



*The Jean Monnet Center for
International and Regional
Economic Law & Justice*

THE NYU INSTITUTES ON THE PARK

THE JEAN MONNET PROGRAM

J.H.H. Weiler, Director

in cooperation with the

**Hertie School
of Governance**



**GLOBAL GOVERNANCE AS PUBLIC AUTHORITY:
STRUCTURES, CONTESTATION, AND NORMATIVE CHANGE**

Jean Monnet Working Paper 13/11

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**EU Law and Global Regulatory Regimes:
Hollowing out Procedural Standards?**

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ISSN 1087-2221 (print)
ISSN 2161-0320 (online)
Copy Editor: Danielle Leeds Kim
© Joana Mendes 2011
New York University School of Law
New York, NY 10011
USA

Publications in the Series should be cited as: AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

**Global Governance as Public Authority:
Structures, Contestation, and Normative Change**

This Working Paper is the fruit of a collaboration between The Jean Monnet Center at NYU School of Law and the Global Governance Research Cluster at the Hertie School of Governance in Berlin. The Research Cluster seeks to stimulate innovative work on global governance from different disciplinary perspectives, from law, political science, public administration, political theory, economics etc.

The present Working Paper is part of a set of papers presented at (and revised after) a workshop on 'Global Governance as Public Authority' that took place in April 2011 at the Hertie School. Contributions were based on a call for papers and were a reflection of the intended interdisciplinary nature of the enterprise - while anchored in particular disciplines, they were meant to be able to speak to the other disciplines as well. The discussions at the workshop then helped to critically reflect on the often diverging assumptions about governance, authority and public power held in the many discourses on global governance at present.

The Jean Monnet Center at NYU is hoping to co-sponsor similar symposia and would welcome suggestions from institutions or centers in other member states.

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Prologue:

Global governance is no longer a new phenomenon – after all, the notion became prominent two decades ago – but it still retains an aura of 'mystery'. We know much about many of its instantiations – institutions, actors, norms, beliefs – yet we sense that seeing the trees does not necessarily enable us to see the forest. We would need grander narratives for this purpose, and somehow in the muddle of thousands of different sites and players, broader maps remain elusive.

One anchor that has oriented much work on global governance in the past has been the assumption that we are faced with a structure 'without government'. However laudable the results of this move away from the domestic frame, with its well-known institutions that do not find much correspondence in the global sphere, it has also obscured many similarities, and it has clouded classical questions about power and justification in a cloak of technocratic problem-solving. In response, governmental analogies are on the rise again, especially among political theorists and lawyers who try to come to terms with the increasingly intrusive character of much global policy-making. 'Constitutionalism' and 'constitutionalization' have become standard frames, both for normative guidance and for understanding the trajectories by which global institutions and norms are hedged in. 'Administration', another frame, also serves to highlight proximity with domestic analogues for the purpose of analysing and developing accountability in global governance.

In the project of which this symposium is a part, we have recourse to a third frame borrowed from domestic contexts – that of 'public authority'. It seeks to reflect the fact that much of the growing contestation over global issues among governments, NGOs, and other domestic and trans-national institutions draws its force from conceptual analogies with 'traditional rule'. Such contestation often assumes that institutions of global governance exercise public authority in a similar way as domestic government and reclaims central norms of the domestic political tradition, such as democracy and the rule of law, in the global context. The 'public authority' frame captures this kind of discourse but avoids the strong normative implications of constitutionalist approaches, or the close proximity to particular forms of institutional organization characteristic of 'administrative' frames. In the project, it is used as a heuristic device, rather than a normative or analytical fix point: it is a lens through which we aim to shed light on processes of change in global governance. The papers in the present symposium respond to a set of broad questions about these processes: what is the content of new normative claims? which continuities and discontinuities with domestic traditions characterise global governance? how responsive are domestic structures to global governance? How is global governance anchored in societies? and which challenges arise from the autonomy demands of national (and sometimes other) communities?

The papers gathered here speak to these questions from different disciplinary perspectives – they come from backgrounds in political science, international relations, political theory, European law and international law. But they speak across disciplinary divides and provide nice evidence for how much can be gained from such engagement. They help us better understand the political forces behind claims for change in global governance; the extent of change in both political discourse and law; the lenses through which we make sense of global governance; and the normative and institutional responses to competing claims. Overall, they provide a subtle picture of the pressure global governance is under, both in practice and in theory, to change its ways. They provide

attempts to reformulate concepts from the domestic context, such as subsidiarity, for the global realm. But they also provide caution us against jumping to conclusions about the extent of change so far. After all, much discourse about global governance – and many of its problems – continue in intergovernmental frames. Global governance may face a transition, but where its destination lies is still unclear. 'Public authority' is an analytical and normative frame that helps to formulate and tackle many current challenges, though certainly not all. Many questions and challenges remain, but we hope that this symposium takes us a step closer to answering them.

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**EU LAW AND GLOBAL REGULATORY REGIMES:
HOLLOWING OUT PROCEDURAL STANDARDS?**

By Joana Mendes*

Abstract

This paper examines the effects that the reception of decisions of international organizations and bodies in EU law may have in procedural standards followed in EU law and practice, such as participation and transparency. Illustrative examples shed light on the practical interactions between EU and global regulatory systems and their likely negative impact on procedural standards. The current EU rules of reception of such decisions are limited in two respects. First, issues of procedural protection are decided by the system of origin, the procedural rules of which may not be as developed as those in force in the EU. Second, rules of reception do not capture the effects of the varied interconnections developed between regulatory regimes at the global and at the EU level. The paper argues that the possible depletion of procedural standards in the segments of EU law that result from the reception of decisions of international bodies has relevant legitimacy implications. Procedural standards that may be bypassed have become accepted standards of legitimacy of the exercise of public power within the EU. Some give effect to norms of EU law and governance now enshrined in the Treaties. To the extent that they may be weakened by effect of reception of decisions of international organizations and bodies, the exercise of public authority is potentially unleashed in those areas of intersection of legal systems. The paper further lays down the premises of a normative conception of the relationships between legal orders that would allow preserving procedural standards in the areas of interaction between EU and global regulatory regimes.

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1. EU law and the reception of international decisions

Today, it has become trite to note that the EU interacts more and more with an increasing number of international institutions, bodies and networks operating in the global scene. Legally, the terms in which EU law interacts with regulatory regimes established at the international level have been defined mostly by the EU Courts while interpreting and giving effect to the EU Treaties. Having secured the autonomy of the EU legal order, the EU Courts have equally defined a set of principles and legal rules that generally ensure a rather open stance of the EU to international law, both regarding its own duties and those of the Member States.¹

However, the broad boundaries defined by the Courts are, in part, challenged by the EU's expanding role in the international scene as well as by the transformations of international society itself and of international law that have occurred in recent years.² In between openness and autonomy, the EU rules of reception of international law do not capture the complexity of the interconnections between different regulatory regimes developed at the global and at the EU level. One important facet of change is the fact that, increasingly, decision- and rule-making by an ever wider number of international bodies, networks, other public and private actors has direct relevance and impact on the rights and interests of individuals. This phenomenon has been analyzed as yet another form of exercise of public power in many ways parallel to the exercise of public power by national administrations.³ At the same time, the EU retains a “middle ground” position between international and national law: by incorporating decisions adopted at the international

¹ Case 181/73, *Haegeman v Belgium* 1974 E.C.R. 449, paragraph 5; Case 104/81, *Hauptzollamt Mainz v Kupferberg*, 1981 E.C.R. 3641, paragraphs 13, 14 and 17; Joined Cases 21 to 24/72, *International Fruit Company v Produktschap voor Groeten en Fruit*, 1972 E.C.R. 1219, paragraphs 14 to 18, and 20; Case C61/94, *Commission v Germany*, 1996 E.C.R. I-3989, paragraph 52. See also Opinion 1/91, of 14 December 1991, E.C.R. I-6079, paragraphs 35 and 71; Opinion 1/00, of 18 April 2002 E.C.R. I-3493, paragraph 12.

² See respectively, e.g., Marise Cremona, *External Relations and External Competence of the European Union: The Emergence of an Integrated Policy* in *THE EVOLUTION OF EU LAW* (Paul Craig and Gráinne de Búrca eds, Oxford University Press, 2011), 217, 260-261; Andrew Hurrell, *ON GLOBAL ORDER. POWER, VALUES, AND THE CONSTITUTION OF INTERNATIONAL SOCIETY* (Oxford University Press, 2007), 96-98, 110112; Alan Boyle and Christine Chinkin, *THE MAKING OF INTERNATIONAL LAW* (Oxford University Press, 2007), 19-24.

³ Armin von Bogdandy and others, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities* in *THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS. ADVANCING INTERNATIONAL INSTITUTIONAL LAW* (Armin von Bogdandy and others, eds., Springer, 2010) 11-16; Benedict Kingsbury and others, *The Emergence of Global Administrative Law* 68 *LAW & CONTEMPORARY PROBLEMS* 15, 17 (2004-2005).

level, it fundamentally transforms the status of international law *vis-à-vis* national laws.⁴ It thereby contributes to exacerbating the effects international decision- and rule-making may have vis-à-vis individuals.

This essay argues that this reality is not duly taken into account by the general rules of reception of decisions of international organizations or bodies in the EU legal order.⁵ Specifically, procedural standards may fall through the mesh that filters international law into EU law. Procedural standards have the double function of structuring the exercise of public authority and protecting the legal sphere of those possibly affected by the ensuing decisions. Access to information, participation and the giving of reasons typically ensure the procedural protection of those affected by adjudicatory decisions. In general, rules on transparency, participation and accountability constitute procedural constraints that lend legitimacy to public actions, by detaching – albeit not fully – decision-making from the preferences of the decisionmaker. They may also serve purposes of subjective protection – similar to the guarantees usually envisaged in adjudicatory procedures – when rule-making impacts on individuals’ legal spheres in an analogous way to adjudicatory decisions. Such concerns are not within the rationale and scope of the EU rules of reception of decisions of international organizations or bodies. Yet, the incorporation of such decisions in the EU legal order may bypass procedural standards that would otherwise apply or be justified. This has relevant legitimacy implications, as such standards have become accepted in EU law and governance as yardsticks against which to measure the legitimacy of public authority. The problems posed by the depletion of procedural standards are aggravated in cases where the very way in which decisions of international organizations or bodies are received in EU law bypasses the general rules of

⁴ See, among others, Daniel Bethlehem, *International Law, European Community Law, National Law: Three Systems in Search of a Framework. Systemic Relativity in the Interaction of Law in the European Union* in INTERNATIONAL LAW ASPECTS OF THE EUROPEAN UNION, (Martti Koskenniemi ed., Kluwer Law International, 1998) 172; Robert Schütze, *On middle ground: European Community Law and Public International Law* in HIGHEST COURTS AND THE INTERNATIONALISATION OF LAW: CHALLENGES AND CHANGES (Sam Muller ed., Hague Academic Press, 2009) 68.

⁵ The term “decisions” is adopted here in a broad sense, encompassing informal acts, such as guidelines, recommendations, best practices, standards. These may result from informal international coordination in regulatory networks that involve public and private actors (see Joost Pauwelyn, “Informal International Lawmaking: Mapping the Action and Testing the Concepts of Accountability and Effectiveness”, Project Framing Paper (2011), available at <http://ssrn.com/abstract=173464>, accessed September 5, 2011). Furthermore, the analysis will focus on the reception of normative instruments – e.g. guidelines and decisions of Conferences of Parties – that do not have an adjudicatory function, excluding the reception of judicial or quasi-judicial binding decisions.

reception established by the EU Courts, since these define the conditions under which such decisions may legitimately produce effects in the EU legal system.

