatory in form...) with obligatory force and effect. The Panel's interpretation of Article 3.1 would, in other words, transform those standards... into binding standards. But ...the SPS Agreement itself sets out no 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...⁷³

In the same spirit, and to lighten the interpretation of the SPM Agreement retained by the Panel, the Appellate Body stressed that the terms of Article 3.3 define an autonomous

⁷³ Beef hormone case, AB Report supra note 7, par. 163.

right, as opposed to an exception to the harmonisation efforts required by Article 3.1. Consequently, countries that do not base their measures on international standard do not have to prove that their measures comply with the Agreement. The complaining party bears the burden of proof that the measures do not comply with the obligation of the Agreement. The Panel had opted for an audacious position. Its aim was to foster the use of international standards to base national measures: measures conforming to such standards would be presumed to be conform to the Agreement's requirements. At the present time, international standards' adoption procedures are much too controversial both as regards of their mode of adoption and of their nature, to be awarded such a central role.⁷⁴ The Appellate Body admitted this fact.

(b) Developing countries

Developing countries have been granted specific deadlines to implement the accords. They are not required to justify their measures with scientific evidence. Many DCs adopt existing international standards to avoid additional costs attached to defining new ones. They benefit from the technical assistance referred to in Article 9 of the SPM Agreement. The WHO, the FAO and the World Trade Centre, provide extensive assistance.⁷⁵

The fact that only more stringent measures should be scientifically justified upon request of trading partners⁷⁶ raises an important issue. Countries with lower requirements on imported food quality can be seen as the alternative destination for products refused in countries where stricter criteria are applied. Despite many efforts carried out in this direction, it is not up to any international organisation, in the present state of affairs, to enforce international quality criteria. Countries with low quality requirement should also be required to justify these requirements.

⁷⁴ Joanne Scott, "On Kith and Kine (and Crustaceans): Trade and Environment in the EU and WTO", Harvard Jean Monnet Working Paper 3/99 online: <<http://www.law.harvard.edu/Programs/JeanMonnet/Papers/99/990301.html>> (date accessed 3 October 1999).

⁷⁵ SPM Committee Report 1999 supra note 43, at par. IV.

⁷⁶ SPM Agreement supra note 5 article 3.3.

The point is that international standards are issued in the form of guidelines and recommendations. There are health safety requirements unilaterally imposed. Can developing countries afford high quality standards? Can effectively refuse the shipment of products refused in wealthier countries and redirected to them at lower prices? International trade agreements cannot be implemented without due attention paid to development issues. Future international sanitary agreements could prevent exporting countries from shipping low quality products that have been refused in wealthier countries to less demanding countries.

1.3 Role of Private Parties Through the Agreements

The SPM Agreement defines obligations pertinent to mandatory regulations adopted by governments, as opposed to standards that are voluntary in nature. The activities of the private sector are not as directly dealt with than in the Code of Good Practice. Because R&D expenses are mostly incurred by private companies, standards and mandatory regulations for foods and plants are crucial.

1.3.1 In the SPM Agreement

1.3.1.1 Voluntary standards

The definitions provided in the SPM Agreement show that this Agreement only pertains to government mandatory regulations. These regulations pertain to products, process and production methods (PPMs), packaging and labelling as well as to certification, testing and certification methods. In fact, the definitions do not clearly precise whether or not voluntary standards are covered by the Agreement.⁷⁷ The definitions include international standards, guidelines and recommendations⁷⁸ issued by the international organisations referred to in the SPM Agreement, namely the Codex Alimentarius Commission, the International Office of Epizootics and the Secretariat of

⁷⁷ SPM Agreement supra note 5 Annex A par. 1 & 3.

⁷⁸ SPM Agreement supra note 5 Annex A par. 3(a), (b) & (c).

the International Plant Protection Convention and the regional organisations related to them. The definitions also refer to standards issued by relevant international organisations other than the latter but which have access to membership as identified by the Committee on SPM.⁷⁹

Given the nature of the subject covered by the SPM Agreement, i.e. food and plant safety, it would be logical that the Agreement covered regulations issued by Members' governments only. Indeed, in this domain, governments should always bear the ultimate responsibility and decision making ability. Moreover, if the Agreement referred to standards issued by private bodies - not under direct government control – it would somehow foster the activities of these entities in competition with governments. This would complicate the task of governments to regulate these private entities. To effectively control and regulate private entities, governments need to finance public research and public laboratories. Private parties operating in the food standardisation domain could be considered as formulating “technical” standards in the sense of the TBT Agreement. Their activities may not fall under the authority of the SPM Agreement. It can be maintained that if non-governmental standardisation/certification bodies conducted further activities in the sanitary and phytosanitary domain, their activities should at least respect the requirements of the TBT Agreement.

1.3.1.2 Non-governmental bodies

The SPM Agreement refers to the role of non-governmental bodies in the article pertinent to its implementation.⁸⁰ Members are “fully responsible (...) for the observance of all obligations”; i.e. observance by bodies other than governmental bodies including local and regional ones. More specifically, “Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories (...) comply with the relevant provisions”. Members shall also refrain from encouraging such non-governmental bodies to “act in a manner inconsistent with the

⁷⁹ SPM Agreement supra note 5 par. 3(d).

⁸⁰ SPM Agreement supra note 5 art. 13.

provisions.”⁸¹ Finally, “Members shall ensure that they rely on the services of non-governmental entities for implementing sanitary or phytosanitary measures only if these entities comply with the provisions.”⁸²

This means that all laboratories and interested parties that are in touch with national governments - excluded private parties that do not regularly collaborate with the government should comply with the requirements of the SPM Agreement. Private parties with which the government co-operates on an organised basis should comply. The practical implications of this would be that the only non-governmental bodies submitted to the Agreement would be the ones that have gained sufficient credibility in the authorities’ eyes. This credibility is very subjective, with a fair margin naturally granted to governments. In this context, the safeguards defined for government procurement can, theoretically, be paramount. The final liability being supported by national states, an extensive role – with no corresponding liability - is attributed to corporations.

1.3.2 In the TBT Agreement Code of Good Practice⁸³

1.3.2.1 Scope of the Code

(a) Adapted to varying national frameworks

The Code of Good Practice extends the application of certain GATT obligations to private entities and to non-governmental bodies. The GATT is less effective at regulating private entities than at regulating central governments. As a consequence, governments that extensively delegated the task of designing standards to private entities are relatively freer to define policies than are nations that kept centralised systems. As long as standardisation bodies effectively defend national advantages, the nation may benefit

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ TBT Agreement supra note 5 Annex 3 *Code of Good Practice for the Preparation, Adoption and Application of Standards* [hereinafter Code of Good Practice].

from its shielded position. But if standardisation bodies protect local monopolies, the nation can lose advantages in the trend for liberalisation.⁸⁴

(b) Potentially extended to private actors

The Code of Good Practice is “open to acceptance” to a number of “standardization bodies.” These bodies are governmental in nature or not. The definitions of Annex I in the TBT Agreement provide further clarification. In addition to governmental standardisation entities (i.e. central governments, plus local and ministerial branches, and semi-private entities), non-governmental bodies are submitted to the Code. Given the number of private standard designers – from laboratories to conformity assessment consultants - the exact nature of non-governmental bodies that should be committed to the Code is uncertain. According to the Annex I definitions, non-governmental bodies are recognised bodies:

8. Non-governmental body:

*Body other than a central government body or a local government body, including a non-governmental body which has the power to enforce a technical regulation.*⁸⁵

The GATT Agreements – including the TBT and the Code of Good Practice – allow governments, in a number of exceptional cases, to adopt national standards different from international standards. The Code reaffirms the principle according to which Member governments (i.e. parties that adhere to the Code), may depart from international standards when the latter will not be effective in the country because of geographic/climatic or technologic specificity. Parties and bodies committed to the Code’s requirement may shorten comment and notice delays for urgent safety/health reasons. In cases where non-governmental bodies are in charge of carrying out these

⁸⁴ Sykes supra note 40 at 40 & seq..

⁸⁵ TBT Agreement supra note 5, Annex I Terms and Their Definitions for the Purpose of this Agreement at par. 8.

obligations, they are logically entitled, in the limits of their empowerment, to invoke such exceptions. At some point, governmental controlled could be needed, unless the bodies face onerous liabilities for mistakes.

1.3.2.2 Impact

(a) Theory

The Code of Good Practice is an innovative experience in the field of international trade. The obligations contained in the Code are similar to those that the Member countries undertook in the GATT⁸⁶ but directed at different entities. Whatever their nature and their position as regards to the governments' authority, these entities are expected to respect obligations imposed traditionally on states only. The Code results in an implicit⁸⁷ but effective transfer of role from traditional states to new entities now expected to be as disciplined as governments can be.

National firms can protect competitive advantages if they have a priority access to technical standards before their competitors adopt them. For a short period of time, they benefit from a monopoly position. The Code recommends that a 60-day comment period be respected prior to the adoption of drafted standards. The requirements of notice and comment in the TBT Agreement are extended to private entities.⁸⁸

Evaluations of conformity are generally conducted by third parties accredited by government agencies, or by governmental branches. As long as they get accreditation, these third parties can be private or public in nature. They can submit themselves to the Code's recommendations. Still, according to experts, "consistent accreditation

⁸⁶ I.e. national treatment, most favoured nation, sham principle, requirement for notice and comment procedures from foreign interested parties, justification for deviations from international standards, harmonisation and avoidance of duplication of standards at the international and regional levels.

⁸⁷ And limited to the scope of the TBT Agreement *supra* note 4.

⁸⁸ Code of Good Practice *supra* note 83, par L.

procedures, and a code of good practice for conformity assessment bodies”⁸⁹ are needed. After five years of implementation of the Code, such remarks are alarming. The current operation of these bodies deter the benefits of the removal of technical barriers to trade, because, among other things, of an excessive sensitivity to interests groups’ pressures.

(b) Practice

The 1999 WTO CAPs Symposium participants pointed out that certification awarded by suppliers – a practice accepted by regulators in certain sectors⁹⁰ – needs to be underpinned by accredited certification bodies in areas of great risk. They signalled that these practices ought to be backed up by appropriate legislation on product liability. In international contexts, products manufactured abroad should also give lieu to such liability. Processing chains, with a listing of manufacturers involved and effective post-market surveillance are necessary.⁹¹ The credibility of private bodies and suppliers certification is at stake. The Code of Good Practice encourages the delegation of tasks to non-governmental bodies. This Code fails to meet its goals if consumers cannot trust certification bodies.⁹²

The Code of Good Practice is pertinent to standards only, i.e. non-mandatory documents. The Code is “open to acceptance” to standard setting entities, some of them being free of governmental control. It follows then that the efficiency of this accord depends on the will of these entities to fulfil their commitments. Besides, government-

⁸⁹ CAPs Symposium supra note 34 Summary Report.

⁹⁰ Décret n°89-662 du 12 septembre 1989 JO. 15 September 1989, implementing EC Directive 88/378 (infra note 129). Manufacturers are required to put on their products a label of conformity to the Directive’s essential requirements. This requirement is enforced at the national level. In France, according to art. L 213-1 to L216-1 C. Cons., false certification is frauds.

⁹¹ CAPs Symposium supra note 34.

⁹² In December 99, an oil tanker broke in two and sunk in the French Atlantic. This accident gave lieu to considerable environmental damages. In the chain of liability, certification companies are at the frontline. They were in charge of inspecting the reliability of the ship’s structure, and might have been negligent. F. Grosrichard, “Erika: la commission d’enquête dénonce une série de “défaillances” *Le Monde* (15 January 2000) at 1 and 10.

controlled bodies frequently rely on the technical and financial participation of private industries.⁹³

The obligations of the Code are two fold. First, they require a willingness of standard setting entities to render their operation procedures more transparent. Second, they require a willingness of interested parties to incur the costs of accessing to information and to co-operate in the spirit of the Code. The need to protection sensitive technological and commercial information can prevent firms from co-operating.

The implementation of the Code is linked to the success of co-operative efforts between standardisation entities. Reciprocity may be an important factor. The more co-operations between standard setting entities and interested parties, the more effective the Code. Foreign interested parties will only bear the cost of participation (e.g. in the comment and notice system) if they can derive further profit from it. Incidentally, the removal of technical barriers *per se* should foster profits. Private players may implement the Code for this very reason. Much is left to the goodwill of private parties, including the control of other non-governmental bodies in the fulfilment of their commitments.

⁹³ See *infra* at 2.1.2. For further discussion on the operations of local standardisation and accreditation bodies.

2. A CENTRAL ROLE ASSUMED CORPORATIONS

2.1 Redistribution of Roles at National Levels

This section illustrates how the agreements dealt with in Chapter 1 are implemented. In function of the structure of their administration, governments delegate the task of issuing labels, standards and technical regulations to either central agencies or decentralised bodies. It is not within the scope of this work to deal comprehensively with the nature and operation of such bodies. But the Canadian, European and American practices all reveal interesting issues.

2.1.1 The North American tradition

2.1.1.1 Canada

The Canadian federal government rarely formulates policies or drafts legislation without prior consultation of the industry. There is in Canada, an effective partnership of the industry and the government, a sort of permanent negotiation process.⁹⁴ Authorities extensively refer to the experience of private parties who are the main pole of technological expertise. The government's role is to ensure that adequate standards are adopted and that trade barriers are not created. It promotes the development of open standards - as opposed to proprietary standards - and makes them accessible to small and medium businesses, in order to foster technology transfers and to preserve the public's interests. Because the Canadian economy is partly driven by small and medium firms, most of them highly specialised, open standards contribute to maintain its dynamism.⁹⁵

⁹⁴ This strategy is extensively presented on <http://strategis.ic.gc.ca/ssg/sd00050e.html> and http://www.ic.gc.ca/sc_mrksv/sustain/engdoc/homepage.html (publication date 18 December 1997).

⁹⁵ D.L. Johnston, S. Handa, *Getting Canada Online: Understanding the Information Highway* (Toronto: Stoddart, 1995) at 85 [hereinafter *Getting Canada Online*].

The relation a corporation keeps with regulating authorities vary with the type of activities conducted. Shell Canada⁹⁶ and Alcan⁹⁷, which exploit natural resources, have very close relations with local authorities. Given their economic weight and their potential environmental impacts they are under the permanent scrutiny of the agencies in charge.

(a) Standards definition for telecommunications

The government of Canada relies on a government-industry body, the Telecommunications Standards Advisory Council (TSAC) to co-ordinate at the national level the definition of standards by local bodies. Besides, the Canadian Standards Association (CSA) represents the country in international organisations such as the ITU and ISO. The CSA consults all interested parties to ensure that the standards adopted respect the sectors' needs. When national industries are strong enough, the CSA supports international standards that reflect the input of these industries. If not, standards can ultimately be imposed on national producers either by regulation or by the market.

Ad hoc standardisation bodies have multiplied in Canada. They issue documents efficiently, at the market pace. Such standards somehow pave the way, or have experimental functions. But there is a risk that international standards rapidly substitute for them.⁹⁸ Despite that risk, regional standards remain crucial. They are a ring of the standards setting chain in between industrial private rights and international standards.

The implementation of the Code of Good Practice can have an impact on the operation of most standardisation bodies. The formulation of standards at national levels implies a confrontation of private interests. On its part, the government the residual role of public

⁹⁶ Interview with Murray Jones, Corporate Advisor, Environment and Sustainable Development, Shell Canada Ltd, Calgary (30 September 1999) [hereinafter Interview Shell].

⁹⁷ Interview with M. Cossette, internal legal advisor, and M. Lalonde, in charge of ISO programs, Alcan Ltd, Montreal (10 September 1999) [hereinafter Interview Alcan].

⁹⁸ Getting Canada Online *supra* note 95 at 82.

interests' champion. The redistribution of traditional roles in the standardisation domain is profound: the application of the Code is all the more a necessity.

(b) The Environmental Choice Program, Responsible Care

The Canadian Environmental Choice Program⁹⁹ is a co-operation of the industries, the governments and consumers to foster the environmental responsiveness of all economic actors. Interestingly, Terra Choice Environmental Services Inc.¹⁰⁰, a private corporation, administers the program. The Canadian Government (Environment Canada), is a main partner of Terra Choice, and substantively controls its policies, activities and the use of the ECP eco-logo. The credibility and the quality of the program in the long term are thus guaranteed. But Terra Choice operates as a private company, employs or consults independent experts at an arm's length from government authority and in the whole better serve the industry's needs that way. Environment Canada is ultimately accountable.

Funding for the program comes partly from the government, the main owner. Costs are also recovered from companies candidate to eco-logo (on a recovery basis). In addition, fees are due for annual licensing. They are based upon the gross annual sales of the labelled product. The philosophy of the program is partly commercial, with governmental backup. Because of double funding sources, Terra Choice could operate as an administration rather than as a business. In that case, it would lose its popularity in the industry's eyes.

