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Juridification Patterns for Social Regulation and the WTO: A Theoretical Framework

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Juridification Patterns for Social Regulation and the WTO: A Theoretical Framework

ABSTRACT

Free Trade has always been highly contested, but both the arguments about it and the treaties that regulate it have changed dramatically since the Second World War. Under the 1947 General Agreement on Tariffs and Trade (GATT) regime, objections to free trade were essentially economic, and tariffs were a nation state's primary means of protecting its interests. However, by the early 1970s, tariffs had been substantially reduced, and the imposition and removal of non-tariff barriers that reflected a wide range of domestic concerns about the protection of health, safety, and the environment have since come to dominate trade agreements and their implementation. The expanding scope of these international treaties, and their effect on domestic regulatory objectives, has created new challenges for the nationstate, and for the international trade system as a whole. Domestic regulatory objectives that are generally embedded in a nation state's legal system or even in its constitution, are now negotiable and are susceptible to adjudication at the international level where they may, or may not, be used to camouflage unrelated economic interests. The international trade system adapted to this situation in 1994 by transforming the GATT into the World Trade Organization (WTO), which has more effective means for dispute resolution and includes a number of special agreements – such as the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) and the Agreement on Technical Barriers to Trade (TBT) – with rules for balancing the economic concerns of free trade with the social concerns of regulatory objectives. These developments have generated legal queries about the general legitimacy of transnational governance arrangements and their 'constitutionalization', i.e. the quest for transnational governance that is mediated by law and not only accepted *de facto* but considered deserving of acceptance.

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Juridification Patterns for Social Regulation and the WTO: A Theoretical Framework [*]

INTRODUCTION

When the European Commission launched its legendary programme, ‘Completion of the Internal Market’ in the mid eighties,[1] both proponents and critics expected broad de-regulation and a ‘race to the bottom’ wherein EC Member States sought to defend or strengthen economic competitiveness by loosening the regulatory grip. Regulation was considered a cost, and de-regulation a gain in efficiency. These expectations were thoroughly disappointed. Instead, we witnessed new trends in regulation and juridification[2]

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[*] A first draft of this paper was presented in November 2003 at the conference on ‘Debating the democratic legitimacy of the European Union’ at the *Mannheim Centre for European Social Research*. The Colloquium on ‘Globalization and its Discontents’ at the *NYU Law School* offered me the opportunity to present a new draft with an extended scope in February 2004. Damian Chalmers (London) was my commentator in Mannheim; Richard Stewart (NYU Law School). Rainer Nickel (Frankfurt a.M./Florence) commented on the second draft. They all have substantially contributed to my decision to change the format again. In this re-conceptualization, I am indebted to the participants in the research project on ‘Social Regulation and Free Trade’ at the *Collaborative Research Center 597* ‘Transformations of the State’ in Bremen (Ulrike Ehling, Josef Falke, Christiane Gerstetter, Christine Godt and Leonhard Maier). Special thanks to Christiane Gerstetter and David Gerl, who helped very intensively with the literature and detailed comments. Special thanks also to Stephan Leibfried who has energetically and intensively accompanied the production of this essay. If the text has now become more accessible to political scientists, this is, to very large degree, a result of his supervision. — The paper will not be published in its present form. Instead, it will be revised again taking into account the discussions at the Workshop on *Legal Patterns of Transnational Social Regulation and International Trade* organized by Ernst-Ulrich Petersmann and myself on September 24-25, 2004 at the EUI/RSCAS – Transatlantic Programme – in Florence. Two anonymous reviewers of the *Sfb 597* have delivered very thoughtful, critical, constructive and demanding comments and suggestions. Their quest for a rethinking of my rather rigid distinctions between national, European and international governance, for a richer empirical foundation of my argument, references to constitutional law doctrines and fields of environmental law I am not familiar all “deserve recognition” – but are too demanding to be taken into account more than selectively in the revision I could undertake at this stage. However the work on the publication of the proceedings of the Florence workshop is under way (*Transnational Trade Governance and Social Regulation: Tensions and Interdependencies*, ed. by Christian Joerges and Ernst-Ulrich Petersmann) and will lead to a more comprehensive response.

[1] European Commission 1985.

[2] This term will be used quite frequently in this essay along with the notion of ‘legalization’. Both concepts have different connotations. The term ‘juridification’ was introduced into the parlance of law and society studies as a translation of the notion of ‘*Verrechtlichung*’ first used in the Weimar Republic by labour lawyers from the left in

— intense re-regulation, new forms of co-operation among governmental and non-governmental actors, and the promotion of a range of participation entitlements such as opening policy-making processes to civil society. Within Europe, free trade and market-building objectives were accomplished in conjunction with the establishment of complex regulatory machinery, especially in ‘social regulation’, such as the protection of health, safety and environmental interests.[3] To use the terminology of the Bremen Chapter One of this volume, the post-national constellation which Europeanization has generated leads to an erosion of the regulatory powers of the **d**emocratic, **c**onstitutional, **i**nterventionist **s**tate (the ‘DCIS’), and of its capability to weigh the costs and benefits of opening the national economy autonomously. But Europeanization has also led to the establishment of sophisticated transnational governance arrangements which nation states could not have accomplished on their own.

Are there lessons to be learnt from the European experience for the organisation of free trade at international level? To what degree do we have to attribute the ‘regulatory re-embedding’ of free trade in Europe to specific supra-national institutional features and interest configurations? To what degree should these developments simply be understood as responses to internationally salient concerns? To what degree has workable social regulation become a precondition for the functioning of international markets? If free international trade can only be realised in conjunction with the establishment of transnational governance arrangements, how can the ‘reasonableness’ of transnational governance be assessed and ensured? Does the nation state have to accept the loss of regulatory autonomy because this is what the functioning of international markets requires? Do the emerging transnational governance arrangements, to take up Jürgen Habermas’ formula, ‘deserve recognition’?[4]

This essay is going to explore this bundle of questions in three steps: In Section I, we will summarize the European experience with an emphasis on Europe’s

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their critique of the use of law to domesticate class conflicts (cf., Teubner 1987: 9). It hence carries with it a perception of the ambivalent effects of the use of law, which were characterized first as depoliticization and later, *e.g.*, (and most famously) as a destruction of social relations, a ‘colonialisation of the life-world’ by Habermas (1985); cf. the recent thorough reconstruction by Humrich 2004: 4 ff. ‘Legalization’ analysis, as presented by Abbott *et al*. (2000), is not linked to these traditions and their critical normative agenda. Pertinent studies explore parallels and difference between the subjection of political process to rule of law requirements within states and the causes and consequences of rule-bound governance beyond the nations states (cf., Zangl/Zürn 2004; Zürn 2005; see, also, Section III 2 *infra.* But there is no consensus among political scientists and legal sociologists and theorists on the proper use of both terms.

3 We are following the definitions of Majone (1989) and Selznick (1985).

4 Habermas 2001: 113.

institutional ingenuity as it embedded its market-building efforts in the construction of sophisticated regulatory machinery as a key part of the European multi-level system of governance.

The regulatory choices open to the international trade system are, of course, more narrow, as we show in Section II. Its institutional centre, the World Trade Organisation, simply does not have the kind of regulatory powers on which Europe can rely. However, the strengthening of international commitments to free trade objectives — achieved in 1994 through the replacement of the former GATT by the new WTO regime — was not as one-dimensional as it is often portrayed in political arenas. The new WTO regime is a compound of governance arrangements which deal with non-tariff barriers to trade, *i.e.*, with exactly the type of regulatory concerns to which Europe has responded in its regulatory policies since the mid 80s. In Section II, we will underline that the shift from the old GATT to the new WTO regime needs to be understood as a two-fold process in which the regulatory autonomy of nation states is eroded while their regulatory concerns are built into the new transnational governance arrangements.

‘Governance’ has become a buzz-word which has substituted the term regulation in many contexts. The new term has come into use at all ‘levels of governance’, first, in international relations, then, in the EU, and also within nation states. In section III, we will summarize the recent career of this concept, and point to its older equivalents in primarily normative and legal perspectives. The turn to novel forms of governance, it is submitted, is both a response to the *impasses* of traditional regulatory techniques, and a challenge to the notions of legitimacy which we have learned to appreciate within our national constitutional democracies.

We are focusing on a particular segment of transnational governance, namely, the interfaces and tensions between the promotion of free trade and the defence of regulatory concerns. We are interested in the potential of ‘legalization’[5] strategies to resolve these tensions. The scope of our inquiries in this essay,[6] will, however, be quite narrow. While the term ‘social regulation’ as we have just introduced it, comprises the regulation of safety at work and environmental protection, we will restrict our discussion to patterns of product regulation. This relatively narrow scope will allow us to look at the background context of these commitments with some intensity. In particular, we will pay attention to the ‘governance arrangements’ which substantiate and complement those commitments and seek to determine whether these arrangements should be understood as the functional equivalents of the administrative infrastructure of nation states. They

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5 See note 6 *supra.*

6 Not the project mentioned in note*! The full text of the application to the German Science Foundation is available (in German) at <http://www.staatlichkeit.uni-bremen.de/ with a summary in English.

seem to us to represent a new type of ‘juridification’ in the international system, which neither traditional international law, nor the other disciplines of international administrative and economic law could, heretofore, conceptualise.[7] But even in this respect, our project is far from being comprehensive in its scope and ambitions.[8] To rephrase these observations: we are interested in the erosion of the regulatory autonomy of nation-states and of their ability to ensure compliance with their constitutional commitments. We are equally interested in the building up of transnational regulatory capacities. We therefore explore the transnational governance arrangements and seek to understand the peculiar legitimacy of their *problématique*. This changing domestic/international interface could well amount to one of the major transformations of the state after its ‘Golden Age’.