The paper will begin by outlining and analyzing the formal rules of reception of decisions of international organizations or bodies in the EU legal order (Section 2). These rules define the systemic entry points of such decisions in EU law, i.e. those that are expressly envisaged by the EU legal system and thereby filter reception as to ensure coherence with EU law and, specifically, with its institutional rules. Mostly, they reflect the openness of the EU legal system towards international law. At the same time, the reception of decisions of international organizations or bodies is also subject to the general boundaries that were established by the EU Courts with a view to protect the autonomy of EU law. Next, on the basis of illustrative cases, this essay will move on to present the limits of the current formal rules of reception in terms of procedural standards. This analysis will highlight two types of limits. First, the general rules leave issues of procedural protection in the hands of the system of origin, which may not have procedural rules as developed as the ones in force in the EU (Section 3). Second, asystemic ways of reception of decisions of international organizations or bodies – i.e. not captured in anyway by the general rules of reception and, therefore, in strict terms, not formally recognized by the EU legal system – also threaten procedural standards that would otherwise apply and, therefore, affect the legitimacy of EU decision-making. Specifically, administrative collaboration between public and private regulatory bodies situated at different regulatory levels (global/EU) may lead to bypassing EU procedural standards, while the effects of such collaboration may be similar to those stemming from decisions of international organizations or bodies (Section 4). Sections 3 and 4 form the core of this essay. In the guise of conclusion, the paper will argue that procedural standards should not be imperiled by effect of the interaction between legal systems, as this problems of legitimacy that may concern both the EU and some of the global regulatory systems with which it interacts. The last section of this essay will set out the basis of a normative proposal to avoid the possible hollowing out of procedural standards at the intersection of legal systems (Section 5). It will suggest a preliminary methodological framework that may lead to their preservation in cases of conflict between procedural rules.

2. Defining boundaries

International agreements concluded by the EU are an integral part of EU law from their entry into force.⁶ According to established case law, decisions of international organizations and bodies, if directly connected to an international agreement incorporated in EU law, also form an integral part of the EU legal system from their entry into force,⁷ in the same way as the agreement itself.⁸ This rule has been formulated with regard to binding decisions of Association Councils acting under the Association Agreements of the EU with third countries and was subsequently developed mainly in this same area.⁹ In the case of *Sevince*, a Turkish national challenged the refusal of the Dutch State Secretary of Justice to grant him a residence permit on the grounds that such refusal violated a decision of the Association Council acting under the Association Agreement with Turkey. The Court made it clear that the decisions of this Council would partake in the same effects of the respective international agreement.¹⁰ This finding countered previous dualist practices of the EU with regard to decisions of international bodies.¹¹

The Court later explicitly extended the rule formulated in *Sevince* to decisions of other international bodies set up under international agreements concluded by the EU with third countries. In *Deutsche Shell*, the Court assessed the status in the EU legal order of a recommendation adopted by a Joint Committee entrusted with the task of implementing a multilateral agreement signed by the then EEC, established under that agreement. The German authorities had applied the recommendation of the Joint Committee, which defined rules concerning the sealing of goods in trade between the

⁶ Haegeman (n. 1 above), paragraph 5.

⁷ Case 30/88, *Greece v Commission* 1989 E.C.R. 3733, paragraph 13.

⁸ Case 192/89, *S.Z. Sevince v Staatssecretaris van Justitie* 1990 E.C.R. I-3497, paragraphs 8-9.

⁹ Agreement establishing an Association between the European Economic Community and Turkey, signed in Ankara on 12 September 1963 (Council Decision No 64/732/EEC of 23 December 1963, O.J. 217/3685, 29.12.1964).

¹⁰ *Sevince* (n. 8 above), paragraphs 14-15, 17 and 19.

¹¹ Peter Gilsdorf, *Les organes institués par des accords communautaires: effets juridiques de leurs décisions*, REVUE DU MARCHE COMMUN, 1992, 328, 331-2. Nowadays, decisions of bodies set up by bilateral agreements signed by the EU are often published as such in the Official Journal (e.g. Decision No 1/2010 of the Joint Customs Cooperation Committee, of 24 June 2010, pursuant to Article 21 of the Agreement between the EC and Japan on Cooperation and Mutual Administrative Assistance in Customs Matters regarding mutual recognition of Authorised Economic Operators programmes in the European Union and in Japan, O.J. 279/71, 23.10.2010; Decision No 3/2005 of the ACP-EC Customs Cooperation Committee, of 13 January 2006, derogating from the definition of the concept of originating products to take account of the special situation of the Kingdom of Swaziland with regard to its manufacturing of core spun yarns, O.J. L 26/14, 31.1.2006).

parties to the Convention, and Shell questioned the validity of such recommendation in the EU legal order. The Court relied on *Sevince*, thereby deciding that non-binding decisions required for the application of international agreements that form an integral part of the EU legal system are also part of EU law.¹²

This bare-bone rule regarding the status of decisions of international organizations and bodies in EU law has not been as developed and further substantiated as the general principles applicable to international agreements.¹³ The rulings of the Court of Justice laying down the general foundations of the reception of decisions of international bodies in EU law concern mostly the decisions of the Association Council of EEC-Turkey Association Agreement. Most other cases pertaining to the reception of international decisions in the EU legal order have assessed EU legal acts that transposed international decisions, and not the decisions themselves.¹⁴ Indeed, this form of reception of decisions of international organizations or bodies remains common practice, for example in the fields of fisheries and the environment.¹⁵

Despite the limited elaboration in the case law, one may surmise that, given its rationale, the rule according to which decisions of international bodies set up under international agreements binding on the EU form part of the EU legal system, if directly connected to the underlying agreements, is generally applicable, irrespective of how decisions of international organizations or bodies are concretely transposed into the EU legal order. According to the case law, this rule is grounded on the fact that, ultimately, the EU and its contracting parties gave their consent to the emanation of such decisions.

¹² Case C-188/91, *Deutsche Shell v Hauptzollamt Hamburg-Harburg*, 1993 E.C.R. I-382, paragraph 17.

¹³ An extensive literature deals with the effects of international agreements in EU law. See e.g. Piet Eeckhout, *EXTERNAL RELATIONS OF THE EUROPEAN UNION – LEGAL AND CONSTITUTIONAL FOUNDATIONS* (Oxford University Press, 2004), Chapters 6 to 9; Panos Koutrakos, *EU INTERNATIONAL RELATIONS LAW* (Hart Publishing, 2006), Chapters 5 to 8; Francis Jacobs, *Direct effect and interpretation of international agreements in the recent case law of the European Court of Justice* in *LAW AND PRACTICE OF EU EXTERNAL RELATIONS. SALIENT FEATURES OF A CHANGING LANDSCAPE* (Alan Dashwood and Marc Maresceau eds., Cambridge University Press, 2008), 13-33; Mario Mendez *The Enforcement of EU Agreements: Bolstering the effectiveness of Treaty law?* 47 *COMMON MARKET LAW REVIEW* 1719 (2010). In contrast, there are relatively few accounts of the effects of international decisions: see Pieter Jan Kuijper, *Customary International Law, Decisions of International Organisations and other techniques for Ensuring Respect for International Legal rules in European Community Law* in *THE EUROPEANISATION OF INTERNATIONAL LAW* (Jan Wouters and others eds., TMC Asser Press, 2008) 96-102; Nikolaos Lavranos, *DECISIONS OF INTERNATIONAL ORGANIZATIONS IN THE EUROPEAN AND DOMESTIC LEGAL ORDERS OF SELECTED EU MEMBER STATES* (Europa Law Publishing, 2004), Chapter 3)

¹⁴ See further Lavranos, 56-7.

¹⁵ *Idem*, pp. 55-7 and 81-4. This is illustrated by the cases analyzed below in Section 3.

Indeed, the direct link between the decision and the respective agreement (“*unmittelbaren Zusammenhang*” in the original wording of the Court in *Deutsche Shell*) stems from the fact that the decision emanates from a body established under an agreement concluded by the EU, which was entrusted with responsibility for its implementation.¹⁶ According to Advocate General Van Gerven, relying on previous Court judgments, the fact “that the act is placed ‘within the institutional framework’ of the agreement and ‘gives effect to it’” (i.e. to its objectives) are crucial factors to determine a “close connection” (“*nauwe samenhang*”) between the agreement and the decision.¹⁷ It follows that, in the Court’s view, the underlying reason to give the decision a similar status and effect to the agreement on which it is based seems to be the fact that, by signing the latter, the EU agreed to entrust powers of decision to organs created by the agreement with the purpose of giving effect to it.¹⁸ In this logic, the binding or non-binding nature of the decision is irrelevant to determine whether it is a part of the EU legal order.¹⁹ Its binding nature only becomes relevant to assess the effects of the decision, not its status.

This rationale applies to decisions of bodies set up both by bilateral and multilateral agreements. This resulted already from the formulation of *Sevince*, but *Deutsche Shell* dissipated any possible remaining doubts on this issue. However, in the case of decisions of bodies set up by multilateral agreements, the link between the consent of the EU and the activity of the international body is weaker. Ultimately, as underlined by Gilsdorf, the decision may be adopted against the will of the EU.²⁰ The EU participates in the decision-making process in a different position from the one it has in the context of bilateral agreements in general and, in particular, in the context of Association Councils that implement Association Agreements, where it is virtually “the master of the preparation of decisions to be taken”.²¹ Yet, undoubtedly, the EU by concluding the agreement, consented to the procedural rules that it enshrines, including the decision-making rules applicable to the bodies set up by the agreement, and is therefore bound by such decisions. Independently of the possibility of raising objections with a view to avoiding undesirable

¹⁶ *Deutsche Shell* (n. 12 above), paragraph 17.

¹⁷ Opinion of Mr Advocate General Van Gerven, delivered on 15 October 1992, Case C-188/91, *Deutsche Shell AG v Hauptzollamt Hamburg-Harburg*, 1993 E.C.R. I-363, paragraph 10.

¹⁸ Gilsdorf (n. 11 above), 332.

¹⁹ Opinion of AG Van Gerven, *Deutsche Shell* (n. 17 above), paragraph 10.

²⁰ Gilsdorf (n. 11 above), 332.

²¹ Kuijper (n. 13 above), 101.

constraining effects, the EU is bound by the principle *pacta sunt servanda* and by the consequences of its consent.²²

At a general level of analysis, the ‘consent rationale’ that, according to the Court, justifies the effect of decisions adopted by international organizations and bodies in the EU legal order does not apply to decisions of international organizations and bodies to which the EU is only an observer and not a member. In this case, arguably there is no link between the consent of the EU and the activity of the international body. Therefore, in principle, the EU is not legally bound by the decisions of the international organization and body to which it is merely an observer. It may, of course, wish to follow them and carry them out, within the limits of its competences, and in accordance with the values that it upholds in the international sphere (e.g. the maintenance of international peace and security, environmental protection, sustainable development, economic integration). At the same time, there may be important nuances to the logic according to which the EU is not bound by the decisions of international organizations to which it is not a member. Cases in point are those in which *the Member States* are bound by such decisions, because they are members of the international organization from which they stem, but their powers in the matter at issue have been transferred to the EU. This may occur, for example, with regard to the International Health Regulations issued by the World Health Organization.²³ In the famous cases of the UN Security Council resolutions on economic sanctions, the issue arose whether the EU, although not being a UN member, would nevertheless be bound to pay heed to such resolutions.²⁴

The rule of *Sevince* and *Deutsche Shell* is in line with the openness or ‘friendliness’ of the EU legal order with regard to international law. This general approach is, however, limited by the general principles formulated by the European Court of Justice (ECJ) with a view to ensuring the autonomy of EU law that currently set the boundaries of the EU legal system vis-à-vis international law. On a first step, the ECJ shielded the EU legal order

²² Gilsdorf (n. 11 above), 333.

²³ Kuijper (n. 13 above), 99.

²⁴ Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission*, 2005 E.C.R. II-3533, paragraphs 243, 247 and 248. The European Court of Justice did not address explicitly this issue on appeal, and preferred to focus on whether the implementation of the UN Security Council Resolutions could ignore fundamental rights review at the EU level (*Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] E.C.R. I-6351).

from international agreements that could negatively impact on the institutional balance defined in the Treaties as well as on the relative powers of the EU institutions. Thus, it prevented the entering into force of international agreements “likely adversely to affect the allocation of responsibilities defined in the Treaties, and hence, the autonomy of the Community legal order” and, thereby, to clash with “the very foundations” of the Union.²⁵ The ECJ also established that the autonomy of EU law required “the essential character of the powers of the Community and its institutions as conceived in the Treaty □to□ remain unaltered”.²⁶ More recently, moving from issues of institutional balance and preservation of institutional power to substantive legal principles, the Court held that “the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty” that form part of “the very foundations of the Community legal order”, among which the respect for fundamental rights, including judicial review.²⁷ Irrespective of the circumstances of the cases in which they were formulated – and concretely of the fact that these rules regarded, respectively, international agreements and the validity of Community acts transposing UN Security Council resolutions to EU law – these statements of the ECJ defined general limits to the reception of international law in the EU legal order. As such, they also limit the reception of decisions of international organizations and bodies.