⁹⁹ Also referred to hereinafter as the ECP. A program created in 1988 under the *Canadian Environmental Protection Act*, R.S.C. 1988, c.22.

¹⁰⁰ Referred to as "Terra Choice". Terra Choice Environmental Services Inc. provides details about its organisation and operation online: <<http://www.terrachoice.ca>> (last updated 06 July 1999).

See also Avi Gesser, "Canada's Environmental Choice Program: A Model for a "Trade-Friendly" Eco-labelling Scheme", *HILJ* Vol. 39, Number 2 spring 1998 pp 501 [hereinafter Gesser]. Avi Gesser wrote a precise article on the compatibility of the ECP with Canada's international trade commitments. Though, this article takes for granted that that eco-labels have an impact on the public environmental responsiveness at the present day, that they are reshaping markets and that consumers are willing to pay premiums for environmentally sound products. These assumptions were a necessary ground for her argument, but are not, at the date of today, fully verified.

Licensing agreement passed by labelled producers are strict and precise. Controls result from periodic spot checks and from self-reporting. Producers show great deference to the co-operative nature of the program. In practice, competitors of labelled producers tend to notify Terra Choice Inc. if the latter disregard their environmental commitments. Enforcement techniques are flexible, mainly because more attention is paid to improving production processes than to avoid penalties.¹⁰¹ There is only one labelling scheme of this type in Canada. Apart from international labelling programs, the ECP eco-labels faces no national competition. It is alleged that competition between labels undermines their quality and credibility. The proliferation of labels can mislead consumers. Canada avoids this pitfall.¹⁰²

Terra Choice operating rules strictly respect the obligations contracted by Canada in the TBT Agreement and the Code of Good Practice. The Ministry of Foreign Affairs is involved in the program, and the ECP exclude the labelling of products that could have significant impacts on developing countries' exports.¹⁰³ The Canadian government also restrained from any official procurement policy in favour of labelled products. Foreign corporations candidate to the Canadian eco-logo need not respect all Canadian environmental requirements. They have to meet environmental rules in their home country. Last but not least, Terra Choice delegates experts to the production sites of potential exporters. At this occasion, it tries to gather, and thus to attract, all potential exporters in a country to allow applicants to share evaluation expenses.¹⁰⁴

Totally distinct from the ECP, Responsible Care is an initiative that was launched by the chemical sector in the mid-80's. It led participants to adopt codes of practices on

¹⁰¹ Gesser *supra* note 100 at 510.

¹⁰² See William Lash III "Eco-labelling: A New Threat to Free Trade", Legal Backgrounder (Washington Legal Foundation), Apr. 17, 1997 available in Lexis, News Library, WLF File.

¹⁰³ Gesser *supra* note 100 at 511. Such products include at the present time textiles, footwear, tropical timber and clothing.

¹⁰⁴ Publicity on projects and adopted guidelines for new labelled products is carried out in the *Canadian Gazette*. The Canadian Gazette is available in all Canadian embassies for exporter's information.

transportation, wastes, environmental practices, PPMs, R&D, public relations and emergency management. The aim of Responsible Care is to prevent the adoption of stricter legislation on the chemical industry. This is why the commitments of participating companies exceed legal requirements. Codes are enforced and progress is measured against negotiated methods and criteria. Public authorities kept distant from the program, until they were finally called as consultants in the management of the codes.¹⁰⁵

2.1.1.2 USA

As in most industrialised countries, technical standards in the United States were until recently both drafted and administered by state agencies or imposed on the market through the exploitation of proprietary standards by the industry. By tradition, many sector associations extensively participate in setting standards for product compatibility. In the United States, there is an extremely high number of standard sources. The use of voluntary labelling programs is a relatively new regulatory experience.

(a) Eco-labels and Standards

Administrative agencies administer numerous labelling programs. These agencies range from the Department of Energy to the Federal Trade Commission or the EPA.¹⁰⁶ In the absence of a co-ordination of these programs at the national level, it is barely possible co-ordinate national and international labelling schemes. For this reason, and for the USA to respect its commitments, it is paramount that all agencies involved better respect, at their own level, the terms of the TBT Agreement.

¹⁰⁵ OCDE, *Réformer la réglementation environnementale dans les pays de l'OCDE*, (Paris, 1997) at 32 [hereinafter OCDE Réformer la réglementation].

¹⁰⁶ The EPA deals with 13 programs at the present time. Among them the Pesticide Labelling Program (1947), the Toxic Substances and Control Act warranting labels, the Energy Star Program, the Green Buildings Program. See USA, EPA, Pollution Prevention Division, Office of Pollution, Prevention and Toxics, *Environmental Labelling Issues, Policies and Practices Worldwide* (Washington DC., 1998) at B-32. Online: <<http://www.epa.org>> (accessed 10 September 1999) [hereinafter EPA Report].

Existing labels aim at leading the public to consider all the characteristics of the products they purchase. Crossbones labels on poisonous products are not new. What is important, beside consumers' safety, is that it should turn less expensive for the producer to avoid using poisonous ingredients than to be imposed this negative label. This label can cause a reduction of its market share. Mandatory labels, be they positive, neutral or warnings, enhance the consumer's right to chose. On the other hand, they render his environmental responsiveness more accurate. As a result, both producers and consumers get involved in environmental efforts. The philosophy is that all actors, producers (visible impact) as well as consumers (un-visible) share environmental responsibilities.

Responsible consumption reflexes, should, in theory, lead to the success of eco-labels formulated out of the regulatory agencies. They also have impacts on the nature of regulatory techniques. Nonetheless, they do not hinder the fact that labels are the tools of financial and industrial interests. The influence of private interests on the design of labels may hinder the educational character of these labels. Assuming that eco-labels have a strong impact on market shares, they could multiply. In this case, credible certification bodies would come in the frontline.

A leader of the world economy and a pole of technological progress, the United States is a main developer of proprietary standards. The impact standards have on shaping markets and consumers' habits is so strong that it has negative side effects if the standards adopted turned to be inadequate.

For the producer as well as for the public, opting for a given standard can be a risk. The United States, as any other developed country, faces the challenge of the quick renewal of product standards for compatibility purposes at a global level. Because of its leading economic position, the United States must pay extreme attention to developing appropriate standards. The costs incurred for redesigning products in accordance with new, stricter standards can be enormous for the industry. In addition, there are risks of

“technology myopia,¹⁰⁷” a phenomenon that can annihilate technological and commercial leaderships “overnight”. Finally, the success and dismentlement of Microsoft suggest that standards can be a double-edged sword in competitive contexts.¹⁰⁸

(b) Private inputs in the regulatory scheme

Administrative agencies, elected governments and the private sector traditionally collaborate. Certain standard setting entities the impact on the regulatory scheme but are exempt of governmental control and vulnerable to financial pressure and discrete manipulations. Despite that, they play a key role in the organisation and success of both production and trade in the country.

The American Society of Mechanical Engineers, a non-profit technical organisation created in 1880, issued codes that are now respected all over the world. Its competitor, the American Society for Testing Materials no longer submits its standards to the ANSI and now issues its own standards.¹⁰⁹ Its legitimacy stems from the support of powerful stakeholders.¹¹⁰

¹⁰⁷ Getting Canada Online supra note 95 at 88. The idea is the following: for instance wouldn't the Microsoft windows *de facto* standard had been adopted by users world wide maybe the Unix system now developed and adopted by Microsoft competitors would have drawn further and faster progress in the use of computers. The idea is that widely accepted standards may hinder valuable alternatives.

¹⁰⁸ Microsoft is accused of biasing the competition environment by shaping Windows's access to Internet so as to prevent the users from resorting to different software to access the Internet. Microsoft is accused of making its own interface the standard access to the information circulated on the World Wide Web. In the case of Microsoft, the standard is both positive because it fosters harmonisation world wide and negative because it places Microsoft in a forbidden dominant position.

¹⁰⁹ The American National Standards Institute, the main standard setting association, further referred to in par. 2.2.1.1 below.

¹¹⁰ S. Krislov, *How Nations Chose Product Standards and Standards Change Nations* (Pittsburgh: U. of Pittsburgh Press, 1997) [hereinafter Krislov].

A case in point of the impact non-governmental organisations on the US regulatory environment is the National Fire Protection Association, a voluntary association.¹¹¹ The NFPA issued a reference code for the safety of electrical installations in buildings.¹¹² The role of the NFPA in defining safety rules for building construction has been described as follows:

In complex and technical areas (...) state and local governments rely heavily upon a variety of model codes and other standards developed by voluntary organizations... State governments themselves lack the governmental resources to initiate, develop through public proceedings, adopt and defend comprehensive codes. (...)

As a practical matter most state and local governments lack the necessary resources to conduct their own investigations. For that reason and because the NFPA and other groups do a professional job in their own right, state legislatures depend on the NFPA and like code-making associations to become, in effect, their committees and scientific laboratories.¹¹³

At the time these remarks were formulated, the NFPA's National Electric Code was incorporated by reference into the laws of almost all federated states and of thousands of local jurisdictions. Nowadays, the NFPA counts about 30,000 members world wide, including manufacturers and other interested parties. The regular change added to current

¹¹¹ The fire and construction security sector counts many authoritative voluntary associations. Several codes have been issued in these domains. For instance, the Uniform Building Code, promulgated by the International Conference of Building Officials is widely referred to. There are also many regional codes. Krislov supra note 110 at 238

¹¹² The National Electric Code, one of the most reliable, comprehensive and most referred to in the world – not only in the United States. *Ibid.*

¹¹³ *Allied Tube and Conduit v. Indian Head*, 48 U.S. 492 (1988) (Brief of Amicus Curiae, State of Illinois), in Krislov supra note 110 at 238.

standards are published in the Federal Register.¹¹⁴ It seeks to preserve a strict balance between all interests represented. The NFPA is a case in point of a body referred to by the Code of Good Practice.

The United States are leaders in reinventing regulatory structures.¹¹⁵ They permanently seek to improve the co-operation of government agencies and private actors. As for regulatory techniques, they opted for economic incentives as a substitute for command-and-control more than 15 years ago. Other countries followed up and extensive transfers of decision making power to private actors occurred. Deregulation is now called into question. Some corporation believe that they have in fact never been that much regulated. Balances of power among actors are being redefined.

2.1.2 The European experience

One of the conditions precedent for the free flow of goods in the European Union is the achievement of a certain degree of harmonisation of national policies and of mutual recognition. Harmonisation efforts result from the application of two main techniques: harmonisation imposed *via* mandatory regulations and the negotiation of common objectives pursued at national levels through the implementation of directives.¹¹⁶ This duality of techniques leaves considerable freedom to Members to build up a common market without disregarding national preferences.¹¹⁷ But the E.C.J. jurisprudence on harmonisation clarified the substance of the obligations undertaken by Member states and

¹¹⁴ Krislov *supra* note 110 at 239.

¹¹⁵ See Sunstein and Pildes, *Reinventing the Government*

¹¹⁶ *Treaty of Rome*, 25 March 1957, art 94 [hereinafter *Treaty of Rome*]. The *Treaty of Rome* was modified by the *Treaty of Amsterdam*, 2 October 1997, entered into force 1 May 1999. The *Treaty of Amsterdam* gave lieu to a renumbering of the existing *Treaty*, only the new numeration is used here.

¹¹⁷ *Treaty of Rome*, art. 28 and art. 30.

considerably limited their margin of action.¹¹⁸ Harmonisation is in Europe at the core of the collaboration between private and public actors.

2.1.2.1 Defining technical regulations and standards

Several levels of government can participate in the formulation of technical regulations and standards. At national level, the Members' central governments are a main source of regulations.¹¹⁹ Local governments also intervene, notably by setting some criteria for government procurement.¹²⁰ National governments control that all requirements are respected, or delegate this task to accredited private laboratories. At the EU level, the central institutions foster harmonisation together with three standardisation organisations.

Two phenomena deserve attention. First, a strict policy of technical barrier removal is carried out. It is based on the promotion of transparent practices and enhanced co-operation at the national, European and international levels. Second, the development of new techniques to design technical standards with further inputs from private producers.

(a) Removal of existing technical barriers.

¹¹⁸ E.C.J. *Dassonville* 8/74, [1974] E.C.R. I-837, E.C.J. *Cassis de Dijon* 120/78, [1979] E.C.R. I-649, E.C.J. *Biologische Produkten* 251/78, [1979] E.C.R. 3369). The European Commission also had the opportunity to deal with private companies practices in cases where the producers refused to recognise national standards from other countries. For instance in EC, *Commission Decision Naverla-Anseau of 17 December 1981*, [1982] O.J.L. 167, housing products and water suppliers refused to allow the connection of products that did not respect national standards. Beside technical barriers, competition issues are frequently at stake.

¹¹⁹ One specific agency can be delegated the task of supervising all normalisation activities on the territory. This the case in France, where the AFNOR, created by *Décret n°84-74 du 26 janvier 1984*, is in charge of the general interest. In Germany the Deutsch Institut for Normung (DIN) is under contract with central government. In the United Kingdom the British Standards Institution is under Royal Charter). Part of the budget of these three institutions comes from public funds. In general, normalisation activities in Europe are centralised (compare USA where hundreds of organisms issue standards).

¹²⁰ In France, this is the case at the regional and at the department level. In Germany, certain Länder have requirements on the emissions of vehicles. Nicolas *supra* note 32 at 138.

The European Union has a comprehensive mechanism to remove existing technical barriers to trade.¹²¹ Part of this mechanism is based in 1983 Directive¹²² on transparency and information transfers, but other Directives completed the schemes afterwards. The Commission gathers and dispatches information on national standards and projects of standards among Members. The objectives and obligations¹²³ set by the directive strictly respect the terms of the GATT. The directive defines the notions of “standard” and technical regulation. Interestingly, the former category includes voluntary agreements between the private sector and public authorities on technical obligations, codes of good practice and professional codes when the respect of these codes grants a presumption of conformity to national requirements.¹²⁴

The 1983 Directive was more successful with regard to technical regulations than for standards. But in the whole, there has been since the mid 80’s a clear limitation of national initiatives in formulating standards and technical regulations, and a transfer of this competence to European bodies.¹²⁵ The European application of the TBT Agreement is a success. The transformation is of considerable benefit to the private sector. Private actors can contest the inaction of Member states in the field notably of technical barriers to trade. They have the support of the Commission that together with the E.C.J.

¹²¹ Treaty of Rome art. 28 & 30 TR.

¹²² EC Council Directive 83/189 of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations [1983] O.J.L 109). Directive 83/189 was substantially modified by EC Commission Directive 88/182 of 22 March 1988[1988] O.J.L. 81 and EC Commission Directive of 23 March 1994 [1994] O.J.L. 100. It was recently modified by EC Commission Decision 96/139 of [1996], O.J.L. 32 (modification to the list competent national certification bodies).

¹²³ The E.C.J. recognised a direct effect to the terms of this directive in E.C.J. *CIA Security International* 194/94 [1996] E.C.R. I-2201 pertinent to the notification of national standards to the Commission.

¹²⁴ Div. 83/89 supra note 122 art. 1 par 2 & 5.

¹²⁵ *Memento Pratique Lefebvre - Communauté Européenne* 1998-1999 (Lefebvre: Levallois) at 185 [hereinafter Lefebvre CE].

extensively used its power to retaliate Members' practices that were not conform to the requirements of the directives and treaties.¹²⁶

Respecting technical standards is beneficial to private actors in more than one way. They can limit their civil liability in case of damage or accidents due to concrete failures. In the case of cement manufacturers, it is easier to prove that the cause of the damage is not the quality of their cement because the products respects all quality standards. Mistakes are to be found at different steps of the construction process. The liability of each party involve is more precisely identified within the damage cause chain.¹²⁷ For Calcia, complying with quality standards recognised world wide is important as well. These standards serve as ranging criteria for top-quality companies. This is a key to many foreign markets.¹²⁸ Calcia is not directly present in international standardisation organisations but mandates sector associations to negotiate European standards on construction. They have strong leverages on highly technical questions dealt with by the ECN, AFNOR or EC institutions.

(b) Harmonisation

Given the difficulty of harmonising policies and products characteristics, especially in the perspective of further adhesions to the EU, a "new approach" to harmonisation was adopted in 1985, and several "new approach" directives were adopted afterwards.¹²⁹ More

¹²⁶ Art. 226 TR.

¹²⁷ Interviews with Mr. Clavreul, Legal advisor (8 November 1999), and Mr Domange, CEO (10 November 1999), Ciments Calcia, [hereinafter Interview Calcia].