I. NON-TARIFF BARRIERS IN THE EUROPEAN COMMUNITY: FREE TRADE AS INSTIGATOR OF REGULATORY INNOVATION

The re-regulatory and modernizing side-effects of the ‘completion’ of the European Internal Market remain puzzling, but are so well documented[9] that we can refrain from reporting them in any detail. What we will focus on, instead, are the governance patterns which Europe has developed in its search for integration strategies that ensure the compatibility of the logic of market-building with the market-correcting logic of social regulation. If we understand these patterns as responses to the political weight that regulatory concerns for the protection of health, safety and the environment have gained, we will have to deal with their functionally equivalent developments at international level. This review should help us to examine to what degree the European responses are dependent upon the specific institutional features of the European Union and whether, as a consequence, they can not be transplanted to the international level.

I.1 The Cassis jurisprudence under Article 28 EC Treaty: a conflict-of-laws approach

The most important of Europe’s institutional innovations is hardly mentioned any longer in the debates on the so-called ‘new modes of governance’. Back in 1979, the

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7 See section III 2 *infra.*

8 In their systematic account of the structures of global administrative governance, Kingsbury, Kirsch and Stewart (2004: Section II A, p.8) distinguish between five types: ‘administration by formal international administration; administration based on collective action by transnational networks of governmental officials; distributed administration conducted by national regulators under treaty regimes; mutual recognition arrangements or cooperative standards; administration by hybrid intergovernmental-private arrangements; and administration by private institutions with regulatory functions’. Our emphasis is on the two types mentioned last.

9 Cf., for example, Eichener 2000; with respect to safety at work, cf., Bücker 1997.

Cassis de Dijon case[10] saw the European Court of Justice (ECJ) declare that a German ban on the marketing of a French liqueur — the alcohol content of which was lower than its German counterpart — was incompatible with the principle of free movement of goods (Article 30 EC Treaty, now 28 EC). The ECJ's response to the conflicts between French and German policies was as convincing as it was trifling: confusion of German consumers could be avoided and a reasonable degree of protection against erroneous decisions by German consumers could be achieved by disclosing the low alcohol content of the French liqueur. With this observation, the Court defined in a new way the constitutional competence to review the legitimacy of national legislation which presented a non-tariff barrier to free intra-Community trade. This move was of principled theoretical importance and had far-reaching practical impact (e.g., Maduro 1997: 150 ff.; Weiler 1999: 221 ff.).

In a comparison of European and international responses to non-tariff barriers to trade, it is important to underline that the ECJ's celebrated argument can easily be translated into the language of a much older discipline, namely, that of conflict of laws. What the ECJ did in substance was to identify a 'meta-norm' which both France and Germany, as parties to the conflict, could accept. Since both countries were committed to the free trade objective, they were also prepared to accept that restrictions of free trade must be based on credible regulatory concerns. Further examples of this type of conflict resolution at the WTO level will be mentioned in Section II 1. Its principal and meta-juridical importance becomes immediately apparent once we take the fact that market-creating and market-correcting regulatory policies are nothing exceptional into account. Without going into the theoretical underpinnings of this argument in any depth, we simply submit here that trade with ever more sophisticated products 'requires' the development of regulatory machinery to ensure the 'trustworthiness' of such products to both traders and consumers (Block 2005; Vos 2004).[11]

This argument has empirical, functionalist and normative dimensions. A blatant disregard of regulatory concerns, and the insistence on the abolition of non-tariff obstacles

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[10] ECJ 1979: 649.

[11] Block (2005) developed this argument systematically in the context of his reconstruction of Karl Polanyi's political economy: 'Once it is recognized and acknowledged that markets are and must be socially constructed, then the critical question is no longer the quantitative issue of how much state or how much market, but rather the qualitative issue of how and for what ends should markets and states be combined and what are the structures and practices in civil society that will sustain a productive synergy of states and markets'. In contrast, Vos (2004: 9-13) conceptualises the irritations or anxieties of consumers as a challenge to be addressed in 'an overarching approach to risk regulation', within which it will be important to enhance the credibility of European institutions 'by means of principles of good governance' (14-21).

to free trade, in conflict-of-laws terms: the refusal to recognize and apply foreign public law is no longer an option open to the proponents of free trade. This is why we are witnessing the institutionalization of the independent bodies entrusted with the task of identifying the rules and principles under which the free trade objective and the respect for legitimate regulatory concerns become compatible. The European experience is, indeed, instructive. In particular, the case law on Article 30 EC Treaty (now 28 EC) has repeatedly indicated how the idiosyncrasies of individual states can be identified as such and reduced to a civilised level (Joerges 1997; Maduro 1997: 150 ff.) – autonomy-protecting and community-compatible, as Fritz Scharpf (1994) has put it..

I.2 The new approach to technical harmonisation and standards: towards ‘private transnationalism’

In the presentation of its White Paper on Completion of the Internal Market, the European Commission (1995) prudently underlined the basis of its new integration strategy in the jurisprudence of the ECJ in general, and its *Cassis*-judgment in particular. The White Paper’s proposals were, however, much more radical than the Court’s jurisprudence. What the Commission suggested was a twofold move: from mediation between conflicting regulatory policies, to the establishment of transnational governance patterns *and* from public to private transnationalism. The so-called new approach to technical harmonisation and standards was the most significant contribution to this new orientation.

The story of the new approach has often been told.[12] In its efforts to build a common market, the EC found itself in a profound dilemma: market integration depended upon the ‘positive’ harmonisation of countless regulatory provisions. Harmonisation was difficult to achieve even after the old unanimity rule of Article 100 EC Treaty was replaced by qualified-majority voting in Article 100a EC Treaty as introduced by the Single European Act of 1987. Similarly, the implementation of new duties to recognize ‘foreign’ legislation which the *Cassis de Dijon* decision of 1979 had arguably imposed, posed complex problems. Somewhat paradoxically, self-regulation, a technique very widely used in Germany in particular, was by no means easier to live with. Voluntary product standards were ‘private’ obstacles to trade, which the Community legislature could not overcome by legislative fiat. How can we/the EU get out of this *impasse*?

The new approach achieved precisely this through a bundle of interrelated measures: European legislation was confined to laying down ‘essential safety requirements’, whereas the task of detailing the general requirements was delegated to the experts of European and national standardisation organisations. The involvement of non-governmental actors involved a *de facto* ‘delegation’ of law-making powers, which

[12] Falke/Joerges 1991; recently and brilliantly, Schepel 2005: 225 ff..

could not be openly admitted. Harm Schepel[13] cites a leading representative of the standardisation community: the new method ‘makes it possible to distinguish better between those aspects of Community harmonisation activities which fall within the province of the law, and those which fall within the province of technology, and to differentiate between matters which fall within the competence of public authorities and those which are the responsibility of manufacturers and importers’ (Nicolas 1995: 94).

The language covers and hides the political dimensions of standardisation. This is small wonder, because the advocates of the new approach had to present their project in legally acceptable clothes. They were perfectly aware of the limited guidance that ‘essential safety requirements’ can offer in the standardisation process. But they had good reasons to trust in the responsibility of the standardisation process — and the potential of national and European public authorities to intervene, should that trust be disappointed/betrayed/misplaced (Falke 2001; Schepel 2005: 403 ff.).

I.3 Administering the Internal Market: the comitology system and European agencies

Two more European institutional innovations need to be mentioned: the comitology system and European agencies. Both operate at the crossroads of market building and social regulation. Comitology committees, which are composed of administrative practitioners and experts from the Member States, are supposed to support the Commission in the implementation of European legislative programmes; they are also involved in the continuous process of amending existing legislation, filling legislative gaps and preparing new initiatives. These committees embody the functional and structural tensions which characterise internal market regulation. They hover between ‘technical’ and ‘political’ considerations, between the functional needs and the ethical/social criteria which inform European regulation. Their often very fluid composition not only reflects upon the regulatory endeavour to balance the rationalisation of technical criteria against broader political concerns, but also forcefully highlights the schisms that exist among the political interests of those engaged in the process of internal market regulation. Even where they are explicitly established to support and oversee the implementing powers delegated to the Commission, committees are deeply involved in political processes and often resemble ‘mini-councils’, in that they are the forum in which the balancing of a European market-integrationist logic against a Member State interest — in terms of the substance and the costs of consumer protection and cohesive national economic development — has to be achieved (in detail, Joerges/Vos 1999). Their activities can be characterised as ‘political administration’ (Joerges 1999), an oxymoron, which reflects their hybrid nature.

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[13] 2005: 65.

Independent agencies were the core institutions advocated by Giandomenico Majone (e.g. 1989, 1994) in his design of a European ‘regulatory state’. Majone’s suggestions attracted a great deal of attention but were never implemented. Europe has, however, adopted his term and established an impressive number of bodies which are called agencies (Chiti 2003). What these bodies are, or will become, is indeterminate. This much is uncontested: agencies are certainly not self-sufficient bureaucratic entities. Charged with the regulation of market entry and exit, or with more general informal, and policy-informing, information-gathering duties, these new European entities meet a technical demand for market-corrective and sector-specific regulation. In their public presentation, it is often submitted that their functions are primarily technocratic. This is what they may accomplish best, and such a function seems well compatible with their semi-autonomous status, and the expectation that they should also give voice to private market interests. It is equally compatible with the thesis that ‘administering’ the Internal Market has more to do with the ‘neutral’ sustenance of individual economic enterprises than with the imposition of (collective) political/social values. The placement of the new entities under the Commission’s institutional umbrella, and the presence of national representatives within their management structures notwithstanding, agencies seem, in the main, to be shielded from explicitly political processes by their founding statutes (Council directives and regulations), permanent staff, organisational independence, varying degrees of budgetary autonomy, and direct networking with national administrators. Their autonomy and independence is also limited for a second reason: they must co-operate with a web of national authorities in accomplishing the tasks laid down in European legislation. Because of these relationships, it is virtually impossible to allocate responsibility for policy decisions to one set of civil servants or another.