3. Between openness and autonomy

In between openness towards international law, on the one hand, and autonomy of the EU legal order in its external dimension, on the other, there remain unsolved issues of procedural protection that may stem from the relationships between the two legal orders. This is one important aspect of the impact of international legal regimes in the EU legal order, as more acts that stand at the crossroads of international law and EU law shape the conduct of natural and legal persons, defining concrete entitlements and obligations. Procedural protection may be ensured through rules of constitutional nature (e.g. due process in restricting fundamental rights) or through rules of administrative

²⁵ Opinion 1/91 (n. 1 above) paragraphs 35 and 71.

²⁶ Opinion 1/00 (n. 1 above), paragraph 12.

²⁷ Kadi (n. 24 above), paragraphs 285, 304, and 316.

procedure (e.g. access to file, participation of interested persons). Both types of rules provide standards against which to measure the legitimate exercise of public authority.

The analysis below will show, through illustrative examples, the effects the incorporation of decisions of international organizations or bodies in the EU legal order may have on guarantees of participation applicable under the general rules of EU law. A previous essay has shown that two different factors explain why the interaction between global regulatory regimes and the EU legal order may ultimately lead to lower procedural standards in the segments of EU law that result from the reception of decisions of international organizations or bodies.²⁸ Firstly, procedural standards applicable to the making of such decisions may not be as developed as in EU law while the regulatory acts are applied in the EU legal order as they have been adopted in international *fora*. Secondly, procedures followed by the EU for the adoption of legal acts of reception may not be as demanding in terms of procedural guarantees as they would be for purely internal matters. This section will take the argument further. It will present one case where reception of decisions of international bodies has a negative impact on procedural rules valid within EU law – the reception of decisions adopted by the Fisheries Commissions of Regional Fisheries Management Organizations – thereby confirming those first findings. However, the analysis of the interaction between the regime of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and EU law will also show that the opposite phenomenon may occur. This is important, as it shows that the diversity of global regulatory regimes manifests itself also in this respect. The case of CITES is, likely, exceptional in terms of guarantees of participation recognized to non-governmental bodies, but it gives an interesting contrasting view on the effects of the interaction between EU law and international regulatory regimes on procedural standards.

Fisheries: EU Advisory Councils and Regional Fisheries Commissions

Regional Advisory Councils (RACs) have recently become important actors in the management of the EU Common Fisheries Policy. They were introduced in its 2002

²⁸ Joana Mendes, *Administrative Law Beyond the State: Participation at the Intersection of Legal Systems* in GLOBAL ADMINISTRATIVE LAW AND EU ADMINISTRATIVE LAW. RELATIONSHIPS, LEGAL ISSUES AND COMPARISONS (Edoardo Chiti and Bernardo G. Mattarella, eds., Springer, 2011), 111-132.

reform with the goal of enabling the participation of interested parties in the decision-making processes in this policy field. The EU law-making institutions considered that RACs would “enable the Common Fisheries Policy to benefit from the knowledge and experience of the fishermen concerned and of other stakeholders and to take into account the diverse conditions throughout the Community waters”.²⁹ Disengagement of the parties concerned with a policy mostly perceived as being “remote, unresponsive and bureaucratic”³⁰ and lack of adaptation to the regional circumstances, were some of the “traditional failings” of the Common Fisheries Policy.³¹ RACs were intended to correct these failings, thereby contributing to the achievement of the goals of the Common Fisheries Policy.³² They became, therefore, a central aspect of the 2002 reform.³³

Despite partially dependent on EU funding, RACs are “stakeholder-led bodies”.³⁴ The Commission does not directly establish them, but rather endorses them, in contrast to other consultative structures active in the Common Fisheries Policy.³⁵ According to one commentator, this strengthens their legitimacy.³⁶ The majority of their members are representatives of the fisheries sector, although the Commission has recently proposed to replace the current distribution of membership (two thirds for the fisheries sector) with

²⁹ Recital 27 of preamble of Council Regulation No 2371/2002, of 20 December 2002, on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (O.J. L 358/59, 31.12.2002), as amended (henceforth, “Basic Regulation”).

³⁰ M. Sissenwine, D. Symes, *Reflections on the Common Fisheries Policy. Report to the General Directorate for Fisheries and Maritime Affairs of the European Commission* (2007), 51, available at <http://www.greenpeace.org/raw/content/denmark/press/rappporter-og-dokumenter/reflections-on-the-common-fish.pdf> (accessed September 5, 2011). See further Green Paper on the Future of the Common Fisheries Policy, COM (2001) 135 final, Brussels 20.03.2001, 11-12

³¹ House of Lords, European Union Committee, “The Progress of the Common Fisheries Policy. Volume I: Report”, 21st Report of Session 2007-8 (henceforth, “House of Lords Report”), paragraph 243.

³² House of Lords Report (n. 31, above) paragraphs 137 and 119. See also Article 31(1) of the Basic Regulation.

³³ Green Paper, Reform of the Common Fisheries Policy, COM (2009) 163 final, Brussels, 22.4.2009, 6. Article 2(2)(c) of the Basic Regulation.

³⁴ Communication from the Commission “Review of the functioning of the Regional Advisory Councils”, COM (2008) 364 final, Brussels 17.06.2008, 3.

³⁵ See Articles 3 and 5(2) of Council Decision of 16 July 2004 establishing Regional Advisory Councils under the Common Fisheries Policy (OJ L 256/17, 3.8.2004), henceforth, “the Council Decision establishing the RACs”. On the contrast with the Advisory Committee on Fisheries and Aquaculture – the other main forum of participation in the Common Fisheries Policy – see Joana Mendes, PARTICIPATION IN EU RULE-MAKING. A RIGHTS-BASED APPROACH (Oxford University Press, 2011), 99-100.

³⁶ Joan O’Mahony, *The Promises and Pitfalls of Participation: What Voice for the Regional Advisory Councils?* in OPENING EU-GOVERNANCE TO CIVIL SOCIETY. GAINS AND CHALLENGES. (Beate Kohler-Koch, Dirk De Bièvre and William Maloney eds., CONNEX Report Series No 5, Manheim, 2008), 223, 225.

the requirement of a “balanced representation of all stakeholders”.³⁷ RACs advise mainly the Commission on matters of fisheries management falling within their respective jurisdiction.³⁸ Concretely, the Commission “may” consult them in respect of measures it proposes on the basis of current Article 43 of the Treaty on the Functioning of the European Union (TFEU).³⁹ They may also be consulted in other matters, both by the Commission and by Member States.⁴⁰ In addition, and importantly, they may submit recommendations and suggestions to the Commission and the Member States, including on implementation problems, and conduct other activities necessary for their functions.⁴¹ They are therefore not dependent on a Commission’s or on a Member State’s request to influence decision-making, even if, at the end, their agenda may be driven by the Commission’s agenda.⁴²

The RACs’ powers have led them to become “active players” in the Common Fisheries Policy, according to the Commission’s assessment.⁴³ The fact that both the Commission and the Member States need to reply to their recommendations “precisely” and timely is, to a limited extent, a guarantee that the EU and national institutions duly consider their views.⁴⁴ Crucial to assess their effective influence is the extent to which the Commission follows up on their advice. There are mixed indications in this respect.⁴⁵ Recommendations adopted by consensus, on the basis of scientific evidence, and compatible with the Common Fisheries Policy may have better chances of being

³⁷ Article 5(3) of the Council Decision establishing the RACs; Article 52(1) of the Proposal for a Regulation of the European Parliament and of the Council on the Common Fisheries Policy, COM (2011) 425 final, Brussels, 13.7.2011. The lower weight of non-fishing interests and of the non-industrial fishing interests has been a reason of concern (see House of Lords Report (n. 31 above) paragraphs 127 and 128; COM (2008) 364 final, n. 35 above, 5 and 6).

³⁸ Article 31(1) of the Basic Regulation. For the areas of jurisdiction, see Annex I of the Council Decision establishing the RACs.

³⁹ Article 31(4) of the Basic Regulation.

⁴⁰ *Idem*.

⁴¹ Article 31(5) of the Basic Regulation.

⁴² House of Lords Report (n. 31 above), paragraph 125.

⁴³ COM (2008) 364 final (n. 35 above) 8.

⁴⁴ Article 7(3) of the Council Decision establishing the RACs. The formulation put forth in the 2011 Commission’s proposal is slightly vaguer: there is no reference to answering “precisely” and the ultimate time limit of three months disappears (Article 53(2) of the 2011 Proposal - COM (2011) 425 final - n. 37, above).

⁴⁵ House of Lords Report (n. 31 above), paragraphs 125 and 138; COM (2008) 364 final (n. 35 above) 9.

followed,⁴⁶ but these are not guarantees of effective influence. In any case, in general terms, the Commission has attached a great deal of importance to the consideration of the views received from interested parties. Indeed, it has adapted its decision-making procedures for deciding on annual fishing opportunities in order to create better conditions for effective consultations and to involve interested parties at an early stage. For this purpose, it started issuing policy statements concerning its intentions for setting total allowable catches and adapted the timing for elaborating its proposals to the Council.⁴⁷ This is a strong indication of the importance attributed to consultation in EU fisheries management and it is confirmed by the intention recently manifested by the Commission to consolidate and extend the experience with the RACs.⁴⁸

In general, the effects of the RACs' intervention in the Common Fisheries Policy have been positively evaluated, even if cautiously so either because of their relative novelty or because of their diversity.⁴⁹ The Commission pointed out that they "have delivered better access to information and better understanding of decisions taken at the European level" and "have helped soften hostility towards the CFP, thus facilitating further direct contacts between stakeholders, EU officials, Member States and scientists".⁵⁰ The House of Lords, on the basis of the evidence received in the course of its mid-term review of the 2002 reform of the Common Fisheries Policy, considered the establishment of the RACs as "the most positive development to flow from [this reform]".⁵¹ Others have expressed

⁴⁶ House of Lords Report (n. 31 above), paragraph 125 (the Commission has a different view on the relevance given to consensual recommendations – see COM (2008) 364 final (n. 35 above) 9; on the position of dissenting views, see Case T-91/07, WWF-UK v Council, paragraphs 72 and 75); Communication from the Commission, "Consulting on Fishing Opportunities for 2010", COM (2009) 224 final, Brussels, 12.5.2009, 11, where the Commission admits that "stakeholders' advice can only be used by the Commission when it is developed using an evidence-based approach to sustainable fishing".

⁴⁷ Communication from the Commission, "Improving consultation on Community fisheries management", COM (2006) 246 final, Brussels, 24.5.2006, 8-11. The policy statements issued so far are available at http://ec.europa.eu/fisheries/cfp/fishing_rules/tacs/index_en.htm (accessed September 5, 2011). On the importance of consultations, see in particular the following policy statements: COM (2007) 295 final, p. 3, 4 and 8. COM (2008) 331 final, 12; COM (2009) 224 final, 11; COM (2010) 241 final, p. 9-10.

⁴⁸ COM (2011) 425 final (n. 37 above), 10.

⁴⁹ House of Lords Report (n. 31 above), paragraph 124; Sissenwine and Symes (n. 30 above), 66; COM (2008) 364 final (n. 35 above), 8 ("the RACs are still going through a learning process"); Ronán Long, *The Role of Regional Advisory Councils in the European Common Fisheries Policy: Legal Constraints and Future Options* 25 *The International Journal of Marine and Coastal Law* 289, 316 (2010); O'Mahony (n. 36 above) 229-231.

⁵⁰ COM (2008) 364 final (n. 35 above), 8.