¹²⁸ *Ibid.*

¹²⁹ EC Council Regulation 85/C of 7 May 1985 on a new approach to technical harmonisation and standards [1985] O.J.C. 136 defined the principle of the New Approach. Harmonisation Directives adopted after this date are called the New Approach Directives. Notably: EC Council Directive 88/378 on the approximation of the laws of the Member States concerning the safety of toys 3 May 1988 [1988] O.J.L. 187; EC Council Directive 89/106 of 21 December 1988 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the construction products [1990] O.J.L. 140; EC Council Decision of 22 December 1986 on standardisation in the field of information technology and telecom [1987] O.J.L. 36.

importance was given to mutual recognition and a larger role was granted to the private sector.¹³⁰ Five founding principles define the New Approach. (1) Harmonisation was to be restricted to the essential requirements that pertain to the general interest imperatives.¹³¹ (2) Detailed specifications necessary for the implementation of EC directives are set by standards designed by specialised institutions in reference to the available technologies. (3) Such standards are voluntary in nature. (4) Products that conform to these standards benefit from a presumption of conformity and can circulate freely on the market. (5) Producers can follow different standards if they prove that their products respect the essential requirements. EC institutions nonetheless issue detailed regulations if the products are politically sensitive (e.g. food products) or when the level of harmonisation achieved requires a central intervention to adapt the products.

The New Approach reinforces the autonomy of producers in managing their access to European markets: a balanced use of voluntary mechanisms and a facilitation of proof. It should be noted that essential requirements are detailed enough to be enforced by the member states. This is important because they are the minimum condition for a product to circulate throughout the community. But the success of the New Approach results from the liberty granted to private actors that decide whether or not it is worse resorting to harmonised standards. It is up to them, as regards to their own financial interests to adopt standards to better enter other Members' markets. Producers almost have a full liberty of choice and are the ones who foster harmonisation. Their interest and the pace of the market are thus in phase. As a result, useless standards should be replaced shortly.

¹³⁰ The objectives pursued by the European institutions in opting for this new approach are listed in *EC Council Regulation* supra note 129: accelerating the procedures of adoption of harmonised technical standards, a better repartition of tasks between the public sector and the private actors, carrying out effectively the principle of mutual recognition, taking full benefit from the progress made in the removal of TBT (i.e. member governments disciplined in limiting the national definition of technical requirements and paid further attention to the benefits of harmonised requirements to the success of the common market).

¹³¹ The European institutions only define essential requirements pertinent to security, health, environmental issues and consumer protection

To interfere with the institutions in charge of implementing the New Approach, private actors have several possibilities. They should remain informed of the activities conducted within the Commission by the technical committees in charge. They can lobby the Council and the Parliament's commissions. They also have to convince national authorities that, in practice, ultimately choose the terms of technical directives.¹³² In practice, sectors' syndicates, not individual corporations, advocate the industries' interests at the European level. Beside that, companies carefully keep up fruitful dialogues with local authorities.¹³³ Given the objectives set by the 1985 Council resolution, lobbying activities are given a strong legitimacy. All considered very much is left to the private sector initiative, a philosophy found in the GATT accords as well.¹³⁴

The European Commission delegated most of the detailed work pertinent to standards to Europe-wide decentralised technical organisations. Namely, The European Committee for Normalisation (CEN), the European Committee for Electro-technical Normalisation (CENELEC) and the European Telecommunications Standards Institute (ETSI). These institutions collaborate with national institutions. The standards they adopt are directly turned into national standards.¹³⁵ The ECN gathers all national standard setting entities, together with "associate members", i.e. representatives of the private sector.¹³⁶ The ETSI

¹³² Lefebvre CE supra note 125 at 189.

¹³³ Interview Calcia supra note 127.

¹³⁴ See chapter 1.

¹³⁵ This should be nuanced: the European normalisation bodies adopt either "standards" (referred to as "EN") that are mandatory at the national level, or "harmonisation documents" ("HD") that allow national standards to be maintained and some exceptions when technical requirements are equivalent, or "experimental standards" ("ENV") when innovation in the field is fast and or in the making. ENV standards are rendered public but existing standards are maintained ENV should not last more than five years. Lefebvre CE supra note 125 at 179. Nicolas supra note 32 at 46.

¹³⁶ *Ibid.* at 177. The (ECN is an international association that was created in 1961 in Belgium. It gathers 18 from Western Europe (EU & EALE) and the Czech Republic. Its Charter was revised in 1992 to allow the private sector to participate in the work carried out (firms, industrial associations, social organisations) – with no voting right at the moment. Associate members must have a legitimate interest in the normalisation activities at the

gathers telecom national administrations and standardisation organisms, operators of public networks, manufacturers of telecommunication equipment, users of the services and research organisms, plus private consultants in the field.¹³⁷

There are three methods to define standards. In most cases, a technical committee within the concerned body carries out the work from the beginning. The secretariat of the committee is assumed by one of the member countries. The choice of this country is important. Indeed, the technical level, as well as the economic leverage of the sector's industry of this country will sensibly affect the choice of the final standard. This is why corporations encourage their national standard setting entities to obtain a secretariat.¹³⁸ In numerous cases, *de facto* standards already exist. For instance when a reference document is extensively used by the industry and needs little modification to be adopted. Votes are then quickly called. Such reference document can be either adopted at the international level or simply used by firms and professional association at national or European levels. Finally, the process can be transmitted to ISO to work out an international standard.

2.1.2.2 *Defining the EU Eco-label*

(a) Logic of harmonisation

The Commission supervises the "EU Eco-label" program.¹³⁹ At national levels, so-called «Competent Bodies» administer the program.¹⁴⁰ Eight member states still run their

European level, be able to fruitfully participate and must engage themselves to promote normalisation and the objectives of the ECN. Lefebvre CE supra note 125 at 177.

¹³⁷ Created in 1988, ass. Loi 1901 based in France. Like the ECN, the ETSI accepts associate members with no-voting rights, in particular these associates may come from foreign countries. The ETSI nonetheless accepts as full members, organisations from the EU, the AELE, Cyprus, Eastern Europe countries, Turkey & Malta. Lefebvre CE supra note 125 at 178.

¹³⁸ Lefebvre CE supra note 125 at 178.

¹³⁹ The current eco-label was created by *EC Council Regulation 880/92 of 23 March 23 1992 on a Community eco-label award scheme* [1992] O.J.L. 99 [hereinafter Reg. 880/92]. The Commission presented a proposal for a regulation establishing a revised Community Eco-Label Award Scheme in 1996: Com. (96) 603 final [1997] O.J.C. 114, – 96/312COD]. This proposal is submitted to the co-decision procedure (Treaty of Rome art 251). It

own national labelling schemes but all others rely exclusively upon the EU scheme for the products it concerns.¹⁴¹ The Eco-label still lacks notoriety but it already covers about 25 groups of products and has been adopted by 40 manufacturers.¹⁴²

The EU eco-labelling program is undergoing a reform process. The aim is gain transparency and efficiency. At the present time too bureaucratic: it does not meet the manufacturers' expectations and is not compliant with the TBT Agreement.¹⁴³ To improve this situation, several steps are being taken. First, the EU now aims at creating an independent, non-political, eco-labelling organisation. Certification would be opened to foreign parties and products with characteristics beyond the EU label requirements would be promoted as such. The accessibility of the program to medium and small businesses would be improved. The industry, technical organisations are solicited to participate to the reform process to make the result as adequate as possible. The new program might extensively refer to ISO methods. Second, the EU seeks to limit proliferation of national labels on markets. It is believed that this proliferation leads to a growing confusion between labels that have different scopes and purposes.¹⁴⁴

was submitted to the Parliament on May 13th, 1998 [1998] O.J.C. 167 which accepted it with some amendments. The Commission accepted some of the amendments [COM 1999 21 final, [1999] O.J.C. 64]. The proposal is now before the Council.

¹⁴⁰ Competent bodies are generally the national standard setting entities. They must be independent, neutral and respectful of the terms of the regulation (art. 9 of Reg. 880/92 supra note 139).

¹⁴¹ France, Germany, Spain, the Netherlands and Austria, plus the Nordic countries (Denmark, Finland and Sweden that all participate in the Nordic Swan label). EPA Report supra note 106 at B-31.

¹⁴² Manufacturers that have been granted the Eco-label operate under a licence agreement passed with the Competent Bodies. The licence is referred to at art. 12 of Reg. 880/92 supra note 139. *EC Commission Decision 93/517 of 15 September 1993 on a standard contract covering the terms of the use of the Community eco-label* [1993] O.J.L. 243 is also applicable, with a detail of compliance monitoring procedures.

¹⁴³ EPA Report supra note 106.

¹⁴⁴ *Ibid.*

Currently, the Commission is the ultimate decision-maker in the adoption of EU eco-labels. But several bodies intervene in the formulation of the criteria. The Commission takes into account the views of all national Competent Bodies, and relies on their guidance, but mainly seeks consensus. Competent Bodies meet every three months and each time a decision is about to be adopted on a new product label. Many interested parties are invited to these meetings.

(b) Private sector's participation

The industry intervenes not only at the initial stage to submit propositions for new product categories but also during the definition of ecological criteria in the Consultation Forum.¹⁴⁵ The Commission, together with *ad hoc* working groups (i.e. the Consultation Forum and the Competent Bodies), decides on adding new categories to the current list. It refers to market and feasibility studies, and defines categories and product criteria using life cycle assessment techniques. The criteria are generally defined strictly enough to limit the market share of labelled products in a 5-30 % range. Manufacturers apply at their point of entry in the EU or in the EU country of their activity, and must produce an independent testing result. The Commission awards the label on behalf of all Competent Bodies.

A group of experts designed the Guidelines for the Application of the LCA Assessment. They state that "LCA does not replace, or eliminate the need for other considerations and processes within the decision-making procedure aimed at setting eco-label criteria". In setting the criteria, quantifiable data pertinent to the environmental impact of the product is taken into account. But the technical and commercial feasibility of the criteria are also examined and industrial stakeholders' expertise can be required at this point. In 1994 an *ad hoc* working group was asked to draft a criteria for converted paper products¹⁴⁶; the services of a private consulting firm were hired to carry out market

¹⁴⁵ Reg. 880/92 *supra* note 139 art. 5 & art. 6. The Consultation Forum allows producers, distributors, consumer and trade organisations, trade unions and environmental organisations to provide inputs at any point in time.

¹⁴⁶ EPA Report *supra* note 106 at B34ff.

studies and to gather appropriate technical data from stakeholders. Paper product manufacturers and their trade associations refused to provide data on the processing of paper for certain products.

When paper products labels were being defined¹⁴⁷ the criteria retained including examination of the pre-production, manufacture, consumption and recycling phases of the products' life. Concerns were raised on opportunity to integrate such PPM and LCA methods. In fact, the criteria favoured products that contained recycled pulp, a component widely available in Europe. For its part, Brazil could value its programs of sustainable forestry, but produces no recycled pulp only virgin pulp. Brazilian manufacturers complained that the Commission did not allow them to participate in the negotiation of the criteria and that it was favouring European producers, not Brazilian ones.¹⁴⁸ This situation is similar to the situation that gave lieu to the Tuna/Dolphin case¹⁴⁹ between Mexico and the USA in the early 90's: an importing country indirectly imposes internal environmental policies to its trade partner.

2.2 Leverage of MNEs Within International Organisations for Standardisation

International standardisation organisations are arenas where Member countries negotiate and carry out global economic policies. Member countries also subscribe bilateral and regional obligations on common policies defined in more or less general terms.

¹⁴⁷ Commissions decisions establishing ecological criteria for the award of a Community eco-label: EC *Commission Decision 94/924* [1994] O.J.L 364/24; EC *Commission Decision 94/925 of 31 December 1994 (kitchen paper)* [1994] O.J.L. 364/1004; *Commission Decision 96/467 (copying paper)* [1996] O.J.L.192; *Commission Decision 98/94 (toilet paper, kitchen rolls and other tissue-paper products)* [1998] O.J.L.19.

¹⁴⁸ OECD *Eco-labelling Initiatives as Potential Barriers to Trade, Life-Cycle Management and Trade* (OECD, Paris, 1994) at 66-67.

¹⁴⁹ GATT Dispute Settlement Panel on *United States Restrictions on Imports of Tuna* (1992) 30 ILM 1598 [Tuna/Dolphin I] and 33 ILM 839 (1994) [Tuna/Dolphin II].

Multinational corporations find multiple advantages in participating in all forums. First, producers benefit from having their own standards adopted at a global level. In the case of European standards, the procedure of adoption is long and complex, and subsequent modifications are hardly conceivable:¹⁵⁰ producer want to participate in the early stages of their formulation. Second, a producer that manages to turn its own standard into global standards expands its business networks: companies that adapt their production to new global standards may wish to sign licensing agreements or joint ventures, or to merge with companies that already possess the corresponding know-how.¹⁵¹ The transparency requirements of the TBT show their relevance in this context.

The international standardisation process occasionally fails to achieve its goals. Once an international entity has issued a decision or recommendation pertinent to a given technical standard, it lacks enforcement authority at the regional or the national level. The incentive to follow up depends on the will of producers to do so and from the threat of retaliation in case of failure to respect the terms of the TBT Agreement. Scholars recognise that,

*Thus, when product interest groups in a dissenting nation are unified in their opposition to the international standard, they are likely to prevail on their national standardization bodies or national governments to eschew it.*¹⁵²

2.2.1 Technical & food areas

2.2.1.1 Technical field

(a) International Telecommunications Union (ITU)

¹⁵⁰ Lefebvre CE supra note 125 at 196.

¹⁵¹ Sykes supra note 40 at 113.

¹⁵² Sykes supra note 40 at 114.

Telecommunication standards are a prerequisite for compatibility and hence for communication. Created in 1865, the ITU is the oldest standardisation body for telecommunications. With more than 180 Member States, it is now almost universal but it has to compete with emerging regional organisations. Information is a key product and its transfer a condition for the interaction of economies, especially at the regional level: liberalisation of trade demands interconnectivity.

The ITU, headquartered in Geneva, Switzerland is an international organization within which governments and the private sector coordinate global telecom networks and services.¹⁵³

As regards to its structure and means of operation, the ITU is one of the most modern international organisations that currently exist. Its aim is to allow a complete and efficient co-operation of public and private entities. The activities of the ITU are divided into three main sectors, the Telecommunication Development Sector (ITU-D), the Radiocommunication Sector (ITU-R) and the Standardisation Sector (ITU-T). The latter sector is especially dependent upon the participation of the industry, the major source of technical progress.

The ITU “advertises” itself as a global, long-standing international body. It points out the quality and prestige of its recommendations.¹⁵⁴ The ITU is increasingly presenting itself as a private company would. This attitude suggests that it actually face competition and that it must produce results to remain the main standardisation body. The ITU is not only a technical entity but also a platform for experts to meet and exchange information and for companies to access this information.

Influence Membership in ITU-T is a means to actively take part in the Sector's standardization work and thus secure an influence

¹⁵³ Information on ITU online: ITU <<http://www.itu.int/>> last (modified 23 April 1999).

¹⁵⁴ Information on the ITU-T Sector online: ITU <http://www.itu.int/ITU-T/itu-t_info.htm> (last modified 17 December 1999).

*of a company's business goals and policies on the development of standards within its business sphere.*¹⁵⁵

The ITU gathers Member states, their telecommunication authorities, private actors and international/regional organisations.¹⁵⁶ Non-state participants are called "Sector Members". Certain Sector Members must gain the approval of national telecommunication authorities before being registered as such at the ITU. This is the case of most private actors that increasingly join competitive national markets. Frequently, Member states mandate Sector Members to act on their behalf.¹⁵⁷ Agency capture problems can appear.

The budget of the ITU consists mainly in the contribution of Member States. Sector Members must contribute as well. They choose their level of contribution¹⁵⁸ but their level of contribution does not interfere with their rights and obligations. The amount of units a company decides to pay can influence the image it has on telecommunication markets. The impact of contributions should be apprehended in view of the effective composition of the ITU.

The United States and its agents participate extensively to standardisation activities. As regards to Europe, France, Italy, Germany and the United Kingdom are major participants. Canada and Japan are also active Members. Each of these countries,

¹⁵⁵ *Ibid.*

¹⁵⁶ ITU Convention art. 19 Participation of Entities and Organizations Other than Administrations in the Union's Activities. Point 228 to 231. The following entities and organisations are invited to participate: (a) recognized operating agencies, scientific or industrial organizations and financial or development institutions which are approved by the Member concerned; (b) other entities dealing with telecommunication matters which are approved by the Member concerned; (c) regional and other international telecommunication, standardization, financial or development organisations.

¹⁵⁷ ITU Convention art. 19 point 239.

¹⁵⁸ ITU Constitution art. 28 points 159 & 160. Sector Members voluntary chose to contribute between ½ up to 40 units.

especially the United States, have several private companies participating.¹⁵⁹ As a result, the financial leverage of these countries and their multinational enterprises on the operation of the ITU is considerable. The ITU is an international (governmental) organisation, a satellite of the United Nations, which is mainly financed by the private sector. In this sense, the ITU can be qualified of modern, liberal organisation. It must consequently face the challenges of competition.