Among the ‘modes of governance’ not addressed in the preceding overview are processes of regulatory competition and the open method of co-ordination (OMC), which has gained prominence in the realm of social policy. These two mechanisms are not *directly* concerned with the definition of rules and standards in the fields of social regulation. But the differences between them and the patterns of juridification we have looked at are gradual, rather than a matter of principle. The conflict-of-laws approach, to which the *Cassis* jurisprudence remains committed, respects the autonomy of EC Member States, and hence their room for experimental manoeuvres to a significant degree. The transnational governance arrangements through which the new approach, comitology, and even the new European agencies operate, cannot be equated with some Weberian type of administrative machinery. They all leave room, and build upon, the institutionalisation of political (deliberative) processes.

II. NON-TARIFF BARRIERS AND THE WORLD TRADE ORGANISATION: A SURVEY OF CONFLICT-RESOLVING AND POLICY-INTEGRATING MECHANISMS

European law and WTO law represent different legal worlds. So obvious and significant are the institutional discrepancies that comparisons between them, which seek to draw upon the experiences of both institutions, are often considered as being all too risky. And yet, some obvious functional equivalents seem to merit closer scrutiny.[14] Both institutions have to balance free trade objectives and regulatory concerns, or, as the Appellate Body in the *Hormones* case put it: ‘the shared, but sometimes competing, interests of promoting international trade and of protecting … life and health’.[15] The non-tariff barriers to trade to which the proponents of international free trade had to pay ever more attention in the last decades are requirements which the EU tends to recognize as legitimate restrictions to the freedom of intra-Community trade. The SPS and the TBT Agreements are institutionalised responses to health and safety concerns, and the legitimacy of trade restrictions resulting from environmental policies is explicitly recognized in the preamble of the WTO Agreement.

Our exploration of these parallels in this section will deal with conflict resolutions under these agreements. We will, on the one hand, contrast juridified and judicialized resolution as opposed to political conflict resolution. We will focus here[16] on ‘product’ as opposed to ‘process’ regulation, and the governance patterns in this area. Both of these distinctions refer to separate debates, but are nevertheless interdependent. Product regulation is obviously more closely linked to the realisation of free trade than process regulation, because product related mandatory requirements can hinder the importation of goods directly, whereas process regulation need not affect the quality of the output of production. Stricter and more costly standards can be a competitive disadvantage. Conflicts arising from such differences are often primarily economic. But the distinction is of limited use: environmental and safety at work requirements may relate to the product itself; low environmental standards may have external effects on other countries; safety-at-work standards may have a human rights basis; and, last but not least, international agreements often do not apply the product/process distinction. Suffice it here to point to

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14 Cf., Scott 2002, 2004; de Búrca 2002; Peel 2004 (Peel’s comparative observations on the differences between the US, the EU and the WTO are all interesting and helpful, and also quite sensitive to the differences between these polities and regimes, although they could have paid more attention to the specifics of transnational policy formation).

15 Report of the Appellate Body on *EC - Measures Concerning Meat and Meat Products*, Report of the Appellate Body, WT/DS26/AB/R & WT/DS48/AB/R, 16 January 1998, para. 177.

16 But, see note 11 *supra.*

the mentioning of ‘measures necessary for the protection of human, animal or plant life or health’ in the Preamble and in Article 2.1 of the SPS Agreement. It seems nevertheless plausible to assume that the juridification of transnational product regulation will be more intense than transnational standardisation in the field of safety at work and environmental protection. To put it slightly differently, the latter can probably be better explained by political processes, whereas the former will more often be dictated by functional necessities.

II.1 Alternatives to substantive transnationalism: proceduralized policy co-ordination through conflict-of-laws methodologies

As underlined in the previous section, the celebrated jurisprudence of the ECJ on Article 28 EC, which seeks to ‘harmonize’ the principle of freedom of intra-Community trade with the respect for the legitimate regulatory concerns of EC Member States can be understood as a modernization of conflicts law because this jurisprudence seeks to identify meta-norms which the jurisdictions involved can accept as a supra-nationally valid yardstick for evaluating and correcting their legislation. The same holds true for the reports of the WTO Appellate Body which assesses the compatibility of health and safety related non-tariff barriers to trade with the SPS Agreement. To generalize this observation, the SPS Agreement does not invoke some supranational legislative authority. It provides a framework within which WTO Members are to seek a resolution of conflicts arising from the extra-territorial impact of their regulatory policies. To become aware of these parallels is not just doctrinally interesting, but also practically relevant because a conflict-of-laws approach is politically much ‘softer’ than the imposition of a supranational substantive rule — Robert Howse and Kalypso Nicolaïdis[17] could hardly call ‘constitutionalization’ through a conflict-of-laws approach ‘a step too far’.[18]

The modern legal history of conflict of laws and its methodology is part of the political history of the sovereign nation state, and the conceptualisation of international relations by the various legal disciplines is based on the same paradigm as traditional theories of international relations. In a very brief account, traditional (public) international

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17 Howse/Nicolaïdis 2001.

18 But they might object to the use of the term ‘constitutionalisation’ which is simply not in use in the debates on the characterization of WTO law (see for a subtle overview N. Walker 2001). If one accepts our premise that the nation state has become unable to comply with the normative yardsticks of constitutional democracies (see Section III 2 and note 52 *infra*) then an outright rejection of the use of the term seems ‘a step too far’. It is true, however, that the term then loses its links with the notion of polity building on which constitutionalists tend to insist (see, for example, N. Walker 2001: 34). ‘Constitutionalisation’ then denotes not more (and not less!) than the Law’s efforts to ensure the legitimacy (in a qualitative sense) of political and legal decision making (see also Section III 3 *infra*).

law (*ius gentium*) was confined to an ordering of inter*state* relations. National public law, in particular, administrative law, was conceptualised as an emanation of the sovereign. A truly ‘international’ public law was hence unconceivable. ‘International’ public law was instead delineating the sphere of application of national provisions — ‘one-sidedly’- because in the heydays of legal positivism any subjection to the commands of the law of another sovereign seemed inconceivable.[19]

By contrast, private international law in the von Savigny tradition was more universalistic in its orientations. Its universalism was based upon an understanding of private law as the organiser of strictly private relations in a, by definition, apolitical (civil) society, *i.e.*, *Gesellschaft*. The private law orders of civilized nations could be treated as equivalent and the application of foreign law was not perceived as a threat to the sovereignty of the *forum* state. This type of universalism is fully compatible with the refusal to support foreign regulatory objectives. Such ‘political’ dimensions are beyond private law. Von Savigny knew, of course, about public law and the public order. But to incorporate what we are used to call regulatory or political objectives into the legal order was about realising non-legal (*außerrechtliche*) values, and thus was stepping outside the law. If private international law were to engage in such activities it would, in his understanding, cease to be law at all.[20] These traditional dichotomies of private law and public (including administrative) law are definitely outdated. The disciplines of international private, economic and administrative law are all aware of the regulatory dimensions of modern legal systems and take them into account in the choice-of-law process. The difficulty lies in getting beyond ‘unilateral’ or ‘one-sided’ definitions of the international sphere of application of domestic law (the *lex fori*) and to conceptualise co-operative legal responses for all concerned jurisdictions. This hesitancy is often expressed as a refusal to obey to the commands of a foreign sovereign, but it can also be based on good ‘constitutional’ reasons, namely, on objections to the legitimacy of validity claims of law that is not generated in democratic processes. Furthermore, where courts are expected to handle transnational matters and/or to mediate between autonomous state orders, they seem to move beyond their constitutionally legitimated functions. Thus, a

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[19] See Vogel 1965: 176-239; for alternative traditions, cf., Tietje 2001. See also Joerges 1979: 8 ff.; for a surprisingly similar recent reconstruction cf. Humrich 2004: 17 ff. Humrich restricts his — otherwise enormously rich — analysis to ‘international law in the narrow sense of interstae law’ (at p. 3). In that respect international law and international relations scholars tend to share the same benign neglect of international economic law (*Wirtschaftskollisionsrecht*) which accompanied the transformation of the liberal to the interventionist state. See also Section III 1 *infra.*

[20] Israël 2004: Ch. 4, para.1.2, p. 107.

‘judicialization’ of international conflicts is a challenge to legal theory [21] — an aspect which political scientists should take seriously.[22]

Once one has become aware of these difficulties, the virtues of the conflict-of-laws alternative to true substantive supranationalism become apparent. The search for a conflict norm can be understood as a ‘proceduralization’[23] of the conflict between competing validity claims, as a search for a meta-norm to which parties can commit themselves in a search for a solution to their conflict without betraying their loyalty to their own law. To take up the trivial *Cassis* case again, France does not need to adapt the alcohol content of its liqueur to German legal requirements, while Germany can continue to protect the expectations of its consumers. Both jurisdictions can live with a consumer information requirement. However, solutions of this kind are not always as unproblematic and soft as the *Cassis* case. The transatlantic conflict over hormones in beef provides an instructive example.[24] The US and (most of the Member States of) the EU are in disagreement regarding the addition of growth promoting hormones to beef-producing cattle. Can both parties agree to expose their practices to a science-based analysis of the health risks which the consumption of hormone enhanced beef may entail? The requirement in the SPS Agreement that the measures of the WTO Member must not be ‘maintained without sufficient scientific evidence’ (Article 2.2) and that it must be ‘based on’ a risk assessment (Article 5) seems to suggest exactly that. But, as the involved actors know all too well, a meta-norm referring to science as an arbitrator is not so innocent. Three reasons are sufficient here[25] to illustrate this point: firstly, sci-

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21 Nobody has ever pointed this out more provocatively and stringently than Brainerd Currie in his search for a new choice-of-law methodology. Currie’s views were—since the time of their presentation in the late 50s and early 60s until today — perceived as a break with the traditions of American conflicts law, let alone continental private international law, that was nothing less than revolutionary. Laws, statutes and even common law rules, Currie argued, should be read as pursuing some policy. His real assault on the citadels of private international law, however, were the implications of this realist insights for intrastate settings: The application and implementation of policy-guided laws, he submitted, will often be backed by the ‘interests’ of that state (Currie’s unfortunate term: ‘governmental interests’), which courts must not disregard (Currie 1963c). It is not compatible with the judicial function in constitutional democracies, Currie concluded, that courts balance competing state interests (Currie 1963c). To rephrase these objections in more contemporary terms, the courts of national states are neither legitimated nor well equipped to address the challenges of transnational governance. Such theses may sound provocative, but are to be taken seriously (see Section III.3 *infra*).