⁵¹ House of Lords Report (n. 31 above), paragraphs 136 and 226.

similar views on the importance of these bodies.⁵² The decision of the Council to provide them permanent funding, in contrast to what was initially envisaged, was seen as an official recognition of their significance.⁵³

It follows from the above that consultation of RACs is an important procedural standard against which to assess both the legal and social legitimacy of fisheries management. According to the Basic Regulation, the Council while adopting measures governing access to waters and resources as well as the sustainable pursuit of fishing activities, needs to take into account, among other factors, the advice received from the RACs.⁵⁴ However, the RACs' role is considerably limited, if not inexistent, with regard to decision-making procedures whereby the Council transposes to EU law decisions of Regional Fisheries Management Organizations (RFMOs). These organizations are established by international agreements and have the powers to adopt fisheries conservation and management measures that are binding on their members.⁵⁵ The EU is party to many RFMOs and is as such under the duty to transpose their binding decisions into EU law.⁵⁶ In addition, it may of course choose to incorporate their non-binding measures. Among other fisheries management measures, RFMOs establish total allowable catches, which are divided into quotas allocated to the members of the organizations, and may adopt long-term plans for the recovery of fish stocks.⁵⁷ The fishing opportunities in the areas covered by regional fisheries organizations are therefore

⁵² Sissenwine and Symes (n. 30 above), 45. Indrani Luchtman and others, "Towards a Reform of the Common Fisheries Policy in 2012 – a CFP Health Check", IEEP London, 2009, 28 (available at http://www.ieep.eu/assets/440/cfp_healthcheck.pdf, accessed September 5, 2011).

⁵³ *Idem*. See Council Decision No 2007/409/EC, of 11 June 2007, amending Decision 2004/585/EC establishing Regional Advisory Councils under the Common Fisheries Policy (O.J. L 155/68, 15.6.2007).

⁵⁴ The guarantees of participation of RACs are not extended to RACs individual members – see Case T91/07, *WWF-UK Ltd v Council*, 2008 E.C.R. II-81, paragraph 72.

⁵⁵ See further Communication from the Commission "Community participation in Regional Fisheries Organizations (RFOs), COM (1999) 613 final Brussels, 8.12.1999, 6-9; Robin Churchill and Daniel Owen, *THE EC COMMON FISHERIES POLICY* (Oxford University Press, 2010), 112-118 and 359. E.g. Article VIII and X(1) of the International Convention for the Conservation of Atlantic Tunas (available at <http://www.iccat.es/en/>, accessed September 5th, 2011)

⁵⁶ COM (1999) 613 final (n. 55 above), 9, 12-13; Churchill and Owen (n. 55 above), 359, 360-375.

⁵⁷ See e.g. Article 5(g) and 10(1)(a) to (d) of the Convention on the Conservation and Management of High Migratory Fish Stocks in the Western and Central Pacific Ocean (available at <http://www.wcpfc.int/keydocuments/convention-text>); Article V(2)(c) and (3) of the Agreement for the Establishment of the Indian Ocean Tuna Commission (available at <http://www.iotc.org/English/info/basicext.php>); Articles 7(1)(b)(c) and 13 of the Convention for the Conservation of Salmon in the North Atlantic Ocean (available at <http://www.nasco.int/convention.html>). All sites were last accessed on September 5th, 2011.

defined in the framework of those organizations and then incorporated in EU law. Recent examples include total allowable catches regarding highly migratory fish and the new recovery plan for bluefin tuna in the Eastern Atlantic and Mediterranean.⁵⁸

The Commission has been rather open regarding the limited role of RACs in fisheries management measures adopted by RFMOs and transposed into EU law. It has declared that in its negotiations with third countries the Commission “cannot impose its views unilaterally but must seek a compromise with its counterparts”.⁵⁹ Accordingly, it has decided to exclude its negotiating position in RFMOs from the policy statements where it defines, for purposes of consultation, its intentions for setting total allowable catches.⁶⁰

Therefore, in the cases where total allowable catches are set by RFMOs and then incorporated in EU law, the possibilities of participation of interested parties in decision-making depends on the rules applicable to each RFMO.⁶¹ These vary, but in general the procedural guarantees are lower than those granted by EU law to the RACs. In most cases, non-governmental organizations may participate as observers in the meetings of Fisheries Commissions – i.e. the bodies of the RFMOs that adopt binding measures regarding fisheries management.⁶² There does not seem to be any concern regarding a balanced

⁵⁸ Annex ID of Council Regulation (EU) No 57/2011, of 18 January 2011, fixing the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in EU waters and, for EU vessels, in certain non-EU waters (OJ L 24/1, 27.1.2011); Council Regulation (EC) No 302/2009, of 6 April 2009, concerning a multiannual recovery plan for bluefin tuna in the eastern Atlantic and Mediterranean, amending Regulation (EC) No 43/2009 and repealing Regulation (EC) No 1559/2007 (O.J. L 96/1, 15.4.2009). On the implications the latter may have, see Case C-221/09, *AJD Tuna Ltd v Direttur talAgrikoltura u s-Sajd, Avukat Generali*, 2011, nyr.

⁵⁹ COM (2008) 364 final (n. 35 above), 9.

⁶⁰ COM (2006) 246 final (n. 47 above), 9.

⁶¹ The following considerations are based on the analysis of RFMOs that have powers to adopt measures binding on their members and of which the EU is a member. The following were considered: North-East Atlantic Fisheries Commission (NEAFC), Northwest Atlantic Fisheries Organization (NAFO), North Atlantic Salmon Conservation Organisation (NASCO), South-East Atlantic Fisheries Organisation (SEAFO), South Pacific Regional Fisheries Management Organisation (SPRFMO – note that the respective Convention has been signed by the EU, but was not yet ratified), Convention on Conservation of Antarctic Marine Living Resources (CCAMLR), General Fisheries Commission for the Mediterranean (GFCM), International Commission for the Conservation of Atlantic Tunas (ICCAT), Indian Ocean Tuna Commission (IOTC), Western and Central Pacific Fisheries Commission (WCPFC), Inter-American Tropical Tuna Commission (IATTC). Also the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) was examined: even though the EU is not a party, it plays “an active role” as a “cooperating non-member” (http://ec.europa.eu/fisheries/cfp/international/rfmo/index_en.htm and <http://www.ccsbt.org/site/> accessed September 5th, 2011) although it is not clear from the text of the convention what this may imply.

⁶² E.g. Article 14(2) of the Convention for the Conservation of Southern Bluefin Tuna (available at http://www.ccsbt.org/site/basic_documents.php); Article XXIII(4) of the Convention CCAMLR (available at http://www.ccamlr.org/pu/e/e_pubs/bd/toc.htm) - in addition, the Convention specifies that the Commission may establish “cooperative working relationships” with, inter alia, nongovernmental

representation of concerned interests. Participation by observers of non-governmental organizations depends on request and on the approval of the members of the respective Fisheries Commission, or, at least, on the absence of objections on their part.⁶³ Specifically, the request for participation of nongovernmental organizations may need to include information regarding the organization's competence concerning the scope of the Fisheries Commission's action or the organization's competence to contribute to the attainment of the objectives of the Convention.⁶⁴ In some cases, upon a request of a member of the Fisheries Commission, observers may be excluded from the discussion of specific points in the agenda.⁶⁵ In addition, the status of observers may be subject to revocation by a decision of the Fisheries Commission.⁶⁶ Finally, the formal role of observers may be limited to distributing documents in the meetings of the Fisheries Commission.⁶⁷ Also when they have broader possibilities of intervention – e.g. making oral statements – this is dependent on the discretion of the chairman.⁶⁸ In sum, the Fisheries Commissions and their members have a wide discretion regarding the admission of observers to their meetings as well as their role once they are admitted. In the absence of other rules that ensure effective opportunities of participation to observers, this status as such does not provide proper procedural guarantees.

organizations). See also nn. 63 to 77 below. "Fisheries Commission" in the following paragraphs refers to the Commission of the RFMOs cited in the footnotes.

⁶³ E.g. Rule 3(6) and (9) of the Rules of Procedure of the Commission for the Conservation of Southern Bluefin Tuna (http://www.ccsbt.org/site/basic_documents.php); Rule 36 of the Rules of Procedure of the NEAFC Commission (<http://www.neafc.org/basictexts>); Rule 30(e) of the Rules of Procedure of the CCAMLR Commission (http://www.ccamlr.org/pu/e/e_pubs/bd/toc.htm); Rule 38 (j) of the Rules of Procedure for the SEAFO Commission (<http://www.seafo.org/AURulesProcedures.html>); Rule XIII(5) of the Rules of Procedure of the IOTC Commission (http://www.iotc.org/English/info/rules_proced.php); Point 4 of the Guidelines and Criteria for Granting Observer Status at ICCAT Meetings (http://www.iccat.es/Documents/Meetings/SCRS2011/OBSERVER_ENG.pdf, all accessed September 5th, 2011).

⁶⁴ E.g. Rule 3(4) of the Rules of Procedure of the Commission for the Conservation of Southern Bluefin Tuna; with similar effect, see Rules 34 and 35 of the Rules of Procedure for the NEAFC Commission, and Rule 38 of the Rules of Procedure for the SEAFO Commission.

⁶⁵ E.g. Rule 3(8) of the Rules of Procedure of the Commission for the Conservation of Southern Bluefin Tuna.

⁶⁶ Rule 38 (k) of the Rules of Procedure for the SEAFO Commission.

⁶⁷ E.g. Rule 3(10) and (11) of the Rules of Procedure of the Commission for the Conservation of Southern Bluefin Tuna; Rule 35 of the Rules of Procedure of the CCAMLR Commission (in this case, only if a member of the Commission objects to observers addressing the Commission, under Rule 34); Rules 37 of the Rules of Procedure for the SEAFO Commission (see also Rule 36).

⁶⁸ E.g. Rules 12 and 37 of the Rules of Procedure for the NEAFC Commission; Rules 36 of the Rules of Procedure for the SEAFO Commission; Rule XIII of the Rules of Procedure of IATTC.

In a few cases, the provisions on the participation of non-governmental organizations as observers to the meetings of Fisheries Commissions are part of a broader set of rules aimed at ensuring transparency of the Commissions' work. Of the twelve RFMOs analyzed,⁶⁹ three Conventions envisage rules of this type: the Convention on the Conservation and Management of High Migratory Fish Stocks in the Western and Central Pacific Ocean (“the Western and Central Pacific Fisheries Convention”);⁷⁰ the Convention for the Strengthening of the Inter-American Tropical Tuna Commission (the “Antigua Convention”);⁷¹ and the Convention on the Conservation and Management of the High Seas Fishery Resources of the South Pacific Ocean (the “South Pacific Fisheries Convention”). Moreover, it is possible that in the future other RFMOs will envisage rules on transparency that include provisions on participation.⁷²

In these cases, the role of observers is subject to relatively less constraining rules than the ones described above.⁷³ But the most interesting aspect of these Conventions, for current purposes, is the fact that they broaden the possibilities of participation by non-governmental interested parties – including representatives of environmental and fish industry interests – beyond their possible status as observers.⁷⁴ In two cases, the Conventions determine that the respective Fisheries Commission must promote transparency in its implementation activities, including, inter alia, decision-making that “*as appropriate*” includes “consultations with, and *the effective participation of*, nongovernmental organizations, representatives of the fishing industry, particularly the

⁶⁹ See n. 61 above.

⁷⁰ The text of the Convention is available at <http://www.wcpfc.int/key-documents/convention-text> (accessed September 5, 2011).

⁷¹ The respective text is available at <http://www.iattc.org/IATTCDocumentsENG.htm> (accessed September 5, 2011).

⁷² An amended text of the NAFO Convention signed in 2007 and not yet legally binding due to an insufficient number of ratifications has a similar provisions to those of the Western and Central Pacific Fisheries Convention, the Antigua Convention and the South Pacific Fisheries Convention mentioned above (Article IV(5)(g) of the Amendment to the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, available at <http://www.nafo.int/about/frames/about.html>, accessed September 5, 2011). In contrast, the last amendment to the GFCM Convention was signed in 1997 and did not change the rules in this respect.

⁷³ Rule 36 of the Rules of Procedure of the Western and Central Pacific Fisheries Commission (available at <http://www.wcpfc.int/doc/commission-01/rules-procedure>, accessed September 5, 2011). Rule XIII. Annex 2 of the Antigua Convention, however, gives broader possibilities of members' objection to observers' participation (see point 7).