ITU-T issues “recommendations” that are non-binding in nature.¹⁶⁰ These recommendations are nonetheless carried out on a global basis, because of the credibility and authority of the participants who hold a considerable amount of technical telecom patents. Competition between participants is fierce and it is thus important for some of them to encourage the development of parallel standard setting entities at regional levels. Members call for a reform of the ITU structure, with further room left to private players in the decision making process. A direct registration at the ITU level could be substituted to the current system of national states’ pre-approval.¹⁶¹ Reviews on good and bad practices of the Members in the field of telecom services (e.g. universal access) as well as more efficient dispute settlement mechanisms should also be put in place.¹⁶²

(b) ISO

¹⁵⁹ Examples of Sector Members: United States: AT&T, HP, Bell, Microsoft, Iridium, Global One, Sprint Communications. France: HP, France Télécom, Bouygues Télécom, Cegetel, Thomson-CSF, Paris, 9 Télécom Réseau. Canada: AT&T Long Distance Services S, Odyssey Telecommunications Intl Inc., Bell Canada, Téléglobe Canada inc. A comprehensive list of ITU Members is available online: ITU <<http://www.itu.int/ITU-T/members.html>> (visited 20 December 1999).

¹⁶⁰ As regards to the implementation of ITU instruments and ITU recommendations, the following texts apply: ITU Constitution art.6, art. 39 point 190, art 44, 45.

¹⁶¹ Interview with Pekka Tarjanne, ITU Secretary-General. ITU News supra note 31 at 7.

¹⁶² See ITU Executive Summary, First Meeting of the Reform Advisory Panel (RAP) Geneva, 13 Octobre 1999 online: ITU <<http://www.itu.int/council/Reform/dm1091e/rap-execsum.html>> (last modified 29 October 1999); Strategic Plan 1999-2003 online ITU <<http://www.itu.int/stratpol/plan/1999-03/sp9903e.doc>> (visited 27 December 1999).

ISO is a key player in the removal of technical barriers to trade. Its extremely intense activity with a decentralised organisation based on an important participation of governmental entities contributes to its longevity. ISO is a federation of standard making bodies. It is not a governmental organisation; though participating bodies frequently are under governmental authority.

Going beyond its traditional role, ISO has recently issued two series of standards that refer to processes and production methods (PPM). The ISO 9000 series attest that production methods respect quality requirements. The ISO 14000 series attest that production processes conform to environmental soundness criteria. Certification is granted upon assessment by an independent third party.

ISO9000 certification is now spread all around the world. National organisations, like the AFAQ¹⁶³ in France, have adopted them as criteria for quality assessment. ISO work has thus been directly transposed into French law, including the ISO gradation of quality levels (i.e. 9001,9002 and 9003/stricter). ISO1400 success is not yet assessed.

All European standardisation bodies participate in ISO activities. The American National Standards Institute, ANSI, represents the United States in the ISO.¹⁶⁴ The credibility of the ANSI is unquestionable, and its standards are most respected around the world, a factor of success for the American economy.¹⁶⁵ At the ISO level, ANSI represents all US standard setters. The process of setting standards is mainly technocratic. The participation of industrial powers is only natural because international standards are “derived from standards already used in their production processes”.¹⁶⁶

¹⁶³ Association Française pour l'Assurance de la Qualité (Quality Certification National Association).

¹⁶⁴ ANSI does not itself issue standards but certifies certain national bodies as standard setters in the country if they respond to criteria of acuity, transparency and balanced representations. The standards they issue are vested with the authority of ANSI standards. Krislov supra note 110 at 237.

¹⁶⁵ Krislov supra note 110 at 237.

¹⁶⁶ Krislov supra note 110 at 23, 24.

Some international agreements have been concluded between ISO, the IEC and the ECN.¹⁶⁷ They aim at improving transparency and at allowing mutual delegations of standardisation work. This helps preventing complaints of protectionism from the USA and Japan. These two countries are known for their minimal participation in the international organisation for standardisation and for the very limited use they make of international standards except in key sectors that affect their export policies.¹⁶⁸

2.2.1.2 Trade in food products

(a) Field of operation

The Codex Alimentarius is a collection of standards for food safety and food labels. ISO used to be the organisation that designed food standards for international trade. But the United Nations rapidly decided to reform the system and transferred this task to the newly created Food & Agriculture Organisation and to the World Health Organisation. They created the Codex Alimentarius Commission in 1962.

The Codex Commission is an intergovernmental body that gathers national food and health agencies to define trade, safety and sanitary standards. Industrialised countries seek to render these standards risk free, as illustrated by the current French and German embargo on the British beef, following the mad cow scandal. The Codex Commission pursues similar goals. It works with the WHO and the FAO, which both assist developing countries in drafting comprehensive and secure food and plant regulations.

(b) Structure of operation¹⁶⁹

The Codex Alimentarius Commission operates as most international standardisation bodies do, by delegating preparative work to expert groups that will submit projects to the Members' representatives. Certain observers participate, with no voting rights, to the

¹⁶⁷ Dresde Agreement IEC-ECN and Vienna Agreement ISO-ECN (27 June 1991).

¹⁶⁸ Lefebvre CE supra note 125.

¹⁶⁹ The Rules of Procedure of the Codex Alimentarius Commission are available online: WHO <<http://www.fao.org/waicent/faoinfo/economic/esn/codex/manual/rules.htm>> (visited 20 December 1999).

activities of expert groups. These observers can be public or private in nature. The following organisations have an observer status at the Commission, among about 150 others: the European Feed Manufacturers Association, the Pan-American dairy Association, Biopolymer International, International Association for Cereal Science and Technology, the European Organisation for Quality Control.¹⁷⁰ The participation of these observers is paramount for two main reasons. On the one hand, they are the main financier of R&D in the field and boosters of innovation. On the other hand, their activities can be slightly controlled thanks to their presence within the Commission.

Certain years, when funds from the WHO and the FAO to the Codex Commission were lacking, the private sector stepped in to provide financing.¹⁷¹ Nowadays, the Codex Alimentarius Commission has the reputation of being dominated by producer groups. It is perceived that food safety standards consequently err in exposing consumers to safety hazards. It is mainly for this reason that national regulations in industrialised countries tend to be stricter than the international standards issued by the Commission.¹⁷² The current European debate on the commercialisation of GMOs from the USA, Canada and Australia illustrates this tendency.¹⁷³

2.2.2 Role within intergovernmental organisations with a political vocation

Multinational enterprises are solicited to participate in the work of international political organisations. It is in their interest to participate because this is where governments design major economic policies. Ultimately, it is up to the firms to affect

¹⁷⁰ The status of observer at the Codex Alimentarius Commission is comparable to the status of observer at the FAO, see Codex Commission Rules of Procedures VII, points 4 & 5. A comprehensive list of the Codex Observers is provided online: WHO <http://www.fao.org/waicent/faoinfo/economic/esn/codex/manual/org_list.htm - E9E2> (visited 20 December 1999).

¹⁷¹ Sykes *supra* note 40 at 59.

¹⁷² Sykes *supra* note 40, at 62.

¹⁷³ Marre *supra* note 56 at 153 & Annexes 14, 22.

part of their budget to participate. Professional associations can be delegated this task, as well as professionals hired to carry out lobbying activities.

For a corporation, being established in several parts of the world gives the possibility of being consulted in several regional political organisations.¹⁷⁴ First, this promotes the interests of the firm in the latter organisations. Second, despite its global scope, the multinational corporation still has the character of its home country, and in a sense represents the interests of this country worldwide.¹⁷⁵ The political influence of home countries is reinforced in the corresponding areas.

2.2.2.1 International organisations with a political and economic vocation

(a) World Trade Organisation

At the present time, private parties are not given any representation status at the WTO. The WTO is before all an intergovernmental organisation. Nonetheless, private companies delegate agents on the site of negotiation, in corridors.¹⁷⁶ The industry is thus effectively present at international commercial negotiations. This practice stems from the very success of the GATT. It is questionable at first sight because negotiating international trade accords does not enter into the attributions of corporations. However, liberalisation of trade aims at granting further autonomy to private players. It is finally logical that they participate in decisions that directly affect their activities. The point is

¹⁷⁴ Alcan participates in the activities of the OECD. In particular, it strongly promoted the adoption of the Code of Conduct on Bribery and participated in the work achieved on the environment. Interview Alcan supra note 97.

¹⁷⁵ At the present day, and as confirmed by the representatives of the corporations studied in this thesis, multinational corporations are identified with their nationality. HP, Nike, GM, Chrysler are American. Renault, Shell, Elf are European. Interview HP supra note 30. Interview Calcia supra note 133.

¹⁷⁶ Le Monde, 23 November 1999, supplement on WTO. Interview of Brad G. Figel, legal adviser for international trade, director of governmental affairs at Nike. "Je vais participer à ce sommet [Seattle] en tant qu'observateur, comme d'autres entrepreneurs. Cela permet d'influencer les négociations, soit à travers des associations – Nike fait partie de la Chambre américaine du commerce et de la Fédération nationale de la vente au détail –, soit en parlant directement aux négociateurs." [hereinafter Nike].

that companies that participate into trade policy decisions should also accept corresponding responsibilities in their own fields of activities. They are not the only ones affected by trade accords: people are as well.

In the whole, restraining from being influenced by lobbies falls upon the shoulders of the negotiators themselves. These negotiators are trained professionals who already have a clear understanding of the conflicts of interests that rise from trade negotiations.¹⁷⁷ It is up to them to carefully balance and defend conflicting interests. For their part, MNEs can help by better defining and respecting modern and responsible commitments.

(b) United Nations

Today, the United Nations is an international organisation dedicated at providing the soft infrastructure for the global economy. In the 80's, the UN was viewed as an international platform for the promotion of essentially political, "universal" goals. During the 70's, it served as a forum for developing countries to express their concerns and identity. In the 90's, the United Nations was perceived as dedicated at promoting a better repartition of wealth worldwide and at protecting human rights and the environment. The United Nations faces the challenge of its financial survival. Indeed, many member States do not honour the financial participation due. Certain countries have important debts to the United Nations but have redirected their support to DCs by renouncing to the latter's debts: negotiation grounds have evolved.

Negotiations between DCs and industrialised countries occur in many arenas. All along its mandate, Secretary General Koffi Annan called for a co-operation of the United Nations with the private sector. A couple of projects are carried out according to its will by the U.N. satellite organisations. These projects remain insufficient in view of the identified development needs of LDCs.¹⁷⁸

¹⁷⁷ National legislation is passed to define the conduct of the negotiators at the WTO. E.g. USA/Euro

¹⁷⁸ A public information release published in June 1998 mentioned no more than 20 projects (Published by the United Nations Department of Public Information, DPI/1820/Rev.1 June 1998 online: UN <<http://www.un.org/partners/business/cases.htm>> [hereinafter UN Partners]. Co-operation of the private sector

In certain cases, the benefits private actors draw from co-operation are striking. Insurance companies, which bear the costs of environmental disasters and other incidents resulting from uncontrolled human activities, participate in the UN Environment Programme to increase their corporate customers' awareness. In Hungary, food production companies solicited the UNIDO's¹⁷⁹ assistance to upgrade their quality standards to comply with EU requirements. The UN and the ICC issued in 1998 a joint statement on the co-operation of the industry with the United Nations. The following extract illustrates the challenges brought by such a co-operation:

There is great potential for the goals of the United Nations promoting peace and development -- and the goals of business -- creating wealth and prosperity -- to be mutually supportive. Development and peace are essential for trade and investment to occur and for business to grow. At the same time, thriving markets are a precondition for creating jobs, improving standards of living, spreading more widely the benefits of globalization and integrating developing countries into the world economy¹⁸⁰.

and governments is a delicate task. Where it seems logical at first sight that the holders of important resources, i.e. MNEs, should participate extensively in improving living standards, realities render the task delicate. Political considerations frequently prevent governments from seeking extensive support from MNEs. The nationality of investors is important in FDI contexts. Furthermore, MNEs can influence sensitively national financial markets, with stockholders may prefer annual dividend distribution to investment in local development.

¹⁷⁹ United Nations Industrial Development Organisation, Vienna. About 30 Hungarian companies have adopted the UNIDO "Total Quality Management" model and 700 technicians have been trained to eliminate health hazards through better food manufacturing processes. *Ibid.*

¹⁸⁰ Joint Statement on Common Interests by UN Secretary-General and International Chamber of Commerce, On 9 February UN Department of Public Information 1998 Press Release SG/2043 Online: UN <<http://www.un.org/partners/business/iccun.htm>> (date accessed 10 October 1999).

2.2.2.2 *International trade tribunals*

The WTO is an intergovernmental organisation. Companies are in no means allowed to participate in its operation. They have unique recourse to exert pressure on national governments to launch dispute settlement procedures or to enter into negotiation with non-complying Members. In a sense, companies are placed under the “diplomatic protection” of their home state. Governments can decide that national policies and interests national should supersede the specific interests of a prejudiced national producer.

(a) USA

In the United States, companies are given a double opportunity to challenge their foreign competitors’ practices. They can convince the government either to launch a WTO DSB procedure or to resort to the Section 301 tools. Section 301 dates back to the 1974 Trade Act. It was modernised in 1979, 1984 and 1988. This section allows the US trade representative to take retaliatory actions of all nature against non-complying countries. It was the legal basis for the US retaliation on EC food product imports before the Beef hormone case was transferred to the WTO.

Section 301 It is one of the most controversial instruments the USA has developed. The President and the US Trade Representative (USTR) are, in certain cases, almost forced to retaliate when asked to do so by complaining companies. After a number of modifications were brought to the mechanism, today the USTR has disposition of the action, under the direction of the president. The use of Section 301 is also now nearly mandatory and the president has little opportunity but to retaliate. Section 301 retaliatory measures generally to negotiations between the USA and foreign states.

(b) Europe

The European Union was recognised the capacity of representing member countries at WTO (then the GATT) in 1979. Regulation 3286 of 1994 on barriers to trade put in place a

system of complaint to the Commission.¹⁸¹ Companies launch a complaint and the Commission initiate an inquiry. Only the Commission decide whether or not to launch a DSB procedure. At national levels, producers can exert pressures on government to challenge their trade partners that violate their obligations.

The E.C.J. refused in 1972 to recognise a direct effect to the GATT.¹⁸² It confirmed this decision in 1994 and 1995.¹⁸³ It is interesting to note that the question of GATT direct effect was raised. The EU, as do the United States and most WTO Members, believes that it would be premature to grant a direct effect to the GATT obligations. It is believed that these obligations are defined in too broad terms. Beside that, Members apparently did not want to reach this level of integration for GATT obligations. It is possible that direct effects be one day recognised to GATT obligations, in a decade or two from now.

2.3 Self-Regulation of MNEs

The law student can view self-regulation of multinational regulations as an interesting phenomenon... Corporate executives, on their part, simply define this so-called "phenomena" as casual "corporate management". Still, the point is that in a legal essay, it remains appropriate to deal with "self-regulation" - not "corporate management" - and to try and demonstrate that it is an interesting reality...Self-regulation consists, notably, in adopting non-mandatory standards, obtaining labels and drafting and implementing corporate codes of conduct. Actually, corporations develop many internal policies that can all be apprehended from a legal viewpoint, but only a couple of them being presented to outsiders.

¹⁸¹ EC Council Regulation 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy [1994] O.J.L. 349/17.

¹⁸² E.C.J. *International fruit company* 21-24/72 [1972] E.C.R. 1219.

¹⁸³ E.C.J. *Germany v. Council* C-280/93 [1994] E.C.R. I4973 (banana case) and E.C.J. *Chiquita Italia* C-469/93 [1995] I4533.

Corporations aim at defining their own rules before the legislator imposes stricter ones. They thus seek to preserve a margin of flexibility. They commit experts and professionals to set adapted rules. "Self-regulations" stick to the needs of corporations by setting meaningful and realistically achievable goals. They are drafted in technical terms familiar to the employees and easily implemented. As regards to technical standards, they generally have a better cost-efficiency ratio than technical regulations. They also are easily adaptable to the evolution of the technology or the market. Corporations all the more comply with technical standards that they financed their formulation process. Last but not least, competition is a factor of emulation between corporations.

2.3.1 Use of voluntary standards and labels

Multinational enterprises have internal departments dedicated at following the evolution of labels and technical standards for all countries where they operate. The budget allocated to these departments from a year to another is a good indication of the firm's involvement in standards and labels negotiations. In general, most of the resources are allocated to research departments to develop proprietary standards that may or may not be submitted as candidates to become national, regional or international standards. As regards to eco-labels, the policy of the firm is more dependent upon the consumer's responsiveness to environmental arguments.