22 See Stone Sweet 1997, but also note 29 *infra.*

23 On this term, cf., Section III 1 *infra.*

24 Cf., note 20 *supra* and out of an enormous number of comments Godt 1998; Joerges 2001; Perez 2004: 115 ff.

25 The point will be taken up in Section III 3 *infra.*

ence does not typically answer the questions that policy-makers and lawyers unambiguously pose; secondly, and even more importantly, it cannot resolve ethical and normative controversies; thirdly, consumer anxieties about ‘scientifically speaking’ marginal risks may be so considerable that policy-makers cannot neglect them.[26]

It is submitted that, all of these difficulties notwithstanding, a conflict-of-laws approach to regulatory differences offers an often viable alternative to a search for substantive transnational rules. This alternative is less intrusive and therefore easier to accept. Even where the meta-norms remain indeterminate, they may nevertheless help to structure the controversies among the parties to a conflict by re-opening political, potentially deliberative, processes. Conflicts-of-laws is, in cases of true conflicts, in the last instance, a political exercise, as Brainerd Currie once argued.[27] This does not, however, exclude the proposition that conflict rules may be strong enough to guide the solution of conflicts. And even where they are not, the ‘shadow of the law’ may be sufficient to promote international *comitas* or diplomacy.[28] The borderlines are not as strict as legal formalists tend to portray them.

In conclusion, the history of the American-European conflict over the use of growth promoting hormones documents that ‘judicialization’ — *i.e.*, ‘the presence of binding third party enforcement’[29] — which the WTO has achieved through the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) does not guarantee definite solutions, but may instead initiate a re-politicisation of the whole process. Is this a failure, an advantage, or simply unavoidable? We will return to this question further on.[30] Suffice it to note here that the parallels with the EU system’s potential to change from legalization to political processes are striking, and that the boundaries between conflict mediation through proceduralizing conflict-of-laws methodologies and the establishment of transnational governance arrangements are of gradual, rather than principal, significance.

II.2 Limits of juridification: the example of health-related transnational governance arrangements

There are, so we have concluded in the introductory remarks, many (functional) reasons which militate in favour of internationally valid product standards. Unsurprisingly, international standardisation is indeed taking place on a great scale in the ISO, the (non-

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[26] Cf., Joerges 1997; Joerges/Neyer 2003.

[27] Currie 1963b; 1963c.

[28] Cf., Joerges/Neyer 2003; Weiler 2001.

[29] Thus, the definition of the term by De Bièvre 2004: 3. It is a workable but under-complex formula as De Bièvre himself shows in later parts of his paper (e.g. at 7).

[30] In Section III.

governmental) International Organisation for Standardization, the IEC (International Electrotechnical Commission) and the ITU (International Telecommunication Union). The ISO is administering around 14,000 standards.[31] Some 30,000 experts, organised in Technical Committees, Sub-committees and Working Groups, are engaged in their elaboration.[32] The CAC, the (intergovernmental) Codex Alimentarius Commission,[33] a mutual institution of the World Health Organization (WHO) and of the Food and Agriculture Organization (FAO), is the relevant body in the foodstuffs sector.[34] (on its operation, see Herwig 2004; Poli 2004; & Victor 2000).

Both bodies follow a harmonization philosophy, which has its basis in the pertinent WTO related agreements, in the case of the ISO, in the TBT Agreement, and, in the case of the CAC, in the SPS Agreement. But on a near to global scale, any stringent harmonization is neither economically reasonable nor politically conceivable. Moreover, contrary to the situation in the EU, the WTO-ISO or WTO-CAC compound have no supranational legal competence which could trump the validity of national legislation. Anybody sufficiently familiar with the jurisprudence of the ECJ on Article 28 EC Treaty and on the New Approach knows that such legal deficiencies are important — but also knows that they are not insurmountable barriers to transnational governance.

The TBT Agreement prescribes in its Article 2.2 that the technical regulations of its Members ‘shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking into account the risks that non-fulfilment of these objectives would create’. The legitimate objectives include the concerns recognised by European law, in particular, the protection of health, safety and the environment.[35] Unsurprisingly, there is no equivalent to the European mutual recognition rule, but only a softer commitment to ‘give positive consideration’ to foreign regulations where ‘these regulations adequately fulfil the objectives’ of the importing Member. The same objective is served by the preference which, in Article 2.8, is only softly prescribed for performance, rather than construction or design standards. All this caution notwithstanding, the TBT Agreement is a powerful means for the promotion of reliance on international product standards as it provides in its Article 2.2:

> *Where technical regulations are required and international standards exist or their completion is imminent, members shall use them, or the relevant parts of them, as a ba-*

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31 Detailed and regularly updated information is available at <http://www.iso.org/iso/en/aboutiso/introduction/index.html>.

32 See Falke 2001; Schepel 2005: 177 ff. both with many references.

33 <http://www.codexalimentarius.net.

34 On its operation, cf., Herwig 2004; Victor 2000.

35 On these parallels, see Scott 2002, 2004; and Peel 2004.

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

The SPS Agreement pursues a very similar strategy which proved to be quite effective.[36] Prior to the adoption of the SPS Agreement, the impact of the CAC standards was apparently quite limited. They had no legal significance whatsoever. The SPS Agreement, which, in Article 3.1 requires that WTO Members 'base' SPS measures on international standards, guidelines and recommendations, has changed the situation quite dramatically. Legally speaking, the SPS requirement is clearly much less than a mandatory supranationally valid rule. The 'right' of WTO Members to determine the risk level that their constituency has to live with is *de jure* not at issue. Instead, the SPS Agreement has to build upon an incentive strategy which is similar to the safety 'presumption' upon which the European New Approach to harmonisation and standards rests. Its Article 3.2 provides that national 'sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.' In this way, Article 3.2 SPS imports these norms into the WTO system.

Our observations so far have not (yet) dealt with the legitimacy of transnational governance but are only concerned with the strategies through which transnational product regulation is achieved. As has become apparent, neither the TBT nor the SPS Agreement seek to prescribe a substantive uniform yardstick for the weighing of the costs and benefits of product standards; instead, they remain akin to a conflict-of-laws approach in that they identify meta-norms which help to mediate the conflicting economic interests and regulatory concerns. In the case of the SPS Agreement, 'science' is the most visible guidepost. 'Science' does not, however, figure as some objective super-standard which could prescribe the contents of regulatory decisions. The function of appeals to 'science' is to discipline and rationalise regulatory debates. But even this cautious interpretation of the potential function of commitments to 'science' needs to be further qualified. The beef hormones saga, which is of exemplary importance here, did not end in any precise agreement about the kind of scientific evidence that the parties to the conflict must submit.[37] The Report of the Appellate Body even explicitly recognized that:

> *the risk that is to be evaluated in a risk assessment under Art. 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also*

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[36] See Streinz 1996; Victor 2000; and Herwig 2004.

[37] See, for example, Godt 1998; Joerges 2001; Joerges/Neyer 2003; Perez 2004: 132 ff. and Peel 2004.

> *risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die.*[38]

The TBT Agreement and the ISO, as well as the SPS Agreement and the CAC, provide a framework for the elaboration of transnational product standards — a framework, which does, however, remain embedded in, and dependent upon, political processes.

II.3 Two interim observations

Our analysis warrants two concluding observations from which the issues to be discussed in the next session follow with a compelling logic.

The first concerns the emergence of transnational ‘law’. Juridification processes which respond to concerns of social regulation, so we have argued, are most likely in the field of product safety requirements. However, neither the WTO-TBT-ISO nor the WTO-SPS-CAC norm production can be equated with the processes of law-making and regulation in constitutional democracies. The co-ordination and norm-generating mechanisms that we observe may be more adequately, albeit somewhat vaguely, characterised as ‘governance arrangements’ — and ‘governance’ is the category which we will explore first.[39]

The second observation concerns the relationship between law and politics, *i.e.*, the embeddedness of juridification in political processes at transnational level. The intensity of this dependence is a matter of degree. Where conflicts can be resolved through choice-of-law approaches, the law is relatively strong, albeit ‘imperfect’, in that it refrains from imposing substantive rules with supranational validity claims. Where transnational governance ‘needs’ substantive rules, be it in the field of product or process regulation, the intensity of political supervision is stronger. Our conclusion may sound vague and daring to political or social scientists but it also seems unavoidable to lawyers. A hypothesis may suffice at this point: we assume that the tensions between law and politics need to be rephrased as the legitimacy *problematique* of transnational governance. This is the second issue to which the following section will turn.

III. THE TURN TO GOVERNANCE AND ITS DISTINCT LEGITIMACY *PROBLÉMATIQUE*

Governance has become an extremely popular concept in Europe ever since the President of the Commission used it in a programmatic speech delivered on 15 February 2000 to the European Parliament in Strasbourg.[40] At this occasion — with Europe in the

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38 Appellate Body Report, *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R and WT/DS48/AB/R, para. 187.