⁷⁴ All provide that they may participate “as observers or otherwise as appropriate”: Article 21 of the Western and Central Pacific Fisheries Convention; Article XVI(2) of the Antigua Convention; and Article 18(4) of the South Pacific Fisheries Convention.

fishing fleet, and other interested bodies and individuals”.⁷⁵ While the Western and Central Pacific Fisheries Convention does not entail a similar norm, it specifies that the rules of procedure of the respective Fisheries Commission must provide for participation and must “not be unduly restrictive in this respect”.⁷⁶ Furthermore, participants must be given timely access to relevant information.⁷⁷

These provisions could ground opportunities of participation that, depending on practice, could be considered functionally equivalent to the access given to representatives of interests affected in the definition of the EU Common Fisheries Policy. The texts of the Conventions give considerable leeway to the respective Fisheries Commissions in accommodating the requirements of participation they establish – participation possibilities different from those inherent in the observer status ought to be given “as appropriate”.⁷⁸ However, beyond the norms of the Convention, the respective rules of procedure are silent about participation possibilities other than the status of observer. It is therefore difficult to assess without detailed empirical research what the broader possibilities of participation envisaged in the respective Conventions effectively represent in these cases. Given the lack of further indications in the rules of procedure of the Fisheries Commissions analyzed, one may submit that these other avenues of participation have not yet been implemented.

It follows from the above that the international regimes governing RFMOs, as they currently stand, do not provide guarantees of involvement of non-governmental interested parties in their decision-making procedures similar to the ones existent in EU fisheries law. Whether intervening as observers “or otherwise as appropriate” – to use the terms of the Conventions mentioned above – interest representatives do not need to be consulted by legal determination, nor can they expect to have a reply regarding the views expressed.

⁷⁵ Article XVI(1)(b) of the Antigua Convention and Article 18(3) of the South Pacific Fisheries Convention, emphasis added.

⁷⁶ Article 21 of the Western and Central Pacific Fisheries Convention (Article 18(4) of the South Pacific Fisheries Convention contains a similar provision).

⁷⁷ Article 21 of the Western and Central Pacific Fisheries Convention; Article XVI(2) of the Antigua Convention; Article 18(4) of the South Pacific Fisheries Convention.

⁷⁸ See n. 74 above

As a result, when assessing how technocratic or participative the governance of the EU Common Fisheries Policy is, a distinction should be made between the internal and the external dimension of this policy. Purely internal decision-making procedures regarding fisheries management measures comply with the legal norms that require the Council to take into account the views expressed by the RACs – this of course does not imply that the comments submitted by RACs need to be followed. This contrasts with decision-making procedures whereby measures adopted by RFMOs are transposed into EU law. Firstly, given the Commission’s position mentioned above,⁷⁹ it is very likely that the RACs’ guarantees of participation be trumped. Secondly, as just argued, even admitting that the interests represented in the RACs could be voiced in RFMOs decision-making procedures, the rules on participation applicable to these organizations do not provide guarantees of involvement of the affected interests’ representatives similar to those applicable in EU law. This is all the more relevant as, already in 1999, the Commission indicated “the volume of Council regulations that transpose RFMOs recommendations” has been growing annually with the rise in the number of recommendations adopted by the organizations and the increase in the number of RFMOs in which the Community is involved”.⁸⁰ In the same document the Commission alerted that EU participation in RFMOs “needs to be considered from the point of view of consistency of the internal and external aspects of the Common Fisheries Policy”.⁸¹ Consistency between the internal and external action of the EU is, moreover, a general requirement established by the EU Treaty.⁸² However, the considerably lower guarantees of participation in the segments of this policy that result from international decisions does not seem to be on the agenda. The Commission considers that improving RFMOs’ decision-making procedures is an important aspect of ensuring compliance with their decisions.⁸³ Yet – despite the role attributed to RACs with regard to issues of

⁷⁹ It should be recalled that the Council decides on total allowable catches on the basis of a Commission proposal (Article 20(1) of the Basic Regulation).

⁸⁰ COM (1999) 613 final (n. 55 above), 13.

⁸¹ *Idem*, 4.

⁸² Article 21(3) TEU. See further, Marise Cremona, *Coherence Through Law: what difference will the Treaty of Lisbon make?* 3 HAMBURG REVIEW OF SOCIAL SCIENCES 11 (2008).

⁸³ Communication from the Commission, “External Dimension of the Common Fisheries Policy”, COM (2011) 424 final, Brussels 13.7.2011, 9.

compliance, the fact that the 2011 reform of the Common Fisheries Policy envisages strengthening the role of RACs,⁸⁴ and the lack of consistency between the internal and the external aspects of the EU fisheries policy – the modifications the Commission suggests with regard to RFMOs' decision-making procedures do not include any reference to participation.⁸⁵

Wildlife trade: CITES and EU implementation

The interaction between the regime established by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and EU law is interesting for current purposes, as it offers a contrasting example of the impact that the interplay between global and EU regulatory regimes may have in terms of procedural standards. Indeed, the procedural rules on participation and practices of transparency seem to be more developed within CITES than in EU law, at least in what concerns the procedure for the designation of species trade in which is subject to control. CITES aims at contributing to the protection and conservation of endangered species by regulating trade of specimens.⁸⁶ The EU implements the Convention's legal regime, including the decisions adopted by the respective Conference of the Parties (CoP), by effect of the EU CITES Regulation.⁸⁷

This interaction raises a preliminary issue. The EU is not a party to CITES. Following the general rules of reception defined by the Court,⁸⁸ in legal terms, the decisions of the CITES CoPs do not constrain the EU in any way, unlike the decisions of RFMOs analyzed above. When the EU changes its rules on trade in wildlife as a result of a measure adopted by the CITES CoPs, it does so on a purely voluntary basis. Despite the deviation from the general rules, in this case there can be little doubts about the legitimacy of this interaction in terms of EU law, as it still finds its basis on the institutional scheme defined in the Treaty. The EU institutions that defined the CITES regime – under which

⁸⁴ See n. 48 above and also COM (2009) 163 final (n. 33 above), 21.

⁸⁵ COM (2011) 424 final (n. 83 above), 9, footnote 11.

⁸⁶ The goal is not explicitly stated in the text of the Convention (available at <http://www.cites.org/eng/disc/text.php#texttop>), but features in the CITES website (<http://www.cites.org/eng/disc/what.php>, both accessed September 5, 2011).

⁸⁷ Regulation (EC) No 338/97, of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (O.J. L 61/1, 3.3.1997).

⁸⁸ See Section 2 above.

the CoPs decisions are translated into the EU legal system – are the same that define the EU international commitments, only that in this case they act as legislator.⁸⁹

CITES regulates international trade of animals and plants of the species listed in the appendices to the Convention on the basis of a system of permits and certificates issued by national management authorities subject to pre-defined criteria.⁹⁰ In basic terms, the CITES regulatory system relies, on the one hand, on enforcement by national authorities,⁹¹ and, on the other, on the recommendations issued by the CoPs that, inter alia, adapt the roll of listed species, thereby adapting the appendices when needed in view of the purposes of the Convention.⁹² The following analysis will focus on the latter. The CoP decisions are of highly political relevance and have a considerable impact on the obligations of the Parties and, indirectly, on the obligations of individuals.⁹³ The appendices list species threatened with extinction, trade in which is only allowed in exceptional circumstances (Appendix 1),⁹⁴ species not threatened with extinction but that may be at risk if not subject to controls (Appendix 2),⁹⁵ and species included at the request of a Party, because respective trade is controlled by national regulation with a view to prevent or restrict exploitation and the Party needs the cooperation of other countries (Appendix 3).⁹⁶ Appendices 1 and 2 may only be adapted by the CoP, which has therefore exclusive powers to add, remove or move species between the two appendices.⁹⁷ The list

⁸⁹ See, further, Section 4 below.

⁹⁰ Articles III to VI of the Convention.

⁹¹ Articles VIII and XIII of the Convention. Peter H. Sand, *Whither CITES? The Evolution of a Treaty Regime in the Borderland of Trade and Environment*, 8 EUROPEAN JOURNAL OF INTERNATIONAL LAW 29, 46-48 (1997).

⁹² Articles XI(2) and XV of the Convention. The legal value of the CoP recommendations is disputed (Rosalind Reeve, POLICING INTERNATIONAL TRADE IN ENDANGERED SPECIES. THE CITES TREATY AND COMPLIANCE (The Royal Institute of International Affairs, 2002), 41-42). In any event, they have been crucial for the development of CITES (see, e.g., Reeve, *idem*; Sand (n. 91 above), 35-38 and Rosalind Reeve, *Wildlife trade, sanctions and compliance: lessons from the CITES regime*, 82 INTERNATIONAL AFFAIRS 881, 882).

⁹³ For an example, see Philippe Sands and Albert Bedecarre, *Convention on International Trade in Endangered Species of Wild Fauna and Flora: the Role of Public Interest Non-Governmental Organizations in Ensuring Effective Enforcement of the Ivory Trade Ban*, 17 BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW 799, 806-809 (1999).

⁹⁴ Articles II(1), III, and VII of the Convention.

⁹⁵ Articles II(2), IV, and VII of the Convention.

⁹⁶ Articles II(3), V, and VII of the Convention.

⁹⁷ Article XV of the Convention.

of Appendix 3 may be changed at any time and by any Party unilaterally, by communication to the Secretariat.⁹⁸

EU law implements the CITES regime and defines additional restrictive measures for trade applicable to the EU Member States. As such, the annexes of the EU CITES Regulation contain not only the CITES species, for some of which the EU has adopted stricter rules, but also non-CITES species.⁹⁹ The EU implements the listing decisions of the CITES CoPs by adapting the annexes of the EU CITES Regulation accordingly.¹⁰⁰ In addition, it may take action regarding wildlife trade by, inter alia, amending the annexes of the EU CITES Regulation on its own initiative, irrespective of CoP decisions.¹⁰¹

Interestingly, the CITES Convention as well as the rules of procedure followed by the CITES CoP and by the CITES committees that operate in between the CoP meetings provide guarantees of participation to non-governmental organizations in the procedures of adaptation of the CITES appendices unparalleled by the formal rules followed for the modification of the annexes of the EU CITES Regulation. Amendments to the CITES appendices may be proposed by any Party and are decided by the majority of Parties' votes after consultation with other Parties and interested inter-governmental bodies.¹⁰² According to the Convention, "*any body or agency*" technically qualified in protection, conservation and management of wild fauna and flora, either governmental or non-governmental, international or national, may participate in the meetings of the CoPs as observers, if their request is not contested by one third of the Parties present.¹⁰³

⁹⁸ Article XVI of the Convention.

⁹⁹ Article 3 of the EU CITES Regulation. For a quick overview of the differences between the EU regulation and CITES, see Commission document available at http://ec.europa.eu/environment/cites/legislation_en.htm (accessed September 5, 2011).

¹⁰⁰ E.g. Commission Regulation (EU) No 709/2010 of 22 July 2010 amending Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein (OJ L 212/1, 12.8.2010).

¹⁰¹ It may also take action to change the appendices of the CITES Convention, through one of its Member States (Opinion 2/91, Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work, 1993, E.C.R. I-1061, paragraph 5; Case C-370/07, Commission v Council, 2009, E.C.R. I-8917).

¹⁰² These are the broad lines of the procedure for the amendment of Appendices I and II – see Article XV of the Convention for more details and Article XVI for the procedure to amend Appendix II.

¹⁰³ Article XI(7) of the Convention. National non-governmental agencies or bodies must be approved for these purposes in the State in which they are located (Article XI(7)(b)). See also Article XII(1) of the Convention, on participation in the activities of the Secretariat.