2.3.1.1 ISO

Executives admit that obtaining at least one ISO certification has become necessary to maintain the firm's image. In certain cases, one actor in a given sector took the initiative to obtain environmental certification, and competitors followed up.¹⁸⁴

(a) The impact within the company

¹⁸⁴ In France, Ciments Calcia was a sector precursor by obtaining ISO14002 certification. All sites are in the process of becoming certified. Competitors followed up and based their policies on further respect for the environment. Interview Calcia supra note 133. Study on the Batimat Fair Paris, Nov. 10th, 1999.

Certification brings in important changes within a company. In preliminary audit phases, all departments are involved in a common effort to prove their environmental responsiveness. Ciments Calcia in France and Alcan in Canada hire one expert per site, plus a support team in preliminary stages, to supervise the process. Certification costs are frequently considered as excessive, especially in preliminary phases, but still represent relatively minor expenses.¹⁸⁵

Certification must be renewed annually. The constant discipline thus imposed by the program fosters permanent improvements of environmental and quality practices.¹⁸⁶ For this reason, a highly specialised technician is needed to supervise the program.¹⁸⁷ If well conducted, the program is also a factor of social cohesion. This is important because the employees are the best conveyers of the firm's image to the public.¹⁸⁸ Despite all these positive aspects, ISO certification engenders an administrative work that sensibly alters its popularity.¹⁸⁹

The ISO certification process leads to profound evolution of internal management techniques, an evolution that has little to do with external legislative incentives. The mere logic of progress injected into the firm engenders further profit by itself. The idea of "doing always better" is undertaken by the whole company: further quality, better environment, and progressive marketing approaches, further involvement of the employees in daily tasks. All this because innovation is at stake.¹⁹⁰

(b) The impact outside the company

¹⁸⁵ Interview Calcia supra note 133, Interview Alcan supra note 97.

¹⁸⁶ Interview Calcia supra note 133.

¹⁸⁷ Both Alcan and Ciments Calcia made this remark. Interview Calcia supra note 133. Interview Alcan supra note 97.

¹⁸⁸ Interview Alcan supra note 97.

¹⁸⁹ The global cost of obtaining a certification for a alumina transformation site is of about Can\$ 10 Mln. Most of this cost corresponds to the allocation of working time to the process.

¹⁹⁰ Interview Calcia supra note 133.

For industries that have a strong, visible impact on the environment, it is important to eradicate a decades old image of negligent polluter. For alumina production, certification efficiently helps to convince that process and production methods are “clean”. Beside the image of the firm stands the image of the product. The consumer should consider cans as clean and environmentally sound. This positive perception is greatly fostered by the use of the “Recycle” logo on cans and by various campaigns on ISO certification and environmental efforts.¹⁹¹

Certification helps to attest of the good will of the company in the quality and environmental fields. This is important in the relations it has with regulatory and controlling institutions. Certification is an efficient counter argument to denunciations of unsound practice calls for stricter regulations.¹⁹² Companies favour a reduction of bureaucracy, controls, and regulations,¹⁹³ but not their disappearance.

Certification has an impact on the relations of the firms with authorities of control, i.e. judges and administrations. To defend itself in an environmental and product liability action, a Canadian firm will use the “reasonable doubt” defence. In doing so it will refer to its certification, to try and convince the judge that the firm could hardly do better, and that the degree of its fault is, after all, limited. On the contrary, the administration agents in charge of controlling corporations only checks that strict performance criteria are met, not that ISO environmental criteria are met. ISO certification is on management systems, not on performances.

ISO certification helps the company to fight against international competition by attesting that they attain a level of quality that foreign competitors cannot prove to

¹⁹¹ Interview Alcan supra note 97.

¹⁹² Such comments are issued in particular when new legislation are being discussed, and when environmental accident occur. Interview Alcan supra note 97.

¹⁹³ Alcan regularly tries and convince authorities that the private sector should be granted further autonomy in conducting its activities as long as it is able to prove that its environmental policies are efficient. Alcan defends the idea that controls and surveys of the practices of the firms should be maintained to ensure and demonstrate that the efforts are maintained. Interview Alcan supra note 97.

have.¹⁹⁴ The trust of the clients, partners and authorities into the company increase considerably.¹⁹⁵ The image of the corporation and of the branch improves.

2.3.1.2 Use of labels

At first sight, labels are in a viscous circle: they exist if leading companies adopt them, they remain if sales of labelled products increase. As standards though, they have technical and commercial consequences attached to them.¹⁹⁶

(a) The consumer factor

In industrialised and newly industrialised countries, consumers' habits do not show any serious inclination for label standards.¹⁹⁷ Prices and the quality remain the main factors of purchase. Market inquiries conclude that most consumers "say" they accept to pay premiums for environmentally sounder products. Markets statistics show that environmentally unsound but price-friendlier products remain best sellers.¹⁹⁸

Professionals concord to say that there is not yet real environmental consumers, neither in Canada nor in Europe. Except possibly in certain countries, such as Germany, the Netherlands or the Nordic countries. Despite that, environmental awareness increase in reaction to major environmental accidents: following the Exxon Valdez drama, Exxon lost part of its clients, so did Shell in a number of occurrences.¹⁹⁹ But this did not to happen to Total after the Erika accident in 1999. It should nonetheless be noted that, following international campaigns it is now a decade that consumers care more for the

¹⁹⁴ Interview Calcia supra note 133.

¹⁹⁵ All the Cement Calcia sites are ISO9002 certified, 90% are ISO14002 certified. Interview Calcia supra note 133.

¹⁹⁶ See text of note 36. Interview HP supra note 30.

¹⁹⁷ In a majority of developing countries, most consumers do not yet afford to select products in regards of the environmental soundness of their process of production.

¹⁹⁸ Interview HP supra note 30.

¹⁹⁹ Interview Shell supra note 96.

rainforests than for gas and petrol extractions.²⁰⁰ Interestingly, labels criteria are viewed as serving the interests of producers. Furthermore, individual consumers can have different conceptions of environmental friendliness.

It should be stressed that labels are gaining ground, and have a chance succeed. For food security, the situation is slightly different, French consumers are polled to be in favour of quality labels guaranteed by public authorities.²⁰¹ Labels attesting that products have been prepared according to sound social practices appear as well.²⁰²

(b) The company's leadership

The companies viewpoint totally differs from that of the consumers. Producers can have stronger incentives to opt for environmentally sound products: they better perceive the immediate impact their activities have on the environment. This is why they can require their suppliers/distributors to be certified, but should then strictly respect competition rules. Individual consumers do not seriously believe that the mere fact of buying one labelled product protects the environment. Producers are used to measuring their economic influence on employment and well fare. Whatever the size of their business, producers know the value of one single employment created in declining areas.

As employment policies, sound environmental and quality management stem from the leadership of the executive. Another Calcia example can help to understand the phenomena. For eco-packaging in France, corresponding labels could only be defined if a whole industrial branch adhered to the idea. For cement, one company took the initiative despite others' resistance and the profession finally opted for certification. But only an extremely low part of the production (less than 2%) was concerned.²⁰³

²⁰⁰ *Ibid.*

²⁰¹ A poll conducted by IFOP, a French regulated polling company, for Le Monde at the end of October 1999 shows that 75% of French people would follow a food quality label if applied by governmental authorities. Le Monde, November 22 1999 at pp. 1 and 10.

²⁰² Marre *supra* note 56 at 98 and 109.

²⁰³ Interview Calcia *supra* note 133.

2.3.2 Private codes of conduct

2.3.2.1 Importance and legitimacy of codes of conduct

(a) Sources and scope

There are different sources of codes of conduct.²⁰⁴ International organisations have prepared or adopted codes of conduct addressed at both their member governments and corporations. These codes have the form of conventions, formal resolutions or declarations. Private codes appeared at corporations' and branch levels in the 70's and early 80s'. Private codes are inspired by international ones.

A minority of corporations drafts their own codes.²⁰⁵ In fact, mainly the biggest. They have improved their image, but the public's trust in their activities remains fragile. Any misbehaviour or simply an accident caused by a medium sized discreet company can affect the image of a whole branch.

Branch associations frequently draft guidelines used as models by individual member companies. Codes can have a specific inter-sector scope, like the International Chamber of Commerce Business Charter for Sustainable Development²⁰⁶ and other ICC Codes.²⁰⁷ They can an industry scope, like the International Federation of Pharmaceutical Manufacturers Association Code.²⁰⁸

²⁰⁴ John M. Kline, *International Regulation of Transnational Business. Providing the Missing Leg.* In UNCTAD, *Companies Without Borders*, (London: International Thomson Pub., 1996) at 305 [hereinafter Kline].

²⁰⁵ Kline supra note 204 at 315.

²⁰⁶ The ICC Charter for Sustainable Development was formally launched in Rotterdam in April 1991, during the Second World Industry Conference on Environmental Management online: ICC <<http://www.iccwgo.org/home/environment/charter.asp> > (date accessed 20 November 1999) [hereinafter ICC SD Charter].

²⁰⁷ ICC International Code of Marketing Practice (ICC Pub. No.275, Paris, 1974), ICC Guidelines for International Investment (ICC Pub. No.272, Paris, 1972).

²⁰⁸ Kline supra note 204 at

The PBEC Charter²⁰⁹ enounces principles clearly negotiated between investors and host governments. It refers to traditional issues of expropriation and compensation, intellectual property, repatriation of profits and taxation. Their respective obligations are carefully balanced and negotiated:

"Governments... realizing that such investments must be profitable, should develop policies conducive to successful business enterprises"

*"International investors should fully recognize the sovereign rights and responsibilities of economies and must accept reasonable obligations that are placed upon business enterprises in the domestic interest."*²¹⁰

The UNCTC (United Nations Commission on Transnational Corporations) is a forum of collaboration of private and public entities. So are the OECD Guidelines for Multinational Enterprises.²¹¹ In addition the UNCTAD Code on Restrictive Business Practices, the UN Consumer Protection Guidelines, the WHO Code on the Marketing of Breast-Milk Substitute²¹², the ILO Tripartite Declaration on TNCs and Social Policy²¹³ represent interesting initiatives.

²⁰⁹ Pacific Basin Economic Council, Pacific Basin Charter on International Investment, 16 November 1995 UNCTAD *International Investment Instruments: A Compendium*, Vol. III (New York: UN 1996) [hereinafter PBEC Charter]. The PBEC gathers representatives from 20 national governments countries and members of the business community. The Charter sets a series of principles addressed alternatively to governments and to international investors. It has all the characteristics of a fully negotiated document.

²¹⁰ PBEC Charter supra note 209 at 376.

²¹¹ UN TNC Code & OECD Guidelines, see supra note 12.

²¹² WHO, Doc. WHA 34.22 (1981) available.

²¹³ ILO Doc. GN 204/4/2, UN Doc. E/C/.10/0/AC.2/3 (Annex-II)(1977).

The success of codes of conduct can be important. But it will be all the more important that parallel markets for “socially sound”, “environmentally responsive”, or “ethically sound” products develop.

(b) Codes of conduct and corporations’ citizenship

Alcan International’s code of conduct²¹⁴ pertains to environmental policies, the prevention of corruption, and security at work. The corporation strictly follows it. According to executives, its impact on the firm’s policies is comparable to that of regulatory requirements in these fields. The code is successful because it strictly responds to the firm’s imperatives and abilities. Alcan carries out its code because the subsequent evolution of its behaviour reduces the gap between new legal requirements issued at a point in time and the practice of the firm already carried out when these legal requirements are enforced. Alcan pays extreme attention to the progress the citizens’ expectations to better anticipate on their future demands.²¹⁵

Nike’s code on the age of employees in developing countries is controlled and reviewed by external auditors. NGO’s are invited to carry out independent controls on working conditions within the facilities. They co-operate with the firm to identify and respond to the employees’ needs.²¹⁶

One of the firsts companies to adopt an internal code, Dupont now advises other corporations on code management. At the turn of the Century, Dupont used to manufacture weapons. It thus had address security at work very carefully.²¹⁷ The success

²¹⁴ Alcan Ltd. Code of Conduct online: Alcan <<http://www.alcan.com/about.nsf/subtopic-E>> (last modified October 1996) [hereinafter Alcan Code of Conduct].

²¹⁵ Interview Alcan supra note 97.

²¹⁶ Mr. Figel refers to programs of collaboration between NGOs, the World Bank and producers. He also mentions a task force created in the United States “The apparel industry partnership”, dedicated at designing model methods of creation and application of codes of conducts for private firms. Nike supra note 176.

²¹⁷ At the end of the XIXth Century, many Dupont’s weapons manufacturing facilities exploded, killing hundreds. One of these explosions killed several of the descendants of the founder. Dupont’s policy then came to a turning point. As of this date, Dupont adopted its current zero-accident policy, and strictly respected it. This

of a code of conduct depends upon years of strict implementation that progressively modify internal habits.

Ethical funds, i.e. funds where investors select stocks according to social, environmental and ethical criteria, expand their influence. Big polluters can no longer avoid justifying their choices. They have to provide potential investors with acceptable policies, data and facts information.²¹⁸ Ratings of all stocks on exchange markets could soon depend upon the ethical and social achievements of corporations, if ethics bring in profits.

An interlocutor stressed that he preferred the notion of “responsible company” to that of “citizen enterprise”.²¹⁹ The latter notion is controversial. Its inherent difficulty is that the prime object of firms is to carry out profits. Being a citizen, for a company, engenders costs that do not directly serve this objective. Furthermore, the notion of citizenship generally implies involvement in national politics. Finally, citizenship supposes right to vote. Alcan Canada²²⁰ used to have a voting right, last Century. It voted on behalf of its employees. Nowadays, working forces within firms are organised according to a logic close to that of the democratic separation of powers.

Firms interact with their social and economic environment. This leads to face complex, contradictory elements. A “responsible enterprise” in France would care for local employment, respect its surroundings, and decrease its emissions and nuisances. A corporation can be responsible if it has an interest in having such a stringent behaviour.

policy is now famous and is referred to by many industrial groups. Interview Calcia supra note 133. Interview Shell supra note 96.

²¹⁸ All interviewees mentioned the importance of ethical funds before being asked the question. Interview Calcia supra note 133. Interview Shell supra note 96. Interview Alcan supra note 97. Interview HP supra note 30.

²¹⁹ Interview Calcia supra note 133.

²²⁰ Interview Alcan supra note 97.

2.3.2.2 *Legal analysis, enforcement of considered code*

The main characteristic of codes of conduct; whatever their source, is that they are not mandatory. Unless they are effectively implemented and shown to be implemented, they can amount to useless declarations of good will.

(a) MNEs' viewpoint

The executives met consider their corporate codes as good instruments and guidelines for sound policies. Dupont set an example by enforcing its code on security at work with extreme stringency. Working attitudes have changed within Dupont after decades of strict implementation of the code.²²¹

Codes adopted by international organisations, call for a different approach. MNEs can conform to their provisions and can transpose them in their own guidelines. A generally worded set of standards, adapted to the realities of daily operations of firms and regularly up-dated have better chances to become a model code than a mandatory, rigid code adopted by consensus. International organisations cannot regulate MNEs worldwide. They can influence but cannot impose practices. The conduct of firms has been considerably affected by such soft regulations. It is continuously influenced by ongoing negotiations within boardrooms and international organisations²²²:

The growth of transnational enterprises and of economic and social integration will guarantee an important role for an international organ of consultation and norm formulation. The

²²¹ Interview Calcia supra note 133. When an accident occurs, whatever the consequences for the victim, she can be sanctioned if she violated the code. The whole group is informed. The CEO himself contacts the victim. The result is an awareness of the whole community within the corporation.

²²² Seymour J. Rubin, "Transnational Corporations and International Codes of Conduct: a Study of the Relationship between International legal co-operation and economic development" *American University Journal of International Law & Policy* (1995) vol. 10:4/ 1275 at 1278 [hereinafter Rubin].

*relationship between international legal cooperation and economic development remains important.*²²³

(b) States' viewpoint

The successive failures of the UN TNC Code (1992) and of the OECD Multilateral Agreement on Investment (1998) suggest attest that the international forum is not adapted to the regulation of MNEs. Their provisions are too general, their ratification is almost impossible and their enforcement hardly conceivable. "Zebra" codes could have a certain impact (i.e. combination of mandatory provisions in the form of international agreements and of non-binding principles),

*The more likely prospect would seem to be that certain areas, addressed only in general terms in the code, might be developed further in specialised (meetings into standards that could be the subject of collateral and perhaps binding agreements).*²²⁴

Codes of conduct are referred to in arbitration forums. Once again, to lighten their liabilities and to prove that they followed sound practices foreign investors conflicting with host governments can refer to their codes of conduct. Arbitration contexts are another way of rendering voluntary regulation profitable. Arbitrators, though at the risk of discouraging their clientele, could develop precedents on code enforcement. They would certainly do so with much precaution.