39 Sections III 1 and III 2 *infra.*

40 <http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/00/41|0|AGED&lg=EN.

grip of the BSE crisis and its impact on the reputation of the European regulatory state — Romano Prodi announced far-reaching and ambitious reforms. This was a message spoken in a new vocabulary, announcing a fresh agenda and a novel working method. Prodi envisaged a new division of labour between political actors and civil society, and a more democratic form of partnership between the layers of governance in Europe. It was this package of innovation, which was strategically launched into a legally undefined space somewhere between a technocratic and administrative understanding and a fresh democratisation of the European Union, that attracted the attention of political scientists and lawyers.[41]

One of the insights that this debate has produced is that the ‘turn to governance’ is by no means a purely European invention but has international and nation-state parallels. ‘Governance’ is a response to interdependent phenomena: to failures of traditional regulatory law, to the erosion of nation state governance and to the emergence of post-national constellations. The interdependence of these phenomena is the basis of our argument, which will be submitted in three steps. We start with a reflection on the national level. The ‘turn to governance’ was discovered, albeit in somewhat different terms, decades ago – and the responses developed since the 1980s remain attractive because the tribute they paid to functional necessities did not betray the law’s *proprium*, its inherent links with the legitimacy *problematique* of governance practices (III 1). At European level, the turn to governance came about for basically the same reasons as earlier changes had occurred within the nation-state since the European Community engaged in, or got entangled in, its ‘political administration’ of the Internal Market. However, even though the similarities between the turn to governance at European and national level are striking, the European legitimacy *problématique* is distinct in one important respect, it is different in that Europe has to conceptualise legitimate governance in a ‘market without a state’. However, this does not imply that Europe should, or could, forget about the constitutional idea of law-mediated legitimacy (III 2). The *problématique* is again different at international level. Transnational governance at WTO level cannot duplicate the EU model. The barriers to equivalent legitimacy enhancing strategies strengthen the political chances of technocratic legitimacy notions. These, however, are by no means the only conceivable way out of this dilemma. Transnational governance can build upon ‘societal constitutionalism’, upon conflict-of-laws methodologies – and, also, on comity (*comitas*)[42] (III 3).

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41 See Joerges *et al*. 2001, and, for a more recent systematic survey, Jachtenfuchs/Kohler-Koch 2004.

42 Comity is, again, a term from the world of conflict of laws. *Comitas* is an ancient ‘doctrine’ with a complex history and an ambivalent heritage. Its dark side is a subordination of law under political prerogatives and the denial of legal duties to respect foreign law and interests. Its brighter side, which we recall, is the respect of foreign

III.1 Governance practices in constitutional states: bringing the 80s back in

The seemingly irresistible career of the governance concept is new, although the phenomena it denotes are less so. In Germany, the inclusion of non-governmental actors into law-making processes and their participation in the political programmes governments design to resolve social problems is as old as that country's 'organized capitalism'. What is changing and new is the deliberate use and sophisticated design of contemporary 'modes' of governance in the context of privatization and deregulation strategies and risk society issues, and of Europeanisation and globalisation processes.[43] What may also be new is their international salience. To cite one particularly interesting American contributor, Jody Freeman defines 'governance' as a 'set of negotiated relationships between public and private actors', which may concern 'policy-making, implementation and enforcement'.[44] She points to a broad variety of administrative contexts, including standard-setting, health care delivery, and prison management. Some of them are clearly public responsibilities. Does this mean that any involvement of non-governmental actors is illegitimate? The reply to this query is her most interesting point: the inclusion of private actors into governance arrangements 'might extend public values to private actors to reassure public law scholars that mechanisms exist for structuring public-private partnerships in democracy-enhancing ways'.[45]

Where this is the case, the performance of such partnerships often seems superior to the achievements of governmental actors and bureaucracies. In this sense, 'governance' could be called a productive activity. Is this a type of 'output legitimacy' with which constitutional democracies should not content themselves? Such a framing of the

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law and foreign interests. (cf., Paul 1991; Israël 2004: Ch. 4. and most recently Späth, "Zum gegenwärtigen Stand der Doctrine of Comity im Recht der Vereinigten Staaten von Amerika", *des Internationalen Privat- und Verfahrensrechts* (2005): 3 (forthcoming). Even that brighter side, however, is ambivalent, since the understanding of the term hovers between "*courtoisie internationale*", political opportunism and "hard" international law. Späth, in his careful reconstruction of the American judicial praxis sees the doctrine evolving into "a true legal principle". That somewhat bold conclusion is, however, somewhat discredited by his observation, that American law reserves to itself the right to decide about the existence of a commitment under international law. Our probablöy idiosyncratic use of the notion underlines the difficulty of identifying conflict-of-laws solutions of general validity: no law is better than unjust law; to acknowledge that justice cannot be done is not to say that non-juridfication is to be eqated with a state of nature and a *bellum# omnia erga ones.*

43 This is a broad discussion in many countries; for Germany, cf., for example, Trute 1996; Mehde 2002; and Franzius 2003.

44 Fremann 2000: 546, 548.

45 Freeman 2003: 1290.

problématique of the turn to governance is too simplistic. What is at stake is not just the performance, but also the capability of the political and administrative system to deliver responses which the citizens of democratic states are constitutionally entitled to receive. To rephrase this issue in an older language, what is at issue here are the failures of the legal system of the modern welfare state, the **D**emocratic **C**onstitutional **I**nterventionist **S**tate, the DCIS.,[46] Its deficiencies have been on the legal theory agenda ever since lawyers became aware of implementation problems and joined the critique of political and legal interventionism that gave rise to the particularly intense debate in the 1980s.

Broad disappointment with ‘purposive’ legal programmes of economic management and a new degree of sensitivity towards ‘intrusions into the life-world’[47] through social policy prescriptions mirrored the understanding that economic processes were embedded within societies in far more complex ways than a simple market-state dichotomy might suggest. This further triggered a search for new modes of legal rationality which were to replace interventionism and, by the same token, free themselves from the destructive myth that law might get a grip on social reality through the simple application of ‘grand theories’. At the same time, however, ‘proceduralisation’[48] and ‘reflexive law’[49] were also concerned with very mundane issues such as the improvement of implementation and compliance. Discrepancies were clear between grand purposive legal programmes and their real world social impact: it became a core concern of legal sociology to establish soft-law and regulatory alternatives to command and control regulation.[50] In other words, law, concerned with both the effectiveness of economic and social regulation and its wider social legitimacy, was,very early on, drawn into the refashioning of constitutional and administrative legal spheres. Law was developing far more constructive and legitimate synergies between markets and hierarchies. The importance of these debates for the assessment of ‘governance’ practices has long gone unnoticed—but that may now change nonetheless.[51]

III.2 Constitutionalising European governance practices through deliberative processes?

As our survey in Section I has documented, the most important and most successful innovations of European governance had been achieved before this concept became so popular. To recall the most prominent examples mentioned there: under the new ap-

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46 For an elaboration of the argument, cf., Joerges 2005: 218-232.

47 Habermas 1985.

48 Wiethölter 1989; Habermas 1998 and Habermas 1999: 414-446.

49 Teubner 1983.

50 Teubner 1987.

51 Cf., for example, Scheuerman 2001.

proach to technical harmonisation and standards, non-governmental organisations with links to administrative bodies, industry, and expert communities are all engaged in long-term co-operative relationships. Europeanisation has managed to re-arrange these formerly national arrangements in such a manner that they operate across national lines and across various levels of governance. In the governance arrangements in the foodstuffs sector, the involvement of administrative bodies has been stronger—'food safety' has, for a long time, been a concern of public administration. This is why the role of bureaucracies in the European 'administration' of food safety through the comitology system was, and still is, stronger than in the field of standardisation. But it, too, has become a governance arrangement *par excellence*. Do such arrangements fit into our inherited notions of government, administration, and the separation of powers? Can such hybrids be legitimate? Is it at all conceivable that their legitimacy will be ensured by law?

These questions concern the 'nature' of the European polity, which is now widely characterized as a 'heterarchically' — as opposed to hierarchically — structured multilevel system which must organise its political action in networks. This thesis has far-reaching implications. If the powers and resources for political action in the EU are located at various and relatively autonomous levels of governance, the coping with functionally interwoven problem-constellations will depend on the communication between the various actors who are relatively autonomous in their various domains, but who, at the same time, remain mutually dependent. Compelling normative reasons which militate in favour of such co-operative commitments can be derived directly from the post-national constellation in which the Member States of the EU find themselves. Their interdependence has become so intense that no state in Europe can take decisions of any political weight without causing 'extra-territorial' effects for its neighbours. Put provocatively, but nonetheless brought to its logical conclusion, the Member States of the EU have become unable to act democratically.[52]

This is not a critique of some of the imperfections of the systems from which we would conclude that the European democratic deficit should not be taken too seriously. Our point is more structural and principled. Individual European nation states cannot include all the non-national (European) citizens who will be affected by their decisions in their own electoral and will-formation processes. And *vice versa*, their own citizenry cannot influence 'foreign' political actors who are taking the relevant decisions for them. This is, of course, true for the 'DCIS' in general — and one of the reasons on

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[52] See already note 18 *supra.* The formula used here may sound drastic, but the phenomenon which it designates has been identified in different disciplines anmd perspeczives in very sim ilar ways: see e.g. von Bogdandy 2003: 126 f. with references.

which the legitimacy of conflict-of-law rules and transnational juridification rests. But within the EU, the interdependence of national societies is particularly significant — and can also be attributed to the integration process itself.