Once admitted, these observers shall have “the *right* to participate but not to vote”.¹⁰⁴ This provision is replicated in the rules of procedure of the CoP.¹⁰⁵ Registration is dependent upon an assessment by the Secretariat of the agency’s or body’s qualification in the protection, conservation or management of wild fauna and flora and upon demonstration of their legal personality and international character.¹⁰⁶ Moreover, the Chairmen of the Plants Committee and of the Animals Committee may invite “*any person or representative of any body, agency or organization* verifiably technically qualified in protection, conservation or management of wild fauna and flora to participate at the meetings [...] including those carried out in working groups” as observers.¹⁰⁷ These Committees prepare the work of the CoPs. They play a decisive role in assessing the status of the listed species and, therefore, in the review of the respective listings.¹⁰⁸

Recognizing the “valuable contributions of observers”, the CoP instructed the presiding officers at plenary and committee sessions “to make every effort to allow observers time in the sessions to make interventions □while giving□ them a time limit for speaking if necessary”.¹⁰⁹ In addition, it equally instructed the Secretariat “to make every effort to ensure that informative documents on the conservation and utilization of natural resources, prepared by observers for distribution at a meeting of the CoP are distributed to the participants in the meeting”.¹¹⁰ At the Committee level, according to the respective rules of procedure, non-governmental organizations may provide documents, either through the national CITES management authority of the Party where they are located – if they have a national scope – or to the CITES Secretariat – if they have an international character.¹¹¹ If accepted for distribution, these documents should be placed on the

¹⁰⁴ Idem, emphasis added.

¹⁰⁵ Rule 2 of the Rules of Procedure of the Conference of the Parties (as amended at the 14th meeting, The Hague, 2007), available at <http://www.cites.org/eng/cop/index.php> (accessed September 5, 2011). ¹⁰⁶

¹⁰⁶ Resolution Conf. 13.8 (available at <http://www.cites.org/eng/res/13/13-08.shtml>, accessed September 5, 2011).

¹⁰⁷ Rule 7(1) and (3) of the Rules of Procedure for Meetings of the Plants Committee and of the Rules of Procedure for Meetings of the Animals Committee (both adopted at the 17th meeting, Geneva, April 2008, effective from 20 April 2008), available, respectively, at <http://www.cites.org/eng/com/pc/index.php> and <http://www.cites.org/eng/com/ac/index.php> (both accessed September 5, 2011).

¹⁰⁸ See Resolution Conf 11.1 (Rev CoP14), Establishment of Committees (available at <http://www.cites.org/eng/res/index.php>, accessed September 5, 2011).

¹⁰⁹ Idem. On their right to speak, see Rule 17 of the Rules of Procedure of the CoP and, at Committee level, Rule 25 of the Rules of Procedure of the Committees (n. 107 above).

¹¹⁰ Resolution Conf 11.1 (n. 108 above).

¹¹¹ Rule 21 of the Rules of Procedure of the Committees (n. 107 above).

Secretariat's website "as soon as possible after they are received".¹¹² The Parties directly affected by their discussion are informed and may request copies.¹¹³

These rules indicate a considerable degree of openness of decision-making procedures of the CoP and of the CITES Committees to the participation of non-state actors. It is true that, similarly to the rules on the admission of observers to the meetings of the Fisheries Commission, participation of interest representatives ultimately depends on a decision of the Parties. Nevertheless, once admitted, the rules mentioned above may support an active role by observers in decision-making. Furthermore, the status of observer may be granted to "any body or agency" – in the case of the CoP – or "any person" – in the case of the Committees – that fulfils the conditions mentioned. Studies of the CoPs' practice indicate that indeed non-governmental bodies play a significant role, not only in decision-making – even if deprived of a right to vote – but also monitoring compliance and enforcement.¹¹⁴ The Committees work in cooperation with external scientific bodies, including non-governmental organizations (NGOs), in their preparatory work that leads to the adaptation of the appendices at the COPs.¹¹⁵ In general – i.e. not only during the procedure for amending the listings – NGOs supply information to the CITES Secretariat that identify problems and base CITES' action.¹¹⁶ The collaboration between NGOs and the CITES governing bodies may be subject to criticism, but has also been pointed out as one of the factors of the relative success of the Convention.¹¹⁷ The International Council for Conservation of Nature and Natural Resources (IUCN), together with Trade Records Analysis of Flora and Fauna in Commerce (TRAFFIC, partially funded by IUCN and WWF), are the NGOs that work most closely with CITES. Both play an active role in the process of revising the CITES appendices. Namely, they analyze the proposals put forth by the Parties and the documents they produce are submitted for discussion at

¹¹² Rule 22, *idem*.

¹¹³ *Idem*.

¹¹⁴ Reeve, *POLICING INTERNATIONAL TRADE* (n. 92 above) 32, 38; Sands and Bedecarre (n. 93 above), 799823. Active participation in decision-making and a relatively high degree of influence in the outcomes was confirmed by the services of the Portuguese CITES Management Authority, whose availability the author gratefully acknowledges.

¹¹⁵ Sand (n. 91 above), 37. Reeve, *POLICING INTERNATIONAL TRADE* (n. 92 above), 50.

¹¹⁶ Reeve, *Wildlife, trade, sanctions* (n. 92 above), 883.

¹¹⁷ David M. Ong, *The Convention on International Trade in Endangered Species (CITES, 1973): Implication of Recent Developments in International and EC Environmental Law*, 10 *JOURNAL OF ENVIRONMENTAL LAW* 291, 293 (1998). Sand (n. 91 above), 50.

the CoPs following the rules explained above.¹¹⁸ But various other NGOs participate in the CoPs and in the meetings of the permanent committees.¹¹⁹

In this case, the degree of openness revealed by the CITES formal rules contrasts with the decision-making procedure followed by the EU for the adaptation of the lists of its CITES Regulation. Participation rules are absent and the flow of information seems to be purely internal (i.e. involving the Commission, the Member States and the Scientific Review Committee, which is also composed of Member States representatives).¹²⁰ The decisions for adapting the respective annexes are adopted by the Commission – or by the Council – following a comitology procedure, which, as is known, involves the opinion of a committee composed by representatives of the Member States and chaired by a representative of the Commission.¹²¹ The agenda and summaries of the meetings of the committee are accessible on line, this being the only information available (at least to the general public) regarding their work.¹²² No opportunities for participation of external actors are envisaged. Admittedly, Member States representatives may individually consult NGOs on the matters that will be discussed at the meetings. But this informal lobbying, where existent, is not supported by any procedural standards and it is limited at least as far as it does not allow influencing directly the discussions held at the Committee's meetings.

Hollowing out procedural standards?

The examples above provide disparate results as to the effects that the reception of decisions adopted by international organizations or bodies in EU law may have in terms of procedural standards. At any rate, whichever the effect, observance of procedural standards is decided by the system of origin, as EU law and practice seem to “withdraw”

¹¹⁸ See <http://www.traffic.org/cites/> (accessed September 5, 2011). The list of documents submitted to the CITES is available online and confirms this information (see, e.g., item 18 of the list of documents submitted to the CoP15 at <http://www.cites.org/eng/cop/15/inf/index.shtml>, accessed September 5, 2011).

¹¹⁹ Reeve, POLICING INTERNATIONAL TRADE (n. 92 above), 46. The list of participants is available at <http://www.cites.org/eng/cop/index.shtml> (accessed September 5, 2011).

¹²⁰ Article 15(5) of the EU CITES Regulation and Article 70 of Commission Regulation (EC) No 865/2006 of 4 May 2006 laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein (O.J. L 166/1, 19.6.2006). The Scientific Review Group was established by Article 17 of the EU CITES Regulation.

¹²¹ Articles 19(5) and 18(4) of the EU CITES Regulation. This procedure does not apply to amendments of Annex A of the EU CITES Regulation that do not result from decisions of the CITES CoPs (Article 19(5)).

¹²² http://ec.europa.eu/environment/cites/ctwff_en.htm (accessed September 5, 2011).

its own standards in situations of reception. Arguably, in most cases, this will lead to a negative impact in procedural standards that would otherwise apply by force of EU law.¹²³ CITES is, in this respect, an exceptional case. First, the significant role played by NGOs is, at least in part, a legacy of the very origins of the Convention.¹²⁴ The International Council for Conservation of Nature and Natural Resources (IUCN) drafted the text that would later become the CITES Convention and administered its Secretariat in the first years.¹²⁵ Although NGO participation in decision-making of international organizations is increasing, especially in international environmental law, the rules and practices of participation of CITES still stand out as particularly open.¹²⁶ Secondly, at present, EU rules imposing participation at the level of legislative implementation are frequent but not a necessary rule – and practices of consultation are often integrated in impact assessment procedures mostly ancillary to legislative procedures. But this is likely to change as a result of the Treaty of Lisbon, mainly of Article 11 of the Treaty on European Union.¹²⁷ The case of CITES, nonetheless, demonstrates that one should not be too hasty in assuming, on the basis of the EU's principles of good governance (e.g. Article 15(1) TFEU), that EU decision-making procedures are likely to be more open to participation than global regulatory regimes. In this case, the relationship between EU law and international law stresses the internal inconsistencies of the EU in terms of procedural standards – i.e. it highlights one of the areas of EU law and practice that still escape the norms on participation and transparency now enshrined in the Lisbon Treaty.¹²⁸ Therefore, it seems to pose only an internal problem.

In the cases in which lower procedural standards are followed when EU decision-making results from the transposition of decisions of international bodies, the substantive and procedural issues that may be at stake are admittedly not of the fundamental constitutional nature of those involved in the reception of the UN Security Council resolutions on economic sanctions (in particular in the *Kadi* case), which justified further

¹²³ See also the examples analyzed in Mendes, *Administrative Law Beyond the State* (n. 28 above).

¹²⁴ Reeves, POLICING INTERNATIONAL TRADE (n. 92 above), 46.

¹²⁵ Sand (n. 91 above), 33-34.

¹²⁶ Kal Raustiala, *The 'Participatory Revolution' in International Environmental Law*, 21 HARVARD ENVIRONMENTAL LAW REVIEW 537, 551 and 569 (1997).

¹²⁷ Joana Mendes, *Participation and the role of law after Lisbon: a legal view on Article 11 TEU*, COMMON MARKET LAW REVIEW, forthcoming.

¹²⁸ Articles 1 and 11 TEU; Articles 15(1) and 298(1) TFEU.

limits of reception placed by the Court of Justice. Fundamental rights are not imperiled (at least not in their subjective dimension). Participation in the cases analyzed does not pertain to the core of due process respect of which is essential to a legal system based on the rule of law. Nor does it affect the allocation of powers under the Treaties, as, using the Court's words, "the essential character of the powers of the Community and its institutions as conceived in the Treaty [remains] unaltered".¹²⁹

Yet, the procedural standards that may be bypassed are intended to ensure the soundness of the decisions adopted within the EU legal system. They were defined to legitimize the exercise of public authority. Depending on the rules at stake, they may give effect to norms of EU law and governance now enshrined in the Treaties, such as openness and participation. Both in the EU and in national settings, these have become means of 'democratic supplementation' applicable to decision-making procedures that, for different reasons and in different degrees, largely escape the intervention of electorally accountable institutions.¹³⁰ The fact that such procedural standards may be bypassed in cases of reception of decisions of international bodies has legitimacy risks in a context in which, more and more, the areas of competence of the EU are covered by global regulatory regimes in which the EU is involved, either as a party, as observer or through its Member States acting jointly in the interest of the Union. Ultimately, reception of international decisions may lead to avoiding internal procedural controls, even if this may be an unintended effect of EU participation in global regulatory arenas. In some cases, this effect is aggravated by the fact that the scheme by which international decisions are incorporated in the EU legal system deviates from the general rules of reception. This raises more fundamental doubts regarding the legitimacy of incorporation.

4. Systemic and a-systemic entry points

The cases analyzed above illustrate different ways of receiving decisions of international bodies in the EU legal order that, formally in one case and by analogy in the other, abide to the general rules of reception presented above in Section 2. These ensure that reception does not trump essential substantive and institutional rules of EU law and

¹²⁹ Opinion 1/00 (n. 1 above), paragraph 12.

¹³⁰ Mattias Kumm *The Legitimacy of International Law: A Constitutionalist Framework of Analysis* in 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW, 907, 925-926 (2004).

that it is consistent with the EU legal system. The grounds for their reception in EU law can still be pinned down to the rationale of consent mentioned above, even if only by analogy in the case of CITES. The international conventions under which the Fisheries Commissions operate were signed and ratified by the EU, which thereby agreed to the respective powers to decide on the fishing opportunities in the geographic regions concerned. The decisions of the Fisheries Commissions are placed within the institutional framework of the conventions and give effect to them. There is therefore a close connection between the multilateral agreements and these decisions.