Despite these inherent difficulties, the legal effects of voluntary codes are not negligible. First, unilateral declarations create international law. Second, voluntary instruments such as the OECD Guidelines set standards of conduct that can be observed, perhaps as much as if they were mandatory in nature, by the companies they are addressed to. Finally, non-binding codes may serve as basis of interpretation of other

²²³ Rubin supra note 222 at 1284.

²²⁴ Rubin supra note 222 at 1285.

binding agreements. Such codes may become de facto sources of law.²²⁵ Beside that, the term “voluntary” only refers to the international status of the instrument. National government may decide to turn part or all of them into law. Voluntary codes can have a legitimisation effect. Notably, nations that adopt and adhere to such codes are estopped in attacking any acts that are taken in respect of the code.²²⁶ Finally, codes can be the source of customary law.

²²⁵ *Ibid.* at 1285.

²²⁶ Principle of good faith in international relations: a nation can legally be bound by its declarations. Nuclear Test case (New Zealand v. France) [1974] ICJ Rep. 457.

3. RESULTING ROLE OF MNEs IN LEGAL DEVELOPMENTS

Laws in force in a given country mirror the nation's history, its traditions and preferences, as well as its future, its projects and fears. Because they have a direct impact on our consumption habits, MNEs participate in shaping our societies. Consumers and producers to a certain extent compete to keep control of tastes and habits. The Canadian Government's promotion of Canadian cultural contents, cultural war between the United States and France all illustrate this competition.

In liberal contexts there could have a natural interaction of MNEs and national entities. Standards, regulations and labels are one of the fruits of this interaction. They can be turned into mandatory instruments in more than one way, hence the need to carefully supervise their sources.

3.1 Traditional Repartition of Powers in the Legal Order

3.1.1 Agency capture

Agency capture is a phenomenon that is generally dealt with by administrative law and access to information acts. It is especially accurate in contexts where private and public entities extensively collaborate. Agency capture has been defined as follows:

*When administrative agencies have scarce resources, they are forced to rely on private interests for information. These private interests are frequently the very industries regulated by the agency seeking the information, and as a result, agency actions are largely controlled by the industry.*²²⁷

²²⁷ Rosenbaum supra note 37 at 11. The response of most countries to these difficulties is the creation of transparency requirements, notice and comment procedures, and private rights of access to government

The phenomena of agency are also the mere representation of persons by other persons. In negotiation contexts, agents can be given specific directions or can be mandated to defend public interests. Agency relations leave room for the interference of private stakeholders at intermediate stages, hence to mandate deviation.

3.1.1.1 Agency capture at the international level

(a) WTO negotiations

The credibility of international trade negotiation rounds partly depends upon the strict respect of their mandate by the negotiators. Horizontal agency reflects the structures of central governments and the relations of bureaucrats and legislators with national interests groups. All nations have a *de facto* division between the legislative and the executive. Within the executive there is a division between politically accountable officials and career bureaucrats. The latter generally participate in international trade negotiations.

According to knowledgeable observers GATT implementation, there are serious doubts on negotiators serving interest groups constituencies. These doubts directly affect the legitimacy of the outcome.²²⁸ Can the legislative ensure that its agents respect their assignment? How is the issue dealt with in countries where the executive is dominant? Most answers to these sensitive issues remain surprisingly incomplete.

Keeping stakeholders informed of the evolution of negotiations helps to anticipate on future resistances to the outcome. But excessive transparency encourages interest groups to exert pressures that can annihilate the political balance needed for efficient talks. The US fast-track system aims at preventing interests groups from blocking the adoption of the final agreement.

documents. USA: Freedom of Information Act & Administrative Procedure Act 5 U.S.C. §551 & seq. (1988), France loi de 1979. Canada: Access to Information Act RSC ch. A-1 1985.

²²⁸ J.H. Jackson & A.O. Sykes, *Implementing the Uruguay Round* (Oxford: Clarendon, 1997) [hereinafter Jackson & Sykes]. The book gathers studies provided by academics analysing the implementation of the Marrakech Agreements in their countries. The main remarks and difficulties mentioned are gathered and compared.

In practice, the Members' effective adherence to their international commitments depends upon the daily work of courts and administrative agencies. Observers note that in many countries, corruption, politicisation, incompetence or good-faith bottlenecks prevent full implementation. Without regard to the development level of countries nor to their degree of judicialization or to the leverage of politics, Prof. Jackson simply notes that "*the sheer magnitude of the WTO undertakings ensures that it will take some time to digest and to codify them*".²²⁹ Resistance and conflicts of interests are felt at all governmental levels.

(b) Transnational regulatory networks

The activities of standard setting entities and the development of labelling collaborative schemes both put in light important transfers of decision making power from elected officials to technocrats and private actors.²³⁰ These transfers occur both at national and international levels. They derive from the success of international trade agreements.

The second force driving the great power of administrative officials over trade policy is the increasing significance of transnational regulatory networks. Efforts to expand the power of supranational institutions have faced harsh domestic criticism for the effect these institutions have on national autonomy, and as a result the power over foreign policy has shifted to regulators developing formal and informal relationships with counterparts abroad. From law enforcement to custom, from antitrust to securities, policy choices affecting barriers to trade are being coordinated by bureaucrats and their foreign counterparts. As a result, policy choices that had been made by international organizations or by more senior national officials closer to the

²²⁹ Jackson and Sykes *supra* note 228 at 464.

²³⁰ See *infra* section 2.1 and 2.2.

*political process are now the responsibility of insulated administrative officials.*²³¹

The analyses provided by Mr. Rosenbaum on the transfer of decision making power from accountable representatives to technicians is exact. Together with a need of close collaboration between the industry and the regulators to define adapted regulations, this transfer of regulatory activity to complex bodies participates in a transformation of the law-making environment. The rules thus formulated might be turned into law, but the very sources of legal obligations are no longer exclusively public in nature.

3.1.1.2 Agency capture at national level

(a) Consultation v. Agency capture

Industries benefit from carrying out well-organised consultations with their regulators. Extreme attention is paid to sharing knowledge and experience with all governmental levels. In this process, producers promote adapted regulations and participate in the formulation of international and national trade policies that can affect them.

Consultation policies adopted in most industrialised countries must be distinguished from agency capture. Nonetheless, the two notions can mix up and leave to unwanted connections. Agency capture and opacity are generally viewed as absolutely unwanted. It is not sure that this negative approach is the most appropriate. The structure of our regulatory systems calls for permanent negotiations between regulators and regulated. They have valuable arguments to discuss and carrots and sticks that can be used against each other (licence to operate v. employment, natural resources v. environment). It is almost certain that the multiplication of transparent bodies and procedures will only affect the superficial part of the relation.

The “French Agency for the food security of aliments” has been specifically designed to meet the consumers’ expectations after several food scandals affected Europe in 1999.

²³¹ Rosenbaum *supra* note 37 at 4. Footnotes omitted.

The Agency gathers agents from three national administrations: the Health Ministry, the Consumer Protection Ministry and the Agriculture Ministry. The Agency is a scientific body that dispatches information among all economic actors involved into the production and distribution of food. It is transparent, independent and drafts safer regulations. According to me, it faces the risk of having to mirror the consumers' tastes and apprehension, thus being too conservative to attract private players. The Agency is useless without private players ready to implement its recommendations. But these players hold sufficient financial and technological expertise to influence food safety policies. Reliable non-producer groups should be more granted influence, and voting rights.

(b) Extending consultations

With the multiplication of technical barrier set to compensate the removal of tariffs world wide, administrative institutions are given a new profile. They are a force to be reckoned with. It is not certain that administrative agents are best trained to design the best alternatives to technical barriers. In a word, they need the inputs and expertise of industry actors to provide them with clear views on the imperatives of the industry's operations. The public choice approach provides great insights on the opening of collaboration forums:

This (...) argument is based on the assumption that administrative officials are self-interested, and it evaluates the costs and incentives imposed by administrative law with respect to the broader political process. This argument therefore does not depend upon an assumption of benevolence on the part of administrative officials (...). (...) if administrative procedures lower the costs of access to information about administrative decisions, than interested parties will be more likely to be able to find out about an upcoming decision. The more time an interested party has to mobilize financial and political resources against a particular decision, the more likely it will be able to force the administrative decisionmaker, through his or her politically

*accountable superiors, to influence their decision. The impact on substantive policy comes from the greater benefit to less organized interest groups of lowering this cost of access to information.*²³²

Mr. Rosenbaum refers to consumers, small and medium sized businesses and NGO's as less organised groups. If given more chances to influence politicians and bureaucrats, these groups increase their power and can influence trade policies, as stronger groups do. In practice, this possibility may be limited because patents and technical expertise are the property of bigger players. Only the latter have an independent economic weight. NGO's and consumer associations lack such legitimacy. They must permanently convince the public of their usefulness.

3.1.2 Flexibility of sources of law

3.1.2.1 The soft law issue

(a) Evolution of international law

International customary law is a set of rules of national behaviour the existence of which is shown by the conduct of nations. Their practices should reveal that the nations act with a sense of legal obligation (i.e. *opinio juris*). It is opposed to conventional international law, which substance results from the provisions and interpretations of international treaties.

According to Prof. Zemanek²³³, international customs have changed in nature. They derive from the multiplication of "potential" sources of international law. Zemanek

²³² Rosenbaum supra note 37 at 8. Footnotes omitted. The author mainly refers to the article of Susan Rose-Ackerman "The Progressive Law and Economics –And the New Administrative Law" 98 Yale L.J. 341 (1988). The approach of Rose-Ackerman is the public choice approach.

²³³ Karl Zemanek, "The Legal Foundations of the International System" Instruments for the Development of International Law, in Collected Courses of the Hague Academy of International Law T.266 1998 pp 9-336 (The Hague: Martinus Nijhoff Pub., 1998) [hereinafter Zemanek].

stresses the importance of international codification efforts and of the soft law instruments. His work pertains to international public law. But it should be read in the perspective of a privatisation of international law. International public law somehow becomes *jus cogens*, after centuries of resistance to the notion.²³⁴ Last but not least, the mere practices of private actors influence international conventions and customs development.

Mainly UN specialised commissions worked on the codification of international customs. For instance, the International Law Commission published codes and expository codes of international customs but no traditional legal instruments can adequately embody such texts. For instance, International conventions on codification failed to gain sufficient support at the General Assembly or at plenipotentiary conferences. General Assembly declarations or incorporations of general principles in Courts statutes were unfruitful. All considered codification efforts either fail to be adopted or to be implemented.

(b) New approach of sources of law

²³⁴ Private parties are recognised can be objects and sometimes subjects of international law. See AC Jurisdiction of Dantzig Courts (1928) P.C.I.J. (Ser. B) No.15 at 17. In 1928 the Court reaffirmed the well-known principle according to which only sovereign states are subjects of international law. Nonetheless, the decision precise that states cannot be presumed to have given their nationals rights under international public law unless they express so. It is precisely the object of all human rights conventions to render private parties subject to international law. Nonetheless, it is very rare that these subjective rights are complemented by action rights: the European Convention on Human Rights and Fundamental Freedoms (Rome, 4 November 1950, modified in 1998) sets a right of action for individuals. Other international conventions on human rights provide certain procedure for complaints and inquiries but these no rights of action (among many others the UN Convention on the status of refugees, 28 July 1951). See Frederic Sudre, *Droit international et européen des droits de l'homme*, 4th ed. (Paris: PUF, 1999) at pp67& s.

As regards to moral persons, two international instruments render private parties subjects of international law: the OECD Guidelines supra note 12 and the Statute for MNEs adopted in 1971 by the Andean Group. In ECHR *Sté Stenuit v. France* (27 February 1992), a corporation was recognised a right of action under the European Convention on Human Rights. See Dominique Carreau, *Droit international public*, 6th ed. (Paris: Pédone, 1999) at pp 395 & seq.; P. Merciai, *Les entreprises multinationales en droit international* (Brussels: Bruylant, 1991).

Because the scope of convergence of interests and shared values at the international level is still narrow, efforts to define new international laws can be meaningless. Ten years separate the discovery of a common ground for negotiation from the recognition of an *opinio necessitatis*. This delay can annihilate all efforts.²³⁵ To solve this difficulty, new techniques of international law development are considered. Among them non-binding declarations, codes of conduct, international standards and soft law.²³⁶

Soft law is opposed to binding international law. Alternative forums of conflict resolution extensively refer to soft law instruments, thus blurring in practice the theoretical distinction between hard and soft international law. In this context, soft law consists in gentleman's agreements, codes of conduct and international standards. The efficiency of soft-law principles derives more from the weapon of reciprocity than from threats of action before international courts.

Although "soft law" engagements of the sort considered here are not obeyed because of a legal command, they are performed because they embody carefully balanced reciprocal interests. As long as these interests subsist, the possible political and/or economical consequences of non-performance are often a far stronger deterrent than the consequences of the non-performance of most legal obligations. This tends to show that reciprocity as an incentive of performance is independent of the nature of the commitment. "Soft law" can even sustain an international organization, as the Organization for Security and Co-operation

²³⁵ Certain authors insist that regulation processes should be initiated even if no possibility of consensus is identified when negotiations are launched. I would call this approach the "leadership" approach: experts rapidly build agreements not purposed to be immediately binding but "opened to acceptance or reference". For instance, the absolute liability principle, strongly rejected by industrialised countries but incorporated into Indian corporate law, could be embodied in an instrument drafted by its supporters. It would at least be ready to use with potential adaptations.

²³⁶ See e.g. Dupuy, "Soft-Law and the International Law of the Environment", 12 Mich. JIL (1990, 1991), 420-435.

*in Europe (OSCE) proves. "Soft law" of this sort may not legally be binding but certainly is in political terms.*²³⁷

Declarations, recommendations and codes do not aim at being imposed on parties. They can be used to interpret treaties or customs. They are widely used because they are flexible. They undergo permanent evolution and remain close to the needs of their subjects.

*They are primarily tools for shaping the future development of the law, either by building opinio juris for custom or by shaping a consensus for future multilateral conventions. They define the principles of that development but are not "binding" in a legal sense. They define a consensus of opinion, existing at a given moment, on how the law should progress.*²³⁸

3.1.2.2 *The corporation, an actor of its time*

(a) The corporation within its institutional environment

The amount and complexity of regulations on industries have reached extremely high levels in industrialised countries. For standards, the situation is almost similar. The French Ministries of Environment and Industry concede that their services are unable to provide reliable and exhaustive lists of all the environmental safeguards applicable at present and for the near future.²³⁹ The situation is the same in North America. It follows that environmental requirements should be enforced with a degree of flexibility.

According to the executives met, their firm is heavily regulated but the authors of the regulations are rarely aware enough of the daily imperatives of production activities.

²³⁷ Zemanek *supra* note 233 at 142 – footnotes omitted.

²³⁸ *Ibid.* at 143.

²³⁹ A fact reported by the Ministry of Environment and the Ministry of Industry at the occasion of consultations with the industry players. Interview Calcia *supra* note 133.

Their position in the regulatory process keeps them at a distance from the industry so that they can decide neutrally. In spite of being highly qualified technocrats, they are thus prevented from grasping all the challenges and opportunities at stake.²⁴⁰

Corporations need to obtain and renew their licences to operate on a regular basis, especially for natural resources exploitation. Obtaining permits is a heavy task, repeated each time legislation change and when the firms' practices are reviewed. In addition, corporations are vulnerable to environmental actions. For instance Alcan was sued on environmental grounds²⁴¹ because it remained a source of nuisance (dust) despite strictly respecting dust emission quotas. The firm's credibility and image were at stake.

Because they have expertise and experience, producers have a fruitful role in drafting processes for environmental legislation.²⁴² But they have a stronger leverage on legislation pertinent to their own technical field; e.g. Ciments Calcia is consulted on construction legislation. Corporations are solicited by the legislator and administrations, but have no voting rights. For the Member of Parliament, the viewpoint of electors may supersede that of industry. As a result, industries extensively benefit from convincing voters as well as regulators. Self-regulation initiatives can help.

(b) The corporation's response to its institutional environment

Once companies take their own initiatives, they feel directly accountable to the citizens. The latter all the more require the firm to operate transparently.²⁴³ Shell issues performance reports and is in close contact with authorities for the creation and operation

²⁴⁰ Interview Calcia supra note 133. In the United States, many highly qualified environmental technicians employed by administrative agencies transferred to the private sector in the 80's. They contributed to change the producers' environmental responsiveness.

²⁴¹ In the early 90's. Interview Alcan supra note 97.

²⁴² For instance, Alcan is being solicited its expertise in the drafting of the latest environmental legislation in Canada. Interview Alcan supra note 97. Interview Calcia supra note 133.