We conclude, that the debate on democracy in Europe is too one-sidedly concerned with the democracy deficits of the European construction. It neglects the structural democracy deficits of nation-state members. It fails to conceptualise the potential of European law to cure the democracy deficits of European nation-states. Such a vision of European law does not suggest ‘democratising’ the European institutions as if they were separate bodies. It seeks to conceptualise the whole of the European multi-level construction in such a way that the European polity will not just be compatible with, but even strengthen, democratic processes.[53]

This is the task that Jürgen Neyer and the present writer have assigned to European law under the heading of ‘deliberative’ — as opposed to orthodox or quasi-statist — supranationalism.[54] We have argued that our normative claims are not pure fantasies but well-founded in important principles of European law: the Member States of the Union may not enforce their interests and their laws unboundedly. They are bound to respect European freedoms. They may not discriminate. They may only pursue ‘legitimate’ regulatory policies approved by the Community. They must co-ordinate with respect to what regulatory concerns they can follow, and design their national regulatory provisions in the most Community-friendly way.

In the field of social regulation, we have taken a further and more daring step:[55] the EU-specific context of risk regulation, so we suggested, favours a deliberative mode of interaction. Its epistemic components are not simply technocratic but embedded in broader normative practices of reasoning. Is it conceivable for law to strengthen such qualities of social regulation in the EU? Is it conceivable to ‘constitutionalise’ the European committee system so that its operation becomes compatible with essentials of the democratic ideals of policy-making? The answers we found have already (implicitly) been rephrased in the distinction used in Sections II 1 and II 2 between conflict-of law-methodologies and transnational governance arrangements and presented elsewhere at length:[56] ‘Deliberative Supranationalism Type I’ should respond to the inter-dependence

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53 Cf., for similar arguments, Bohman 2003; Caporaso 2003: 368 ff.; and Schmalz-Bruns 2004: Section 3.

54 Joerges/Neyer 1997. Good, or at least well-meaning, intentions do not cure theoretical failures. And *vice versa*, the often-repeated thesis that deliberative supranationalism is anti-democratic, or, at best, technocratic sounds odd to us and is particularly difficult to understand when brought forward together with the insight that the EU cannot develop into a state and hence is unable to realise/achieve state bound models of democracy.

55 Joerges 2003; Neyer 2003; 2004.

56 For a recent summary, cf., Joerges 2003 with references to earlier work.

of semi-autonomous polities by identifying rules and principles that respect the autonomy of democratically legitimated units and restrict controls to their design. ‘Deliberative Supranationalism Type II’ should also cope with the apparently irresistible transformation of institutionalised government into under-legalized governance arrangements. It must avoid two dead-end alleys: it must come to terms with the new challenges cannot hope to get rid of governance practices through which legal systems have, at all levels, responded to the *impasses* of traditional (administrative, interventionist) regulation. It cannot hope to achieve at European level that which could not be accomplished at national level, namely, a transformation of the practices of the ‘political administration’ of the Internal Market into a Weberian type transnational administrative machinery for which the European Commission and the European Parliament could be held accountable. Instead, it should build three types of mechanisms by:[57]

- getting the interests of non-governmental (in particular, standardisation) bodies to commit themselves to fair, politically and socially sensitive procedures through which they can build up public trust;
- covering the shadows of the law which cannot prescribe and control the activities of non-governmental actors and administrators in detail;
- introducing ‘hard’ procedural requirements to ensure that the governance of the Internal Market remains open for revision where new insights are gained or new concerns are raised by politically accountable actors.

The Internal market is a ‘Market without a State’. It need not, and should not, become a ‘Market without Law’.[58]

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[57] As inidicated (see Section I 1 *supra*), governance by committees and by agencies is not as diverse as the legal terms suggest – and the inquiries into the ‘juridification’ of agencies and comitology pose structurally similar difficulties (see on the example of agencies recently Chiti 2003; Dammann 2004)

[58] There is, of course, an intense debate on the role of law in these analysesd, the strands of which quite faithfully mirror the controversies over the proper constitutionalisation of Europe. (1) Implicit in the argument submitted here is the rejection of the idea that Europe could legitimize its ‘political administration’ of the Internal Market through some pan-European administrative law which would copy nation state models. (2) So, to speak at the opposite end of the spectre, there has been a tendency in political and legal writing since the European Commission’s White paper on Governance (European Commission 2001) to equate ‘good governance’ with panaceas such as ‘more transparency’, ‘more pluralism’, ‘broader public debates’, and ‘more participation of civil society’. All this may sound very attractive, but to assert that we could achieve the desired discipline without the visible and not always welcome force of law seems at best naïve (Schmalz-Bruns 2004; Scheuerman 2004). The third way that ‘societal constitutionalism’ is pursuing (albeit quite tentatively as will be visible from the following section) assumes that the legitimacy-generating function of law can come to bear ‘beyond the state’ and ‘beyond Europe’.

III.3 Conclusion: constitutionalising a transnational political administration

All the difficulties experienced by the law with respect to governance at national and at European level are present at international level, albeit in even more challenging variations.

Governance phenomena, as we have defined them in the preceding paragraphs, are responses to the regulatory ‘needs’ that the traditional legal system could not fulfil. The reasons for these failures and the learning processes that the law underwent at national and at European level provide the basis of the following concluding observations which will proceed in three steps. After, first, substantiating the specifics of the juridification of transnational market governance, we will, secondly, review three types of responses to its legitimacy *problématique*, namely, economic and technocratic rationality, transnational ‘administrative’ law and societal constitutionalism; where these approaches fail, we have, thirdly, to rely on conflict of laws, *comitas* and diplomacy.

(1) ‘Juridification’ has intensified at international level in many respects. The empirical indicators are so strong that all legal disciplines, as well as political and social philosophy are in the process of re-defining their premises. Juridification in the post-national constellation is broadening in scope and deepening in its reach to such intensity that we have to take the notion of ‘law without a state’ seriously, as even Jürgen Habermas concludes.[59]

The governance phenomena that this essay is exploring concern just one segment of these developments. This segment may even seem quite mundane in its importance. It is, however, theoretically particularly challenging because it concerns regulatory issues and governance practices which do not fit into the traditional categories in which legal systems perceive problems, and through which they operate. James Bohman has recently contrasted the present efforts to constitutionalize Europe with American experiences, and drawn a pertinent analogy: Europe is going through a ‘constitutional moment’ in Bruce Ackerman’s sense, he argues. ‘It is a constitutional moment that is not initiated by the People’; …‘it is rather like the case of the New Deal motivated by the democratic and functional failures of its existing, not fully constitutionalized use of administrative and political power’.[60] This characterisation comes close to the ‘political

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[59] Habermas 2004. On the good reasons for Habermas’ hesitancy cf. Humrich 2004: 17 ff. Humrich himself is cautious with the use of the term ‘law’ because he seeks to defend the normative quality that notion carries with it in Habermas’ social philosophy and legal theory. He does not address explicitely in his theoretical reflections the *problématique* of ‘deliberative supranationalism type II’. But his reserve against the heritage of ‘regime thery (at p. 2) and his inquiries into international environmental law (pp. 36 ff.) mirror the concerns raised here.

[60] Bohmann 2003: 316.

administration' thesis submitted here, but is, at least at international level, not radical enough, because the barriers to conceptualising and realising a constitutionalization of transnational governance are significantly higher.

(2) These differences become apparent because the approaches tried out at WTO level and in the EU are very similar in their design.

(a) The formative era of the European Community is particularly instructive in this respect. Two answers to the – by now very famous – democracy deficits were developed, which have been important up to the present and have their equivalents at international level. One was the theory of the European Economic Constitution which legitimized — and restricted — European governance through supranationally valid commitments to economic freedoms, open borders and a system of undistorted competition. The constitutional perspectives for the law of the WTO, which, in particular, Ernst-Ulrich Petersmann defends are anchored in this tradition.[61] They will not be discussed here because they do not deal with the type of regulatory concerns and governance arrangements that this essay focuses on.[62] As indicated,[63] we interpret markets as social institutions and are interested in their 'infrastructure', *i.e.*, the web of formalized and semi-formal relations through which decisions are taken, which the economic theories of the functioning of markets do not address directly.

The second approach to European 'governance' was technocratic in that its exponents sought to defend — and to restrict! — European governance activities to a non-political type of expertise. One contemporary version of this argument has been cited in the presentation of the new approach to harmonisation and standards.[64] Its most prominent equivalents at international level are 'expertise' and 'science'. There are many reasons for the attractiveness of such references, in particular, of 'scientific expertise'. 'Expertise' and 'science' claim a genuine authority in regulatory decision-making, which is, by its very nature, objective (neutral) and un-political. The standards of good science are not bound to some specific legal system which endorses the binding quality of scientific findings, but they are, by their very nature, transnationally valid. By resorting to scientific expertise, legal systems subject themselves to 'external' validity criteria — and overcome their territorial parochialism precisely for this reason. If only science

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61 Petersmann, for example, 2003. On the importance of this school of thought for the European economic constitution, cf., Joerges 2004b. For a critical and instructive evaluation of Petersmann's contribution to the .constitutionalization debate cf. von Bogdandy 2003: 115-

62 This is, of course, not to say that economic theories have nothing to contribute to issues of social regulation! For an instructive survey, cf., Arcuri 2004.

63 See Section I.1.

64 Cf., the reference to Nicolas 1995 in Section II.2.

could be that objective and find answers to the questions we pose! But, alas, to cite Niklas Luhmann's ironical characterization. 'an expert is a specialist to whom one can put questions he is unable to answer'.[65] This is because citizens, policy-makers, and courts are all confronted with trans-scientific question. The good expert is aware of these limits, and these limits are, by now, so widely known that the objectivity myth cannot even serve as a workable fiction.[66]

(b) The standardisation bodies for foodstuffs (CAC) and technical products (ISO, IEC, ITU)[67] are both linked to the WTO, to other governmental and non-governmental actors, and also to national legal systems. Their 'regulatory authority' depends upon the concrete contents of these links — and on the trust that they build up. 'Expertise' is crucial in this respect. But expertise is not sufficient. Since standardisation involves decision-making, the quality of standardisation procedures is a second dimension on which the impact of these organisations depends.