The source of the EU international commitment with regard to the decisions of the CITES CoP is different. As mentioned, the EU is not a Party to the CITES Convention. Its accession to CITES is dependent on the entry into force of the Gaborone amendment to the text of the Convention that would permit accession by regional economic integration organizations.¹³¹ Therefore, the choice to receive internally the decisions of the respective CoP remains purely voluntary. However, incorporation takes place through an act adopted by the Council on the basis of the Treaty rules, which now require also the intervention of the European Parliament. It is justified by the EU competences in environmental policy and in external trade, as well as by the internal market implications of the CITES regime, to which some of the Member States were parties prior to the EU CITES Regulation. CITES is not binding on the EU, but the EU through the same institutions that have the power to bind it to international agreements – albeit acting, in this case, with different relative powers – decided to fully implement it within the EU legal order. By doing so, the EU institutions recognized the decision-making powers of the CITES CoP and consented to receiving its decisions in EU law. These decisions are transposed into EU law because the EU decided to implement the CITES regime despite not being bound to it.

Also in another aspect, these examples illustrate the entry points of decisions of international organizations or bodies in EU law. The decisions of the Fisheries Commissions mentioned are received in legal acts that, although adopted directly on the basis of the Treaty, by the Council on a proposal of the Commission, are not legislative

¹³¹ See <http://www.cites.org/eng/disc/gaborone.php> (accessed September 5, 2011).

acts under the rules of the Lisbon Treaty.¹³² The decisions of the CITES CoP are incorporated by non-legislative acts of the Commission that adapt and give effect to EU legislation. Therefore, in both cases decisions of international bodies enter the EU legal order at the level of non-legislative rulemaking. This is often the case, even though decisions of international bodies are also received by legislative acts.¹³³

This snapshot of the relationships between international and EU law does not capture the complexity of the interconnections between different regulatory regimes developed at the global and at the EU level. Administrative collaboration between regulatory bodies situated at different regulatory levels is an additional important element to consider as it may lead to other ways of percolating decisions of international bodies into the EU legal order and, therefore, opens other possibilities to eventually deplete procedural standards valid within the EU. The guidelines adopted by the International Conference on Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH) are a case in point.¹³⁴

Medicines: ICH guidelines

The ICH is an informal transnational body, described as a “joint regulatory/industry project” and analyzed as a “public/private platform”.¹³⁵ It has a mixed public and private composition. While it involves representatives from EU and State regulatory entities (Japan and the US), it is composed also of private associations representing the pharmaceutical industry in these three regions. The international process of harmonization has been driven by the pharmaceutical industry.¹³⁶

¹³² For examples, see n. 58 above.

¹³³ E.g. the EU directive on irradiation facilities used for the treatment of foods makes the approval of such facilities by Member States dependent on they meeting the requirements of the relevant Codex code of practice (Article 7(2) of Directive No 1999/2/EC of the European Parliament and of the Council of 22 February 1999 on the approximation of the laws of the Member States concerning foods and food ingredients treated with ionising radiation (O.J. L 6/16, 13.3.1999).

¹³⁴ This case was analyzed in Mendes, *Administrative Law Beyond the State* (n. 28 above) from where the paragraphs in the following sub-section are drawn.

¹³⁵ Respectively http://ec.europa.eu/enterprise/sectors/healthcare/international-activities/multilateralrelations/index_en.htm (accessed September 5, 2011) and Alessandro Spina, *The Regulation of*

Pharmaceuticals Beyond the State: EU and Global Administrative Systems, in GLOBAL ADMINISTRATIVE LAW (n. 28 above), 258.

¹³⁶ On the origins of ICH, see Joseph Contrera, *The Food and Drug Administration and the International Conference on Harmonization: How harmonious will international pharmaceutical regulations become?*, 8 ADMINISTRATIVE LAW JOURNAL 927, 939-40 (1995); David Vogel, *The Globalization of Pharmaceutical*

The ICH guidelines define the scientific requirements that drug industry may need to follow when requesting a market authorization, in order to ensure and demonstrate the quality, safety and efficacy of pharmaceutical products. They are intended to guide the assessment of the competent authorities and, by reducing the differences between the procedures for approval of medicines, reduce the costs of multinationals operating in the three regions represented in the ICH. ICH guidelines have, in EU law, the same status as other EU scientific guidelines, possibly replacing existing ones.¹³⁷ It should be noted that, despite their non-binding nature, they have considerable constraining force in EU law. They are used by the European Medicines Agency (EMA) to assess the applications for the authorization of medicines and, on the agency's view, reflect "the best or most appropriate way to fulfil an obligation laid down in the [Union] pharmaceutical legislation". Although the EMA admits that "alternative approaches may be taken", these need to be "appropriately justified".¹³⁸ Proper and sufficient demonstration of the quality, safety and efficacy of pharmaceutical products is, according to Article 12 of Regulation 726/2004, a *sine qua non* condition for the approval of medicines.¹³⁹

These guidelines are approved by the ICH Steering Committee following a procedure that is grafted onto the existing procedures within the three regions covered by the ICH. In the case of the EU, draft guidelines approved at a first stage of the procedure (Step 2 guidelines) are published as a guideline of the Committee for Medicinal Products for Human Use (CHMP, operating within the EMA). These are then, and as such, subject to consultation within the EU (the same occurs in the other two regions).¹⁴⁰

Since these consultations are carried out according to the procedures and practices of the European Medicines Agency, the impact on the respective procedural standards

Regulation, 11 GOVERNANCE: AN INTERNATIONAL JOURNAL OF POLICY AND ADMINISTRATION 1, 11-14 (1998). See also <http://www.ich.org/about/history.html> (accessed September 5, 2011).

¹³⁷ European Medicines Agency (EMA), "Procedure for European Union Guidelines and Related Documents within the Pharmaceutical Legislative Framework", London, 18 March 2009 Doc.Ref. EMEA/P/24143/2004 REV. 1 corr (henceforth "EMA Procedural Guidelines"), 9 (4.1.3).

¹³⁸ EMA Procedural Guidelines, 4 and 5 (2.1 and 2.2).

¹³⁹ Regulation (EC) No 726/2004, of the European Parliament and of the Council, of 31 March 2004, laying down Community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (O.J. L 136/1, 30.4.2004). See also Article 26 of Directive 2001/83/EC, of the European Parliament and of the Council, of 6 November 2001, on the Community code relating to medicinal products for human use (O.J. L 311/67, 28.11.2001).

¹⁴⁰ The formal procedure for the adoption of ICH guidelines is described in <http://www.ich.org/about/process-of-harmonisation/formalproc.html> (accessed September 5, 2011).

seems to be minimal or even virtually inexistent. However, in the case of ICH guidelines, the results of the consultation are assessed, not by the EMA, but by the ICH expert working group that prepared the draft guidelines. The assessment of the comments received, mainly the statement of reasons that reflects the grounds to accept and reject the observations of the participants is a crucial aspect of participation procedures. In this respect, EMA's practices are certainly more transparent than those of the ICH. In particular, EMA prepares a report on its assessment of the comments received and makes this publicly available.¹⁴¹ On the contrary, there is little information on how comments are treated within the ICH. The ICH website informs us that the expert working group that prepared the draft guideline assesses them with a view to achieving consensus. Indeed, consensus is the basis of the ICH normative activity, throughout the procedure for the approval of guidelines.¹⁴² At this stage, the representatives of the industry and of the regulatory entities that compose the expert working group may decide that the consensus that based the release of the draft guideline should be maintained after the consultation, or that modifications should be made. These need in any event to be agreed by consensus.¹⁴³ Contrary to the practices of the EMA, there seems to be no concern regarding the feedback to be given to the participants neither public explanations on the regulatory options finally made. As such, the value of the consultation procedure remains in the shade. It is hardly possible for interested persons to assess how their contribution has impacted on the final decision.

Inclusiveness is another aspect the approval of ICH guidelines might hinder. EMA purports to involve in its consultation procedures patients, consumers and health care professionals, mainly through their respective organizations.¹⁴⁴ This concern is not matched by the ICH. Even though, as mentioned, EMA conducts the consultation on the ICH guidelines following its usual practices, the voice of parties outside the pharmaceutical industry – most likely already quite weak on such highly technical matters, however potentially relevant – is likely to fade as the regulatory process moves

¹⁴¹ EMA Procedural Guidelines (n. 137, above), 17 (4.7).

¹⁴² See link quoted in note 140.

¹⁴³ Step 3 of the formal procedure.

¹⁴⁴ EMA Procedural Guidelines (n. 137, above), 16 (4.6). More generally, see “The EMA Transparency Policy. Draft for Public Consultation” (Doc Ref. EMEA/232037/2009 – rev), London, 19 June 2009, namely p. 10, available at

http://www.ema.europa.eu/docs/en_GB/document_library/Other/2009/10/WC500005269.pdf (accessed September 5, 2011).

back to the international arena. Irrespective of how successful EMA's efforts of inclusiveness effectively are, this is a non-negligible effect of the reception of international pharmaceutical standards in EU law.

The administration empowers the administration

Unlike the situations analyzed in the section above, there is not in this case a formal international commitment of the EU in carrying out international activities nor is implementation of an international regime determined by a EU legislative act. The reception of the guidelines of the ICH stems from the participation of the EU – through the Commission and the EMA – in the activities of the ICH. ICH itself was established on purely informal grounds and was justified by the international needs of harmonization determined by the multinational character of the pharmaceutical industry. At the same time, the international activity of the EMA is sanctioned in very general and somewhat imprecise terms in its founding regulation.¹⁴⁵

Arguably, the risks of “outsourcing” decision-making and circumventing internal controls are even more pronounced in such cases of international administrative collaboration. It is a European agency that incorporates decisions of international bodies in EU decision-making procedures, decisions in which elaboration it participates without a clear mandate from the EU legislator. In the absence of limiting legal rules, there are virtually no limits as to what international harmonization or coherence with international standards and best practices requires in the view of the agency. In such circumstances, EU decision-making procedures may ultimately become “empty [vessels] for international governance writ large”,¹⁴⁶ insofar as the acts adopted tend to conform to international standards. However, as an effect, EU decision-making procedures become also deprived to a greater or lesser extent of the procedural rules that have become accepted in EU law

¹⁴⁵ Article 57 (1) (j) of Regulation (EC) No 726/2004 (n. 139 above) defines as one of the EMA's tasks that of “upon request, providing technical and scientific support in order to improve cooperation between the Community, its Member States, *international organizations* and third countries on scientific and technical issues relating to the evaluation of medicinal products, *in particular in the context of discussions organized in the framework of international conferences on harmonization*” (emphasis added). While the last part of the paragraph seems to refer to the activity of the ICH, the latter cannot be qualified as an international organization.

¹⁴⁶ Daniel Halberstam and Eric Stein, *The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, 46 COMMON MARKET LAW REVIEW 13, 62 (2009).

and governance as standards of legitimacy against which to measure the exercise of public authority.

In this case, lower procedural standards may be coupled with shifts in public authority. Indeed, the authoritative source that justifies the reception of the decision of the international body lies outside the EU legal system and of the formally assumed international commitments of the EU. The standards of ICH are vindicated as best practices in international expert *fora*, in which the Commission and the EMA represent the EU. This is their source of authority. They are accepted as best practices by the competent EU administrative entities that, therefore, incorporate them in their decisions. Cases such as these – as well as reception of international decisions that, even if covered by EU legal rules of reception, is based on too broad delegation clauses capable of encompassing virtually any decision of the EU administration (e.g. international standards and best practices must be followed) – might contribute to strengthen the weight of the executive and, in limit cases, circumvent the legislator's discretion in shaping the EU's international obligations. This clashes with the limits of reception defined by the Courts, and, as a result, aggravates the legitimacy problems stemming from the reception of international decisions that depletes procedural standards otherwise applicable by force of EU law.

5. Preserving procedural standards

It follows from the above that the general rules that delimit the conditions under which decisions of international organizations or bodies may be received in EU law, as defined by the EU Courts, are limited in two respects. First, they are insufficient to preserve procedural rules that have become accepted standards of legitimacy of the exercise of public power within the EU. Second, they do not capture the interactions that may occur in practice between the EU administration and international regulatory bodies, beyond the formal ways through which the EU assumes international commitments – either voluntarily or by effect of legally binding international agreements. This potentiates the possible negative effects that the incorporation of decisions of international organizations or bodies may have on EU procedural standards.