²⁴³ Interview Alcan supra note 97. Alcan holds consultation committees with citizens, and multiply open days operations. The employees actively participate.

of its major facilities (refineries, gas plants). A consultation program involving regional and local governments, NGOs and individuals is designed and carried out prior to any new project launch. It is vital, if the project should be profitable in the long term, that local needs be assessed and managed carefully. Neighbouring authorities are consulted as when the project affect their territory and economy. Foreign governments that participate in aid programs can also be solicited.²⁴⁴

Industry fully benefits from being in tune with the public's expectations and from being ahead of their time as well. By carrying out sound environmental management policies that respond to the needs of citizens, the industry anticipates and limits the risk of sudden retaliatory, strict and costly regulations. They should prove to have stable sound policies. Furthermore, with innovative management policies, a company may take a leading position in the market.²⁴⁵

A permanent negotiation process is carried out between the industry and its regulators. In practice, it occurs principally in political and financial terms. Surprisingly, environmental practices and responsible conducts still are secondary subjects.²⁴⁶ A key argument for the company is its economic ability to provide local areas with jobs and taxes.

²⁴⁴ Interview Shell supra note 96.

²⁴⁵ The cement industry in France consists in five main players, three of them being part of international groups. Career extraction has a strong impact on the environment and landscapes. Together with petrol, paper and chemical industries, this industry is among the most environmentally visible. It is at the crossroad of conflicting needs: construction at the detriment of landscapes. Interview Calcia supra note 133.

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3.2 Polarised Approach to the Traditional Rule of Law

At first sight, the rule of law, i.e. legislation and regulations at time “b” are static. A closer look shows that they are not only dynamic but also polarised.

Legislation is inherently dynamic. First, they inherently represent a past state of affairs. Second, they are the very tools a society disposes of to officially set its objectives for the future. What the law prevents its subjects from doing reflects either the aim of building new institutions or the aim of avoiding that certain feared institutions develop. The trend to end command and control logic is recent but it leads to reorganise forces.

Legislation is polarised all along their implementation: they carry out the conflicting interests of their subjects. A given law that reflects the influence the industry had on its redaction is polarised with the industry’s needs. Though, the general balance needed for the adoption of the law by a legislature commands that other interests be reflected in it. Legislation are polarised because the varying importance of their substantive provisions moves between two poles in relation with the respective ability of the interested parties to enforce its terms. Legislation will serve the aims of the strongest industry groups at the time of adoption. Under the shield of legislation and institutions, forces ally or conflict for a variable length of time.

3.2.1 Levels of polarisation

Governments have no interest, either at the national or at the international level, to set objectives that cannot be reached by the actors they concern. The political costs of such failures, resulting from the absence of appropriate consultations, are equal to a total absence of decisive action in the domain regulated.²⁴⁷ For instance, unreachable emission reduction targets are useless.

3.2.1.1 Implementing the Uruguay Round

(a) Liberalisation and control by governments

²⁴⁷Interview Calcia supra note 133.

According to Jackson and Sykes²⁴⁸, one of the strengths of the GATT 1994 system is its very lack of direct applicability. Private interest groups exert pressures on their home governments to enter into trade dispute, but governments are not easily convinced and filter out most of the requests. If not, interest groups would excessively interfere in the implementation of the accords. They are needed for instance to implement the TBT Agreement, but cannot be given the ability to call into question the practices of foreign sovereign states.²⁴⁹ The GATT accords are protected from the effects of polarisation of national laws, and this preserves their longevity.

As regards to agency capture issues, a problem that is only partly resolved by national laws, the absence of direct applicability provides solutions. As the agents sent on the negotiation site lack democratic legitimacy, internal legislation can fill in the gaps and even make adjustments to the obligations undertaken. Moreover, the Accords being considerably ambiguous, precision given in reception instruments can help resolve difficulties not solved at the negotiation stage. Obscure terms can thus be clarified, with the risk that self-serving constructions surface. But *ex post* adjustments remain possible, as long as deviation from the letter of the agreement are politically effective inside the country and acceptable outside. This requires that the interests of trading partners be not too disregarded ("efficient breach").

(b) Liberalisation by private actors

It is mainly up to private actors to lead harmonisation efforts, if they consider it profitable to participate in the activities of standardisation bodies. On the other hand, they have the ability, within standard setting entities, to slow down harmonisation and the removal of technical barriers to trade. They also have a strong influence on their home governments to promote their views on international trade liberalisation policies.

²⁴⁸ Jackson and Sykes *supra* note 228.

²⁴⁹ As mentioned as regards to the current debates about the direct effect of GATT obligation in Europe, corporations could be given the ability to challenge the practices of their trade competitors in the coming decades. See par. 2.2.2.2(b).

Eco-labels have been launched following the rise of environmental concerns and the need to experiment policies that would not rely anymore on a command and control logic. Eco-labels promote environmental care by the consumer and, theoretically, by the producer. Beside, their educational aim, eco-labels promote trade liberalisation. They promote better exchanges of information, harmonisation and mutual recognition. In this sense, provided eco-labels become as popular as expected, labelling programs might play an economic role that will increase in proportion of their ability to liberalise markets.

3.2.1.2 Delegating power, reorganising forces

(a) Specific cases of “partnership” in Europe

Ciments Calcia relationships with governmental bodies at all level in France is strategic, and fruitful from several viewpoints. Dialogue is conducted with the parliament, ministries, regions, departments and de-concentrated entities, either to obtain authorisations to operate or in the context of a regular and informal dialogue consolidating mutual trust. The “self-regulation” initiatives taken by the company are as many internal experimentation of possible public policies. The input of the firm into policy definition is subsequently substantive, not superficial. The impacts of the operations are limited to local areas (Perimeter 100km around site of operation): the company thus has the opportunity to focus on local, precise issues and to address them adequately. With its economic weight, the company participates in shaping the local context and its evolution. The industry is rooted into a territory and it evolves with it.

Regulators call for “concertation” processes. The aim is to be able to issue efficient and potentially innovative regulations, to promote progress in industrial practices and better responses to the public’s expectations. The more technical the activities regulated, the more necessary the consultation process. Exchanges of information are beneficial to both sides. Public actors rapidly develop a good knowledge of the practices of the industries they are in charge of controlling. In some cases, the partnership can become very close.

It is felt that the state should regulate less and delegate more to the private players. To pave the way in this direction, it is frequently is more economical for an industry to auto-

regulate itself. The success of such experiments heavily depends upon the ability of the industry to prove that it achieves the goals it said it could reach. The industry must be trusted and then show that it reaches if not perfection at least high quality practices. Self-regulation can foster a transfer of further responsibilities to the private sector.

(b) Specific case of partnership in Australia

In Australia, most responsibilities in the telecommunication sector have been delegated to the private sector. Since 1997, a new balance between the industry self-management capacity and government regulatory interventions has been set. The industry²⁵⁰ is fully in charge of developing codes of practice that can be registered with the Australian Communication Authority (ACA) for enforcement purposes. The partnership between the industry and the government has been institutionalised.

The ACA still deals telecom issues pertinent to health and safety, emergency access, network integrity, numbering, interceptions or interoperability. The ACA has in fact agreed to simply use the standards defined by the industry to these ends. Still, Australia and its telecom industry widely rely upon the work of the ITU as regards to the negotiation and the adoption of international standards.²⁵¹ This new structure allows the multiplication of actors or association actors at the national or at the regional levels. This complicates the task of sourcing the standards best adapted to the public's needs.

3.2.2 Foreign direct investment and MNE-State relations

3.2.2.1 General approach of the question

(a) Forms of FDI

After de-colonisation, many authors compared the respective powers of host states and of MNEs in FDI contexts. These issues have considerably evolved. Investors still have considerable leverage on local economics but host governments have slightly reinforced

²⁵⁰ Through the Australian Communications Industry Forum.

²⁵¹ Telecommunications Standards, *Weathering the Change*, ITU News 8/98 at 44.

their bargaining position. This partly results from the fact that investors need licenses to operate and are not anymore majority stockholders of the projects.

Certain host countries opt for joint venture with foreign investors. The latter will bear part of the investment risks, and the country might plan to take up the project in the long term. The repartition of influences within an investment operation is very subtle. It is organised according to agreements passed between the investor and the host country, as well as according to bilateral investment treaties passed between the host and the home country. Shell holds 30% of Shell Nigeria and still detains the techniques that render the exploitation possible.²⁵² It is not certain that without the presence of an investor, Nigeria would be able to exploit its natural resources.

(b) What the investor can bring in or not²⁵³

Bilateral Investment Treaties (BITs) can be compared to virtual “highways” for corporations to establish business operations in host countries. Questions can be raised as to the traffic direction on such highways: Can investments flow back from DCs to industrialised countries? How easily can investors from industrialised countries make “U-turns»? What about the host state? BITs influence the relationships of home and host states, as well as the viability of investment projects.

In a domain where no comprehensive multilateral agreement can be reached, BITs are the main source of investment rules. They deal with national treatment, dispute settlement, repatriation and convertibility of funds, and taxation. They also address the problems of expropriation and compensation, movements of personnel and technology

²⁵² In Nigeria, governmental authorities hold equity shares while the company operates extraction activities. Nonetheless, Shell detains about 30% of the total shares. Shell receives a fee as operator and a percentage of profit. Interview Shell supra note 96.

²⁵³ Illustration of a traditional FDI context, Shell, a multinational corporation, can operate oil and gas extraction activities anywhere. Location and local governments are in theory neutral on the success of their operation. But certain countries do not have the ability to run such operations by themselves (lack of expertise & funding). Interview Shell supra note 96.

transfers. The interaction between host states, home states and investors can be strong, the latter having strong leverage on shaping the former' economic policies.

The nationality of the investor is important. The BITs applied are different, though most of them have common features. Second, the past practice of the home country as regards to foreign investment shapes the dialogue of the parties. For Shell in Latin America, the development of positive relationships was facilitated by the Canadian and European origins of the company, plus the commitment to create truly international working teams. The investor brings in its culture, or an international culture. Third, investors are viewed as serving the interests of the home country rather than those of the host country.²⁵⁴

Investors can bring in commitments to sound policies. For Shell, Alcan and Ciments Calcia, sustainable development is considered a condition precedent to success. Sustainable development policies foster profit because they increase the chances that the project will be perennial for decades (plus image).²⁵⁵ Executives stressed that the availability, costs and quality of the local labour are no longer an investment criteria. The stringency of environmental regulations is not anymore taken into account: investors apply their own codes, with frequently higher standards of protection. These attitudes suggest that new basis for profits are sought for. The next step is a focus on social issues.

3.2.2.2 Shell in Peru: focus on a negotiation

(a) Limits of a local partnership

To be granted a right of access to natural resources and a permit to exploit, the investor starts by connecting with national authorities. Since a couple of years, investment projects also deal with the "common issues", i.e. bio-diversity, respect for indigenous populations,

²⁵⁴ Rubin *supra* note 223 at 1280.

²⁵⁵ In Canada, sustainable development has been accepted as source of profit since the early 90's. Within Shell group this policy has then progressively been expanded at the international level less than five years ago. Interview Shell *supra* note 96.

respect for poverty alleviation and development programs carried out locally. It may actually come to the edge of the project but be the direct concern of supporting agencies such as UN agencies and the World Bank, that lack regulatory authority but nonetheless play a role in the negotiation process.

Investors design their project according to what they understood and assimilated about local specificity. Nowadays, the term “licence to operate” refers to a larger reality than it used to. It encompasses not only official authorisations but also the local communities’ preparation and consent. For the project to possibly succeed, obstructions, local campaigns and protest related to the project should be avoided. They are extremely costly, and need to be anticipated and carefully addressed. Once the grounds for the longevity of the project are set, the company can effectively care for sustainable development follow up. The preparation of an investment project can be long, and the interaction with local actors very dynamic. The outcome should be a proposal addressing, together with stakeholders, all sensitive issues.

This “partnership” approach shows that new type of negotiation appear. It is possible that investment techniques have drastically changed. The risk is that the investor be excessively solicited to join the local context.

(b) Citizenship?

In theory, each interested party has a clear role to play in pre-project consultation programs. In practice the arrival of a foreign investor can be strategic. Each party’s interests are too high for them to remain neutral: the investor will be offered to undertake further responsibilities if no alternative solutions exist.

*We don’t want to assume the role of the government nor the role of civil society. We want the parties to have their respective roles and then allow us to perhaps facilitate and move the process forward where each and every party can actually play a role.*²⁵⁶

²⁵⁶ Interview Shell supra note 96.

Foreign companies investing in developing countries frequently assume functions of public interest, like the financing of hospitals or schools. For instance Shell in Nigeria participates in school financing, and agriculture training.²⁵⁷ In fact, as expressed by the Shell representative, Shell prefers to limit the scope of its local involvement. This is an anticipation of upcoming questionings on the legitimacy of such practices. What would be the liability of the private company, together with its public interlocutor, in case of damage resulting from its participation in the local community's organisation? It is the role of public constituencies to deal with public activities and to bear the corresponding responsibilities. It is not within the attributions of corporations to participate in local life, especially when politics are involved (e.g. education).²⁵⁸ In Peru, given the requirements of the host state on involvement in public affairs and the refusal of Shell to play civil roles, the project failed.

In the case of the Chad-Cameroon²⁵⁹ pipeline project, the World Bank set stringent conditions on investors' interaction with local communities. The participation of the Bank made the project a leading sustainable development project. The Bank injected funds and controlled the destination of the amounts transferred. This supervised injection of funds was aimed at facilitating negotiations by providing official sources of revenue that could not be used for corruption. It helped smothering the negotiation process. Notwithstanding the importance of such schemes, investors cannot but deal with local political contexts. They have to face a series of "political" risks that they carefully anticipated and measured, and cannot remain neutral. By its mere presence, the company being a source of employment and welfare, the investor can help settling local conflicts. At some point in

²⁵⁷ See Shell online: Shell <<http://www.shellnigeria.com/>> (date accessed 20 December 1999).

²⁵⁸ To try and better understand the position of a company in this context: the image, credibility, possibly its future, of a company are at risk whenever it becomes clear that it even indirectly participated in the development of a pole of terrorism in a neighbouring local community (like in Peru). The very cost of proving that the company remained neutral can exceed the benefit (financial and image cost).

²⁵⁹ Exxon and Elf, with the World Bank's assistance. Interview Shell *supra* note 96.

time, the company must work with the local government and deal with local politics. Hence the Codes...

3.3 Public Interest and Profitability

3.3.1 The modernised functions of MNEs?

3.3.1.1 Going beyond requirements

The technique of using eco-labels and codes of conducts to improve corporate practices is extremely ingenious. As exposed earlier, initial incentives came from governmental agencies (USA) or from the private sector's initiatives (Europe). The success of the technique depends on "leadership" and "paving the way" attitudes.

(a) Downstream and upstream chains

Corporations now begin to require their suppliers to bear environmental labels.²⁶⁰ In the present days, respecting the environment beyond regulations is more expensive than to simply conform to legal requirements. For a medium size company, not for an industry giant, self-regulation engenders substantial additional costs. To require its suppliers to have sound PPMs labelled by a credible certification authority, a producer should accept to pay a premium. This situation will remain until environmental discipline in production provokes sale increase.

Ford, GM and Chrysler require Shell to deliver ISO certified products (quality).²⁶¹ For its part, HP also has strict procurement policies: "only suppliers that satisfy HP's criteria for Technology, Quality, Responsiveness, Deliveries, Cost and Environment are selected". For quality, HP's policy is that all HP's "manufacturing facilities throughout

²⁶⁰ UN partners supra note 178.

²⁶¹ Interview Shell supra note 96.

the world are at least ISO9002 certified. [Their] key suppliers also".²⁶² Such policies multiply but the public can hardly control how well they are respected.

Let's consider that a national industry, one that mirrors the country's history, strength and identity²⁶³ in the eyes of consumers-voters advertise its of "supplier filtering" on environmental criteria. The influence of the client company on modifying the habits and management of its suppliers can be huge. On the other hand, it appears excessive and can lack of legitimacy. It is almost certain though that at a national level such a campaign would have efficiency comparable to that of a governmental policy (with penalties).

Would the gains of credibility of the suppliers, and their own partners, go beyond the results of government led initiatives? This economic incentive logic is the main regulatory technique now used in the United States. It is increasingly used in Europe - there notably under the leadership of American companies. It represents a deep evolution of relationships between trade partners. Evolution towards up-stream and down stream policies cannot efficiently occur prior to a full assimilation of these self-regulation management techniques by more producers.²⁶⁴

Companies do not necessarily have to require their suppliers to be environmentally sound. Encouragement may suffice.²⁶⁵ Suppliers, informed of the management policies of their clients are encouraged to improve the PPMs. In case they fail to do so, they take the risk of losing a partner that might increase its requirements.

(b) Improving credibility

Eco-labels defined and granted by public authorities have an administrative aspect that alters their attractiveness for producers. Private eco-labelling programs, even with public

²⁶² Interview HP supra note 30. Plus White Paper on Quality, T. Dirksen available online: HP <<http://www.hp.com>>.

²⁶³ E.g. Ford or Microsoft in the United State, Alcan or Bombardier in Canada, Renault in France.