Unsurprisingly, their record is contested. The technique of incorporating CAC standards into the WTO system (Article 3.2 SPS Agreement) has been criticised precisely because of the internal CAC procedures. These procedures, the critics argue,[68] do not merit such preferential treatment. The Appellate Body in the Hormones case has been very cautious in its determination of the legal status of the CAC standards.[69] Moreover, the CAC has acknowledged the need to revise its rules.[70] Similar caution can be expected in the response to the complaint by the US against the *de facto* moratorium on approving genetically modified foods by the EU.[71] The WTO, we can conclude, has

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65 Luhmann 1992: 141.

66 Cf., instructively, for the WTO context, Christophorou 2000 and 2003; Pauwelyn 2002; V. Walker 2003; and Peel 2004 and for a very lucid summary of the sociological debate Bechmann 2003.

67 See Section II.2 *supra.*

68 For example, Godt 1998; Victor 2000; and Herwig 2004.

69 'To read Article 3.1 [of the SPS Agreement] as requiring Members to harmonize their SPS measures by conforming those measures with international standards, guidelines and recommendations, in the here and now, is in effect, to vest such international standards, guidelines and recommendations (which are by the terms of the Codex recommendatory in form and nature) with obligatory force and effect. …[Such an] interpretation of Article 3.1 would, in other words, transform those standards, guidelines and recommendations into binding norms. But … the SPS Agreement itself sets out no indication of any intent on the part of the Members to do so.' Appellate Body Report, *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R and WT/DS48/AB/R, para 165.

70 <http://www.codexalimentarius.net/ccgp20/gp20_01e.htm>.

71 The establishment of a WTO panel to examine the EC's 'moratorium' on issuing marketing approvals for 'agricultural biotech products' and its labelling and traceability requirements for imports of GM food products was re-

accepted the need to integrate regulatory policies into the free trade system. It has not pushed the case for juridification: thus, food standardisation remains closely embedded in political processes. This embeddedness, however, is not of the same quality as in European governance. The form of legitimacy claimed for (constitutionalized) comitology rests upon the epistemic and political potential of deliberative processes to achieve fair compromises between conflicting interests, to integrate a plurality of expert knowledge(s), to make use of the management capacities at different levels of governance, and to remain open for revision where new insights are gained or new concerns are raised by politically accountable actors. Constitutionalized comitology is a proceduralising endeavour which operates in the shadow of democratically legitimated institutions.

(c) Reservations similar to those raised against the CAC are voiced with regard to the international standard-setting by the ISO and the IEC.[72] But these are minority opinions. The assessment of the ISO and the IEC is, in general, much more favourable. The most positive evaluation is that of Harm Schepel.[73]). It is also the most challenging interpretation theoretically.

In Schepel's account, 'good' governance, as we observe it in standardization both within the EU and at international level, is not political rule through institutions as constitutional states have developed them. Instead, it is the innovative practices of networks, horizontal forms of interaction, a method for dealing with political controversies in which actors, political and non-political, public and private, arrive at mutually acceptable decisions by deliberating and negotiating with each other. The crux of this observation is a paradoxical one within traditional democratic theory, and it is counter-intuitive: productive and legitimate synergy between market and civil society cannot be furnished within traditional democratic theory, be that theory majoritarian (working with a *demos*) or deliberative (dispensing with the *demos*, but placing a 'governing' emphasis on the primacy of a/the? public sphere). How can this be? To cite Schepel once more:

> *The paradox is, of course, that the mechanism through which to achieve this is, well, politics. Due process, transparency, openness, and balanced interest representation are norms for structuring meaningful social deliberation. They are not obviously the appropriate vehicles for revealing scientific 'truth' or for allowing room for the invisible hand.*[74]

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quested by the US, Canada and Argentina; see DS291: European Communities: Measures affecting the approval and marketing of biotech products, 20 May 2003.

72 For example, Petersmann 2000: 253.

73 Schepel 2005: 177 ff.

74 Schepel 2005: 223.

This is a message with many theoretical premises and practical provisos. To relate it back to the beginnings of this essay,[75] the modern economy and its markets are ‘politicised’ in the sense that politically important processes are taking place there. The political system cannot reach into this sphere directly. These two steps of the argument do claim some plausibility. However, it is the third thesis which is the critical one: there are constellations in which the political processes within society seem perfectly legitimate. ‘Private transnationalism’ is the term that Schepel employs, but ‘societal constitutionalism’ seems a preferable notion because it covers national, European and transnational phenomena. But it, too, is a notion in need of further explanations. Those (the few) who advocate it accentuate different aspects.[76] In the version adopted in this essay, societal constitutionalism seeks to respond to three interdependent phenomena: the ‘politicisation’ of markets; the emergence of governance arrangements which need to acknowledge the problem-solving capacities and managerial qualities of the private sphere; and the transformation of nation-state governance in transnational constellations.[77] This is not where the law ends, however. Even where non-governmental actors commit themselves credibly to normative standards which ‘deserve recognition’, their legitimacy and autonomy, according to Harm Schepel, rests upon the compatibility of their institutionalization with the legal institutions surrounding them: it is not, therefore, so surprising that standardisation organisations seek to establish procedures in which society as a whole can trust, and that sufficiently self-critical law-makers and regulators realise they would not be able to substitute what standardisation accomplishes.[78] In short, standardisation both integrates and co-ordinates private governance actors across national and international levels, and reconnects with national and international public spheres, functioning all the while, not under their direction, but in their shadow.

(3) Is the weak transnational juridification of social regulation a bad thing that we should try to overcome? It is first of all important to acknowledge the normative arguments against stricter transnational legalization. Their core is that there is simply no political authority which would be entitled to take the same type of decisions for which constitutional states are legitimated. But it is then equally important to consider the re-

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75 Section I.2.

76 Sciulli 1992; Teubner 2004; and Joerges 2004a.

77 All of these aspects need to elaborated further to be situated properly in present debates. Their reliance (and dependence!) on societal law production may be particularly provocative in the eyes of public lawyers (like Stewart 2004; Kingsbury *et al*. 2004) and international lawyers (like Slaughter 2004: 216 ff.). This reliance should, however, rather be understood read as a critique of overly optimistic readings of the reach and normative quality of public governance.

78 Cf. J. Scott’s (2004: 211 ff) plea for a supervision of standardization procedures by the Appellate Body.

sponses that law can nevertheless help to organize. The most important among them is a conflict-of-laws inspired approach to the handling of legal differences which result in barriers to free trade.[79] The European experience is encouraging and can be developed further at WTO level. Conflicts between legal systems which become apparent in legal differences in the field of social regulation are usually multi-faceted. They concern political preferences, economic interests, industrial policy objectives, distributional politics, and ethical concerns. A proceduralising approach to such conflicts has the potential of discovering the nature of the differences and thereby identifying the conditions under which the free trade objective can be defended. The conceivable solutions will regularly be incomplete, in that they leave it to the concerned jurisdictions to deal with implications that cannot be handled at international level. The distributional implications of regulatory decisions are a case in point; their political implications tend to overburden the international system. A strategy of differentiating between the levels of governance, which decentralises the management of such difficulties, can be advantageous — provided that the international level proceeds with sufficient sensitivity to national concerns.

A balancing of competing ‘governmental interests’ is beyond the functions with which courts are equipped and legitimated to perform, Brainerd Currie has argued.[80] But

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[79] A long note on terminology could be inserted here which would have to cover at least three points. (1) The first concern the notion of conflict of laws. The core issue of this discipline is in my understanding the task of dealing with validity claims which conflicts law should recognize as legitimate in principle. (2) The second step is the structural affinity between the conflict of law issue and the conflict between competing, yet legitimate objectives *within* the legal systems of constitutional states (or the EU respectively). Detaching the specific mode of thought in conflict of laws from traditional (*Savignian*) private international law and making it serve other areas of law, and in particular a social theory of law, was the great project of Rudolf Wiethölter, explained e.g. in Wiethölter 1977. As Gunther Teubner (2003; 2004) explains, the point was no longer merely to reflect conflicts between national legal systems theoretically and cope with them in practice, but to generalize conflict-of-laws thinking itself in such a way as to make it yield results for conflicts between complexes of norms, areas of law and legal institutions, but also those between social systems, indeed even for divergences between competing social theories. This two-fold recourse to rich historical experience of private international law on the one hand and to competing theories of society on the other managed to establish ‘conflicts of laws’ as the central category for legal reconstruction of social contradictions. (3) The third step concerns the notion of ‘proceduralization’ (note 48 *supra*) and its use both within national legal systems and in postnational constellations. Too much for a footnote, to be sure. But by no means entirely idiosyncratic, as a fourth step could show, namely the similarity in substance of suggestions submitted in other (or similar!) suggestions. Suffice it here to point Armin von Bogdandys (2003: 126 ff.) interpretation of the Appellate Body’s approach.

[80] See Currie 1963a-c and Section II.1.

in his later writings, Currie has allowed for a ‘moderate and restrained interpretation’ of state interests so as to ‘avoid’ conflicts.[81] This concession comes close to the type of proceduralised conflict management advocated here. It is less juridical in one important respect: the search for conflict ‘avoidance’ is, at any rate within the EU, a constitutional duty. As Jona Israël has recently put it: Article 10 EC has turned comity among the European nation states into a duty of co-operation.[82] The European system of multi-level governance is operating within legally defined limits. Law-mediated legitimacy of its new modes of governance (their ‘constitutionalisation’) is at least conceivable.