The general rules of reception ensure respect for procedural rules only insofar as international law cannot have the effect of prejudicing the “constitutional guarantee[s] stemming from the EC Treaty as an autonomous legal system”.¹⁴⁷ In procedural terms, this translates as preventing reception that may collide with guarantees of due process in the restriction of fundamental rights. Important as this undoubtedly is, it does not preserve procedural standards – such as participation – that have been developed by the EU with a view to secure the legitimacy of its non-legislative rulemaking activities beyond the core constitutional values generally identified with liberal conceptions of democracy. Some of these standards are now enshrined in the EU Treaties.¹⁴⁸ It may be that the Treaties’ current provisions on participation, openness and good governance will widen the debate, triggered by the *Kadi* case, on how far should the EU Courts expand the limits of their rules of reception.¹⁴⁹

At present, as was shown above, which procedural standards apply in cases of reception (beyond the mentioned guarantees of due process) is a matter left to the system where the international decision originates. Therefore, it will be regulated in a variety of different ways, which may or may not match in functional terms the EU procedural standards otherwise applicable. Ultimately, this leads to a lack of consistency between the procedures followed in purely internal decision-making and those followed in decision-making that results from the reception of decisions of external actors.¹⁵⁰ This has more severe consequences in terms of legitimacy when regulatory acts adopted at the international level impact significantly on the legal spheres of individuals. Lack of consistency will more likely than not be detrimental to procedural rules that would otherwise be followed in internal decision-making, as in the case of reception of the

¹⁴⁷ *Kadi* (n. 24 above), paragraphs 316 and 326 (see also paragraphs 334, 285 and 304).

¹⁴⁸ See n. 128 above.

¹⁴⁹ There has been much debate on the meaning of the *Kadi* judgment to the commitment of the EU towards its international law obligations (see, e.g., Gráinne de Búrca “The European Court of Justice and the International Legal Order after *Kadi*”, Jean Monnet Working Paper 1/09 (2009), available at <http://centers.law.nyu.edu/jeanmonnet/papers/09/090101.html>, accessed September 5, 2011). Questioning the Court of Justice’s finding that the annulment of the EC regulation implementing the UN Security Council resolution “would not entail any challenge to the primacy of that resolution in international law”, see, significantly, Case T-85/09, *Yassin Abdullah Kadi v Commission*, 2010, nyr, paragraph 118 (*Kadi II* currently under appeal: Case C-595/10 P, appeal brought by the United Kingdom, O.J. C 72/10, 5.3.2011: see also appeals brought by the Commission - C-584/10 P, O.J. C 72/9, 5.3.2011- and by the Council - C-593/10 P, O.J. C 72/9, 5.3.2011).

¹⁵⁰ On the broader significance of consistency, see n. 82 above.

decisions of Fisheries Commissions. But it may also highlight the internal inconsistencies of the EU with regard to its own procedural standards, as in the case of reception of the decisions of the CITES CoP.

One may argue that the effects of reception of decisions of international organizations or bodies in EU law analyzed in this paper are simply a manifestation of the “disorder of normative orders” that increasingly characterizes the global scene,¹⁵¹ or the result of the inter-systemic relations between differentiated legal orders in which spaces for conflict and alternative approaches should be preserved.¹⁵² From this perspective, one could argue, there is no a priori reason why the Fisheries Commissions should follow rules of participation that are functionally similar to those followed in EU law, nor, conversely, why the EU when deciding on which specimens should be listed under its trade control rules should create opportunities and conditions of participation that mirror in functional terms those followed by the CITES CoP when adopting similar decisions. Accordingly, one could – should – assess positively the limits of the rules of reception identified above. In other words, there is nothing more that the EU rules that filter the incorporation of decisions of international organizations or bodies should impose apart from respect with the basic constitutional guarantees.

Yet, the problem remains. In such circumstances, the interaction between legal systems may very well deplete rules of procedure intended to ensure open and, to the extent possible, inclusive procedures subject to the scrutiny of the concerned constituencies. The rules of participation trumped by reception in two of the cases analyzed – fisheries and medicines – were established to ensure due consideration for different competing interests involved in decision-making and, thereby, not only an accurate factual basis of decision but also improved conditions of compliance due to a better understanding of the decisions taken. These are both conditions for achieving – or, at least, facilitating the achievement – of the substantive goals underlying each of the policies in these cases. At a more fundamental level, participation gives effect to the Treaty

¹⁵¹ Neil Walker, *Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders*, 6 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 373 (2008).

¹⁵² On the reasons for preserving legal diversity, see, among others, Paul S. Berman, *Global Legal Pluralism*, 80 SOUTHERN CALIFORNIA LAW REVIEW 1155, 1190-1191 (2006-2007); Nico Krisch, *BEYOND CONSTITUTIONALISM. THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* (Oxford University Press, 2010), 78-103.

provisions according to which decisions should be taken as openly as possible, and is now one of the pillars of EU democracy.¹⁵³

It may be argued that this is purely an internal problem of the EU. Furthermore, if the EU were to condition the reception of decisions of international organizations or bodies depending on whether or not they abide to procedural standards functionally equivalent to those valid within it, this would disrupt the very processes of international decision-making to an unacceptable degree. This is a valid argument. Yet, at whichever level it is exercised, “public power stands in need of legitimation and limitation”¹⁵⁴ and, also in the global scene, political processes have been relying more frequently on setting rules for decision-making that structure and limit the exercise of public authority. International organizations and global regulatory bodies have sought to submit their actions to self-created standards that, at least (possibly at best, in some cases), create the appearance that they do not pursue their own interests irrespective of the public interests they proclaim (e.g. food safety, environmental protection, market or trade regulation).¹⁵⁵ This is illustrated, in different ways, by the three cases analyzed above. Such procedures tend to include some degree of participation.¹⁵⁶ Together with transparency and the giving of reasons, increasing demands of participation are perceptible, in different variants, in some international legal regimes.¹⁵⁷ In the words of one commentator, “they are something you find *sometimes*, within *some* institutions (or regulatory systems), and not other times, or within other institutions (or regulatory systems)”.¹⁵⁸

¹⁵³ Articles 1 TEU and 15(1) TFEU; Article 11(1) and (2) TEU.

¹⁵⁴ Dieter Grimm, *The Achievement of Constitutionalism and its Prospects in a Changed World*, in *THE TWILIGHT OF CONSTITUTIONALISM?* (Petra Dobner and Martin Loughlin eds, Oxford University Press, 2010), 16.

¹⁵⁵ E.g., Jochen von Bernstoff, *Procedures of Decision-Making and the Role of Law in International Organizations*, in *THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS* (n. 3 above), 797-8.

¹⁵⁶ E.g. Sabino Cassese, *A Global Due Process?*, in *VALUES IN GLOBAL ADMINISTRATIVE LAW* (eds. Gordon Anthony and others, Hart Publishing, 2011), 42-48; Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 *YALE LAW JOURNAL* 1490, 1543-1561 (2006) (with disparate findings); von Bernstoff, 799-800.

¹⁵⁷ E.g. Eleanor D. Kinney, *The emerging field of international administrative law: its content and potential*, 45 *ADMINISTRATIVE LAW REVIEW* 415, 429-430 (2002); Kingsbury and others (n. 3 above); Cassese (n. 156 above).

¹⁵⁸ Giandomenico Falcon, *Internationalization of Administrative Law: Actors, Fields and Techniques of Internationalization – Impact of International Law on National Administrative Law*, 18 *EUROPEAN REVIEW OF PUBLIC LAW* 217, 244 (2006).

One cannot claim, in general terms, that these are legal values common to the EU and to the global regulatory regimes. Not only the latter are extremely varied, but also within the EU – as the CITES case demonstrated – such values are not followed consistently. Furthermore, even if empirical research would allow us to identify commonly accepted procedural standards of legitimate governance, the rationale and effects of rules of transparency and participation are likely to be quite diverse across policy fields and across levels of governance, and lead to diverse degrees of involvement of the constituencies concerned.¹⁵⁹ Nevertheless, the fact that transparency and participation are increasingly enshrined in rulemaking procedures followed in the global setting indicates that the depletion of procedural rules may be a problem of legitimacy that is not uniquely a concern of the EU. What at first sight would seem to be purely an internal problem may indeed be common to the global regulatory regimes that are in connection with the EU legal system. On this basis, procedural standards that ensure the legitimate exercise of public power could be part of the “terms of engagement” reached among interlocking legal systems.¹⁶⁰

Arguably, these “terms of engagement” would be more usefully established on the basis of a sector analysis. Sector differentiation favors comparability and reduces the risks of claims of universally shared values. While acknowledging that such claims may be problematic or lay on too broad and slippery grounds,¹⁶¹ one may nevertheless seek to determine whether interlocking legal systems share common values by taking the areas of overlap as a reference point and assessing the solutions devised by each legal system to deal with issues of procedural legitimacy raised in the sector of analysis. If the same values inspire the different procedural standards that collide in the concrete situation – if, for instance, both the EU and the overlapping global regulatory system envisage participation in decision-making procedures as a means of structuring the decision-maker’s discretion and ensuring legitimacy – one may, on this basis, inquire into the possibilities of ensuring

¹⁵⁹ With regard to environmental decision-making, noting that the roles and functions of participation in international and national context differ, see Jonas Ebbesson, *Public Participation* in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, (Daniel Bodansky and others eds., Oxford University Press, 2007), 682.

¹⁶⁰ The quoted expression is taken from Kumm (n. 130 above), 928.

¹⁶¹ Berman, 1191. See also Thomas Cottier, *Multilayered Governance, Pluralism, and Moral Conflict*, 16 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 647, 673-74 (2009), as an arguable instance of the difficulties of an universalist argument.

those values in the areas of interaction between legal systems. Taken one step further, this may lead the interpreter to search for the most adequate solution in ensuring the values commonly upheld in the case of inquiry.

This normative process would develop in two different steps: translation and normative innovation. One should first establish what procedural guarantees of participation and transparency stand for in the context from which they are taken and whether they can be applied to the contexts of arrival.¹⁶² Thus, for instance, if it is possible to ascertain that the rationale of rules of participation established in some of the fisheries international agreements is similar to the one that guides the procedural intervention of RACs in EU decision-making regarding fisheries, one could consider translating the RACs model to the international sphere. By the same token, if the values and effects sought by NGO participation at the CITES level are paralleled by rules on participation envisaged by EU environmental law in similar areas of action,¹⁶³ there is little reason to justify why, internally, the EU procedures should not envisage guarantees of participation functionally equivalent to the ones followed by the CITES CoP.¹⁶⁴ However, this commonality only provides the basis to transpose legal solutions from one legal system to the other. Whether this transposition is justified, ultimately depends on the relative advantages of each solution to solve the problem at stake (e.g. low levels of compliance), on the adequacy of the legal solution considered to the legal system of destination, in systemic, institutional, historical and material terms, and on practical feasibility. Translation, therefore, entails room for accommodation where normative innovation takes place. When considering whether the rules that serve participation at the EU level can and should be applicable to the global regulatory regimes with which it relates, and vice-versa, the interconnecting legal systems are likely to influence each other. Assessing the possibilities of translation requires much more than blindly transposing legal solutions across legal systems. The interconnections between legal systems may reveal the respective limitations in dealing

¹⁶² Neil Walker, *Postnational Constitutionalism and the problem of translation* in Joseph Weiler and Marlene Wind eds, Cambridge University Press, 2003), 27, 35-38; Krisch, 35-38.

¹⁶³ Article 9 of Regulation No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (O.J. L OJ L 264/13, 25.9.2006).

¹⁶⁴ This reasoning resembles the relation of “sympathetic consideration” proposed by Walker, *Beyond boundary disputes*, 384.

with common problems and this awareness opens a channel for dialogue that may lead to innovative normative solutions.

In sum, the possible verification that interlocking legal systems share common values in dealing with common problems in a parallel case leads us to inquire into the possibilities of translation and normative innovation. Arguably, this may leave little room to justify without further ado the depletion of procedural standards as a result of systems' interaction.