²⁶⁴ Interview Shell supra note 96. Interview Calcia supra note 133.

²⁶⁵ Alcan Code of Conduct supra note 214 and Calcia Charter.

accreditation, are suspicious in the eyes of consumers. The image of the issuer and the success of the label are directly related one to the other. Corporations and consumers have entered the “show me” world and left the “tell-me” world.²⁶⁶

Can the private sector effectively gain credibility by setting examples of good behaviour for consumers? Partial answers have been given in the previous sections. What role is left to regulatory authorities? The government can either set incentives for self-regulation or opt for residual roles. For the public at large, the gains of vast industry led initiatives can be huge. Corporations themselves could incur the very cost of regulating corporations, no longer by public administrations (which should be awarded sufficient financial means & R&D to be able to control businesses, especially in high-tech domains).

Shifting responsibilities from the public sector to the private sector would raise concerns on the credibility of the latter. Should the good willed private actors, in exchange for the costs incurred, be entitled to a reward? Could they really be granted further autonomy and less control, could they be trusted to maintain self-regulation efforts in the long term? Interlocutors from Shell and Ciments Calcia admit that they have undergone deep transformations over the last decade. Shell mainly because of competitive pressure, Calcia to win a leadership challenge.

3.3.1.2 Liability of Multinational enterprises, should it be absolute?

The concept of MNE liability covers several elements. First, as any person, they are liable when they cause damages. Second, they have economic responsibilities in the sense that they provide employment and production.

Business accepts the challenge and is eager to cooperate with the UN and other public sector bodies to enhance all three. Alongside them however, we must place a fourth value – the economic responsibility incumbent upon any company to its customers, to its

²⁶⁶ Interview Shell supra note 96.

*employees and to its shareholders. Fulfillment of that responsibility is the key to the other three, for without it companies cannot remain in business.*²⁶⁷

(a) Bhopal, 1985. Erika, 1999.

A gas leak occurred in 1985 at Union Carbide Corporation's (UCC) gas site in Bhopal, India. The combined effects of rains and gas condensation made thousands of victims. The Union of India acted both as *parens patriae* for the victims of the disaster. It also sued UCC to recover the damages suffered by the country. The counts of liability against UCC were the following: (1) multinational enterprises liability, (2) absolute liability, (3) strict liability, (4) negligence, (5) breach of warranty, (6) misrepresentation.²⁶⁸ The United States Courts declared they were incompetent according (*forum non conveniens*).

In December 1999, an oil tank sunk nearby French coasts. Environmental damages to the area are huge. The owner of the fuel transported, Total Fina, selected the ship despite its fragility. Interestingly, Total Fina had adopted a code of conduct stating its commitments to environmental soundness. The situation is paradoxical. First, the exact liabilities of all the parties that intervene in the transport transaction are not all identified yet. Second, Total Fina, declared it would finance part of the cleaning operations. Third, no consumers boycotted their gas. Fourth, Total Fina is one of the top actors of the Paris Stock exchange market. Total Fina is partly owned by the French, who have to choose between dividends and environmental damage cleaning up.

(b) Absolute liability endeavour

As opposed to strict liability, the concept of absolute liability leaves no room for defence arguments. The idea that MNEs should have an absolute liability emerged after

²⁶⁷ Maria Livanos Cattai, *Business takes up Kofi Annan's challenge*, Paris 15 March 1999 online: ICC <http://www.iccwbo.org/home/news_archives/1999/business_takes_up_to_un_call.asp> (visited 17 December 1999). See generally <http://www.iccwbo.org/home>, regularly updated.

²⁶⁸ See Upendra Baxi, *Inconvenient Forum and Convenient Catastrophe: the Bhopal Case* (Delhi: The Indian Law Institute, 1986).

the Bhopal disaster, in India. Most industrialised countries resisted it. It is now one of the major principles of Indian corporate laws. Further research could interestingly deal with the effective impact of this concept on investment in India, and how investors deal with their corporate liability.²⁶⁹

In my view, the concept of absolute liability of corporations in the conduct of their activities has tremendous consequences. A corporation that can be pursued without being given grounds for defence must also have been granted extensive exceptional responsibilities. Derogatory regimes are usually not set up unless the situation regulated specifically demands derogatory treatment. Absolute liability should be seen in the context of its emergence, i.e. the Bhopal gas leak. It was the most aggressive instrument India could use in a confrontation of powerful, highly implicated interests on both the Indian and the investor (USA) sides. In a dispute, it is fair that parties choose the tools they need to make their point: here a dramatic concept was put at the service of a tragic context. India was also a leader of the non-aligned countries and one of the stronger opponents to Western hegemony.

Daring concepts can form the basis of future universal principles. The financial and political implications of the absolute liability concept were perfectly perceived after the Bhopal case. Resistance to the principle could be anticipated and it was almost certain that the principle would not be implemented at a global level at that time. Almost 15 years later, the nature of the liability of corporation is being rethought. Absolute liability is revisited. But it has little chance of being accepted or incorporated in international instruments. It can nonetheless inspire soft international law. It is enforced in India.²⁷⁰

²⁶⁹ Upendra Baxi, "Mass Torts, Multinational Enterprises and Private International Law" (The Hague Academy of International (Private) Law, Peace Palace, 19-23 July 1999). See Collected Courses of the Hague Academy of International Law to be published.

²⁷⁰ Ibid.

3.3.2 Policy and law making techniques: the next step

3.3.2.1 *The case for private standards*

The formulation of standards by semi-private or voluntary organisations raises important questions. Whereas their efficiency is recognised by economic players world wide, their legitimacy and authority depart from traditional legal thinking.

(a) Reliable grounds.

Bodies that formulate standards have no enforcement powers, but standards have a *de facto* authority. Producers are free to stop using standards, provided the market's imperatives allow them to do so. Voluntary standards are paradoxically weaker than regulatory standards, but they are better obeyed. This results from the fact that they are adopted on a consensus basis and reflect the market's needs. The success of business operations also depend upon the producer's credibility. Consumers expect quality and rapidly lose trust in a company that delivered unreliable products.²⁷¹

The existence of standard setting entities depends upon the participation of the producers, which funds them. They are vulnerable to the free-rider phenomena: free-riders can cause the withdrawal of key participants. This phenomenon occurs when a non-member benefits from the standardisation work of its direct competitors, the latter being the funding members of the association. Members may withdraw as soon as the free riders' practice harms them. The longevity of the association depends on its ability to control free riders.

To preserve its existence – i.e. to ensure that major players participate – a standardisation body must serve as a mediation and negotiation arena for the industry

²⁷¹ Interview HP supra note 30. And HP White Paper supra note 262: "HP prefers to purchase standard components whenever possible because these are the ones that the supplier knows best how to make and they are least likely to cause compatibility problems. Nevertheless, HP sets its own quality criteria and reliability targets." "Our objective is to catch potential problems as early as possible and to make our suppliers co-responsible for the quality of our finished products. If needed the HP materials engineers provide extra quality training to suppliers."

concerned. It is vitally dependent upon the good will and participation of its members. It is *de facto* an agent of the industry. Voluntary associations can help limiting violations of standards and regulations by their members. They can try and design common policies for an industrial branch and collaborate with authorities to avoid that new technical barriers to trade appear. But they cannot effectively control their members.

(b) Legitimacy

One important question is that of the ability of the industry to “auto-regulate” itself and to pursue “public” objectives, whereas its prime object is to generate profits. The potential excesses of successful liberalism are at stake. The new partnership set up between Microsoft and the MIT to develop educational technologies illustrates this aspect.²⁷² Microsoft will finance the development of a range of educational software. It will be granted a first option to patent the software developed in collaboration. It is extremely common that the private sector finances university research related to its specific activities, but here Microsoft finances research in education, i.e. a sector controlled by public authorities, at least in the traditional approach of the role of the state. Safeguards should then carefully be set to prevent the appropriation of new standards by Microsoft in the education field, and to ensure that the results of the research are widely available to other institutions.²⁷³

As standards are given further authority and an extended role, they should have a stronger legitimacy. But this legitimacy can derive from their implicit acceptance by consumers. Protectionism is also at stake.

²⁷² New York Times, Microsoft and M.I.T. to Develop Technologies Together - *Projects Will Include New Methods of Online Learning* - Sara Robinson and Lisa Guernsey dated 5 October 1999 online: <<http://www.nytimes.com/archives> >. Under terms of the agreement, the intellectual property financed by Microsoft but done at M.I.T. will belong to M.I.T., but Microsoft will have the right to license it without paying royalties. But for research done jointly at Microsoft and M.I.T., Microsoft will have the first option to patent it.

²⁷³ Ibid.

“[S]tandards organizations with broad concerns are more likely to advance standards that encompass “public” concerns and are less likely to be challenged as protectionist.”²⁷⁴

To gain legitimacy in the public’s eyes they should embrace vast scopes of interests. The broader the scope of interests dealt with by the association, the broader the scope of representatives and the stronger the legitimacy. “Like a polity, standards-setting organisations must not be simple but richly textured.”²⁷⁵ Standards adopted with the support of many stakeholders can have a strong legitimacy. But in practice, the diversity of participants in the standards setting work might prevent efficiency. Participants should also participate as disinterested parties, not as agents. In practice, they are present on their working time and their employer finances their presence. Companies invest in sending their technicians, and expect profitable outcomes.

3.3.2.2 Reflections on reinventing the government

(a) Limit and potential of self-regulation

All the executives met recognise that the end of the decade is characterised by a real tendency of the multinational to opt for some form of self-regulation. Some companies are still considered as poor practitioners. But many tools have been created to help them improve their management, for instance the OECD, the ICC and the World Bank Guidelines and strategies. Ethical funds have a growing influence and executives concur to say that they should be taken seriously. Executives nonetheless insist that clear limits should be defined as regards to the role they are called to play in the civil society. The notion of corporate citizenship should not be substituted to that of responsible enterprise. And the own responsibilities of civil society should not be underestimated. For instance citizens have a duty to challenge the unacceptable practice of a corporation.

²⁷⁴ Audrey Silberston *The Economic Consequences of International Standardization* ISO Geneva 1967 in Krislov supra note 110 at 64.

²⁷⁵ Krislov supra note 110 at 64.

National laws specifically define the notion of object of corporation. Corporations have certain objects, defined at the time of incorporation, and should respect this limit to their activities. The role of the corporation results from the way it pursues this object, its commercial policies. There is no obligation contained in laws on incorporation to respect the environment and to carry out sustainable development policies. Corporate laws deal with the organisation and the object of corporation, not their activities. As well, they do not restrict their role. Imperatives pertinent to e.g. the environment are imposed on businesses in distinct laws. They are not inherent to the nature and organisation of corporation. It is time that corporate laws deal with “external” issues such as sustainable development and social responsiveness.

By paying attention to local needs and by improving their response to the needs of communities, corporations become well accepted by citizens. The more efforts the corporation makes to improve its local implementation, the best chances it has to gain autonomy. But if corporations were officially delegated extended responsibilities, they should remain controllable.

The idea of controlling “self-regulation” is paradoxical, but it reveals that there is an apprehension for industry led initiatives. It is feared that further autonomy render the industry hardly controllable. Such instruments as codes of conduct, which enhance trust in corporations, be precisely worded. In case of failure to respect its “voluntary commitments” how could the industry be sanctioned ?²⁷⁶ Assuming that self-regulation ends up improving market share value, how could small and medium businesses with no self-regulation policies not be excluded from the market? Could the stronger players impose their practices to the smaller ?²⁷⁷

The technique of labelling products to promote environmental awareness is seen as having some “great potential.” But this potential is still not realised. It excessively depends upon the good will of both producers and consumers, each group being in charge

²⁷⁶ See 3.3.1.2(a).

²⁷⁷ OCDE Réformer la réglementation supra note 105 at 33. See also 3.3.1.1(a).

of convincing each other. Eco-labels can face sudden discredit and disappear as a mere failed experience of economic incentive regulation. Improving their transparency is crucial. The Canadian government's decision to use a private interface to administer the Environmental Choice Program sets a good precedent for other countries. The acceptance by the Canadian authorities that the administrative logic does not match with the market's need seduces economic actors of all sizes and scopes. But the presence of the government in the "background" reassures consumers.

The regulatory reforms and experience referred to in this work date back to the early 80's. They are quite recent and their effective impact is not yet measured, though already under the scrutiny of academics. As regards to environmental practices, were private initiatives are popular, self-regulation is considered as promising. It is too early to issue reliable studies and analyses on the question.²⁷⁸

(b) Self-regulation, a pole for innovation?

Self-regulation is the best option an industry has to prevent the adoption of stricter regulations. In a sense, it is a technique of interaction between corporations and regulating authorities. For instance in FDI contexts:

*It is difficult to imagine all host-nation governments accepting significant limitations on their abilities to regulate foreign direct investors if these investors themselves were not subject to obligations at the international level. Multinational firms do often have objectives that are at variance with the laws or policies of the nations in which they operate, and these governments have a right to that local affiliates will comply with local law or policy.*²⁷⁹

Several projects to set common international rules on FDI failed. In the meantime, MNEs should improve their policies of attention to local contexts and needs.

²⁷⁸ OCDE Réformer la réglementation supra note 105 at 58.

²⁷⁹ Graham supra note 8 at 56.

Corporations should multiply the publication of reports on the progress that they make in carrying out sustainable development policies. The commitments they take should be followed by reports on the corresponding progress made. Many corporations do so already.

Self-regulation trends have to lead to legal consequences. For instance, corporations could take annual commitments on a voluntary basis. The legal effect attached to these commitments would be an obligation to respect this commitment year after year: a corporation would be liable for not respecting its own commitment. Damages would be awarded to potential victims of failure to respect this obligation. Commitment at time *t* would be the criteria to evaluate future behaviours. Corporations would be liable for not maintaining years after years the level of responsiveness it proved to be able to reach at one point in time. Limited defence ground could be defined. Regulatory authorities would be solicited to evaluate the quality of the commitments and would only intervene as consultants in the process of self-regulation.

Specific rules adopted and respected at local levels are as important as general rules adopted at international level. It is necessary and fruitful that investors mobilise the funds and expertise necessary to the comprehensive apprehension and management of a local environment (social, natural, and economic). By focusing on specificity, investors will *de facto* follow and create adapted rules. The toughness of negotiations with local authorities is only the proof that solid ground can exist for perennial agreements. It is up to the corporations to set precedent on the basis of their own sound behaviour.

CONCLUSION

One of the main successes of the Uruguay Round negotiations, beside the creation of the WTO, was the creation of comprehensive body of regulations aimed at removing all imaginable barriers to trade. Since the adoption of the GATT 1994, the movement of trade liberalisation is so profound that we came to the point where cultural preferences and consumer habits themselves can be defined as trade barriers...The cumulative effect of the TBT and the SPM Agreements permitted to reach several types of sources of barriers to trade. The SPM Agreement aimed at removing and preventing barriers set by regulatory agencies. The TBT Agreement managed to reach private sources of technical barriers. The Code of Good Practice represents one of the most daring initiatives of the WTO era. Indeed, it somehow institutionalise private parties, i.e. non-state entities, as potential subjects of international trade law. It is now perfectly conceivable that in the coming decades private persons become subjects of international law as sovereign states currently are.

Liberalisation has led to a shift of responsibilities from the public sector to business enterprises. The goal of leaving further room to market forces if fully attained, but the fact that private entities are called to play roles that are not traditionally devoted to them raises delicate issues. On the one hand, corporations are afraid of undertaking new functions because enhanced liabilities are attached to these functions. On the other hand, corporations increasingly perceive that if they auto-regulate themselves and follow sound and innovative policies they can gain autonomy. It is in the interest of a given corporation as little texts as possible regulate its activities. In is also in its interest that its competitors be the object of controls. By adhering to the idea of self-regulation, corporations become involved on the process of redefining their role. It is quite possible that they cannot remain in an intermediate position and that they have to chose a new position. It is not in their traditional attributions to care for the public good. But they accept to carry out self-regulation policies. In doing so, they put themselves on the edge of becoming citizens. They have to find ways of either taking a step back or bear larger responsibilities.

Self-regulations encompass many activities that slowly gain importance in our societies. As reviewed throughout this work, they participate in designing standards, eco-labels, national policies and their own codes of conduct. As such, corporations can be considered as a source of law. Indeed, standards, experimental eco-labels and the principles contained in private codes frequently are incorporated into national laws. Corporations have a discreet but strong leverage on shaping legislation. Corporations could go further. They could go further by announcing what role they are ready to play and what corresponding level of responsibilities they are will assume. This is certainly the best way they have to gain further autonomy from their regulators. But they should be trusted and trustable, i.e. transparent. Judicial actions could be created for non-respect by a corporation of its previous commitments and performance. The key for the success of self-regulation is the margin left to business enterprises to define their own commitments and innovations. This is how a sound transformation of the business role can be achieved.

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