At WTO level, the transformation of *comitas* into mandatory commitments may be, to rephrase a famous reservation against the constitutionalization of the WTO, ‘a step too far’.[83] Comity is a softer technique. It involves self-restraint in the assertion of jurisdiction and the application of the *lex fori* out of respect for foreign concerns. To invoke such commitments among WTO members is to suggest that court-like independent bodies — such as the WTO’s Appellate Bodies — remain legitimised to promote amicable solutions to disputes where they cannot resolve them through adjudication. *Comitas* would suggest a search for a middle ground between law and politics by advising the latter to take the expertise of the former seriously, and by advising the former to be aware of the limited legitimacy of law that did or does not originate in a democratic process. Where the WTO has reached the borderlines of ‘judicialization’ and does not seem empowered to assess policies and economic interests, it may still function as forum and instigator of fair and workable compromises. What an ambivalent message, one may object. And yet, it seems quite instructive that, in such thorough interdisciplinary analyses as that of Mark Pollack and Gregory Shaffer,[84] we observe the political scientist destroying the lawyer’s normative claims and the lawyer questioning the practical sensibility of purely explanatory exercises. And one should note that the term ‘law’ is employed here not in a descriptive sense which would content itself with observing a quasi-statal degree of stability and compliance. In an understanding of law which carries with it the promise of justice, the two dimensions of the approach submitted here seek to do justice to the weakness of the law: conflict-of-laws in conjunction with societal constitutionalism is what we can envisage and improve with some realism.

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81 See,especially, Currie 1963d: 763.

82 Israel 2004: Ch. 3.

83 Howse/Nicolaïdis 2001; for a comprehensive survey, cf., N. Walker 2001 and a more recent one with a systematic close to the categories used here v. Bogdandy: 2003: 114 ff. .

84 Pollack/Shaffer 2004.

REFERENCES

Abbott, K.W., R.O. Keohane, A. Moravcsik, A.-M. Slaughter and D. Snidal (2000) ‘The Concept of Legalization’, *International Organization* 54:3, 401-419.

Arcuri, A. (2004) The Case for a Procedural Version of the Precautionary Principle Erring on the Side of Environmental Preservation. In D. Mortimor (ed.) *Frontiers on Regulation and Liability*, Aldershot: Ashgate (forthcoming).

Bechmann, G. (2003), ‘The Rise and Crisis of Scientific Expertise’. In G. Bechmann and I. Hronszky (eds.) *Expertise and Its Interfaces. The Tense Relationship o Science and Politics* Berlin: edition sigma, 17-34.

Block, F. (2005) ‘Towards a New Understanding of Economic Modernity’. In Ch. Joerges, B. Stråth and P. Wagner (eds.) *The political construction of modern capitalism* London: GlassHousse (forthcoming).

v. Bogdandy, A. (2003) ‘Legitimacy of International Economic Governance: Approaches to WTO Law and Prospects of its Proceduralization’. In S. Griller (ed.) *International Economic Governance and Non-Economic Concerns* Schriftenreihe der Österreichischen Gesellschaft für Europaforschung (ECSA Austria) Band 5, Wien: Springer Verlag, 103-148.

Bohman, J. (2004) ‘Constitution Making and Democratic Innovation’ *European Journal of Political Theory* 3:3, 315-337.

Bücker A. (1997), *Von der Gefahrenabwehr zu Risikovorsorge und Risikomanagement im Arbeitsschutzrecht* Berlin: Duncker & Humblot.

Caporaso, J. A. (2003) ‘Democracy, Accountability and Rights in Supranational Governance’. In M. Kahler and D.A. Lake (eds.) *Governance in a Global Economy. Political Authority in Transition* Princeton, NJ: Princeton University Press, pp. 361-385.

Chiti, E. (2003) ‘On European Agencies’. In E.O. Eriksen, Ch. Joerges, and J. Neyer (eds.) *European Governance, Deliberation and the Quest for Democratisation*, EUI-RSCA/Arena (Arena Report 2/2003. Oslo), pp. 271-322.

Christoforou, Th. (2000) ‘Settlement of Science-Based Trade Disputes in the WTO: A Critical Review in the Face of Scientific Uncertainty’ *New York University Environmental Journal* 8:3, 622-648.

Christoforou, Th. (2003) ‘The Regulatotion of Genetically Modified Organisms in the EU: The Interplay of Science, Law and Politics’ *Common Market Law Review* (forthcoming 2004).

Currie, B. (1963a) *Selected Essays on the Conflict of Laws* Durham, N.C.: Duke University Press.

Currie, B. (1963b) ‘Notes on Methods and Objectives in the Conflict of Law’ (first published 1959). In Currie 1963a, pp. 177-187.

Currie, B. (1963c) ‘The Constitution and the Choice of Law: Governmental Interests and the Judicial Function’ (first published 1958). In Currie 1963a, pp. 188-282.

Currie, B. (1963d) ‘The Disinterested Third State’ *Law & Contemporary Problems* 28:4, 754-794.

Dammann, a. (2004), *Die Bescherdekammern der europäischen Agenturen* Frankfurt a.M. etc.: Peter Lang

De Bièvre, D. (2004) ‘Governance in International Trade. Judicialization and Positive Integration in the WTO’, Preprints of the Max Planck Institute for Collective Goods Bonn, 2004/7.

de Búrca, G. (2002) ‘Unpacking the Concept of Discrimination in EC and International Trade Law’. In C. Barnard and J. Scott (eds.) *The Law of the Single European Market. Unpacking the Premises* Oxford: Hart Publishing, pp. 181-196.

ECJ (1979): Case 120/78, ECR [1979] 649 – *Cassis de Dijon*

Eichener, V. (2000) *Das Entscheidungssystem der Europäischen Union. Institutionelle Analyse und demokratietheoretische Bewertung*, Opladen: Leske + Budrich.

European Commission (1985) Commission White Paper to the European Council on Completion of the Internal Market, COM (85) 310 final, 14 June1985

European Commission (2001) European Governance. A White Paper, COM(2001) 428 final of 25 July 2001, O.J. 2001, C 287/5; <http://europa.eu.int/comm/governance/index_en.htm>.

Falke, J. (2001) International Standards for the Elimination of Barriers to Trade- An Analysis of the Agreements and of the Discussion of Standardization Policy (Report commissioned by the Commission for Occupational Health and Safety and Standardization [KAN]), Bremen: ZERP.

Falke, J. and Ch. Joerges(1991) ‘“Traditional" harmonisation policy, European consumer protection programmes and the new approach’, EUI Working Papers Law 91/14, available at <http://www.iue.it/LAW/WP-Texts/Joerges91/>.

Franzius, C. (2003) ‘Der “Gewährleistungsstaat” – ein neues Leitbild für den sich wandelnden Staat?’ *Der Staat* 42:4, 493-517.

Freeman, J. (2000) ‘The Private Role in Public Governance’ *New York University Law Review* 75:3, 543-675.

Freeman, J. (2003) ‘Symposium: Public Values in an Era of Privatization: Extending Public Law Norms through Privatization’ *Harvard Law Review* 116:5, 1285-1352.

Godt, C. (1998) ‘Der Bericht des Appellate Body der WTO zum EG-Einfuhrverbot von Hormonfleisch-Regulierung im Weltmarkt’ *Europäisches Wirtschafts- und Steuerrecht* 9**:**6, 202-209.

Habermas, J. (1985) ‘Law as Medium and Law as Institution’. In: G. Teubner (ed.), *Dilemmas of Law in the Welfare State*, Berlin: de Gruyter, 203-220.

Habermas, J. (1999), *Between Facts and Norms* Cambridge, MA: MIT Press.

Habermas, J. (2001) ‘Remarks on Legitimation through Human Rights’. In id*., The Postnational Constellation. Political Essays* Cambridge, MA: MIT Press, pp. 113-129.

Habermas, J. (2004), ‘Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?‘ In id. *Der gespaltene Westen* Frankfurt a.M.: Suhrkamp, pp. 113-193.

Herwig, A. (2004) ‘Transnational Governance Regimes for Foods Derived from Biotechnology and their Legitimacy’. In Joerges *et al*. 2004, pp. 199-222.

Howse, R. and Nicolaidis, K. (2000) ‘Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step too Far’. In R. B. Porter, P. Sauve, A. Subramanian and B. Zampetti (eds.) *Efficiency,*

Equity and Legitimacy: The Multilateral Trading System at the Millenium (Washington DC: Brookings Institution Press) pp. 227-252.

Humrich, Ch. (2004) ‘Legalization and the Evolution of Law in International Society: A Habermasian pproach’. Paper presented at the 5th Pan-European International Relations Conference in The Hague, available at < www.sgir.org/conference2004>.

Israël, J. (2004) European Cross-Border Insolvency Regulation, Ph.D. Thesis EUI Florence, available at <http://www.xs4all.nl~monk/jona/thesis.pdf>.

Jachtenfuchs, M. and B. Kohler-Koch (2004), ‘Governance and Institutional Development’. In Th. Diez and A. Wiener (eds.) *European Integration Theory* Oxford: Oxford University Press, pp. 97-115.

Joerges, C. (1979) Vorüberlegungen zu einer Theorie des Internationalen Wirtschaftsrechts, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 43, 6-79.

Joerges, Ch. (1997) ‘Scientific Expertise in Social Regulation and the European Court of Justice: Legal Frameworks for Denationalized Governance Structures’. In Ch. Joerges, K.-H. Ladeur and E. Vos (eds.) *Integrating Scientific Expertise into Regulatory Decision-Making. National Traditions and European Innovations* Baden-Baden: Nomos, pp. 295-324.

Joerges, Ch. (1999) ‘“Good Governance” Through Comitology?’ In Joerges/Vos 1999, pp. 311-338.

Joerges, Ch. (2001) ‘Law, Science and the Management of Risks to Health at the National, European and International Level˜ Stories on Baby Dummies, Mad Cows and Hormones in Beef’ *Columbia Journal of European Law* 7:1*,* 1-19.

Joerges, Ch. (2003) ‘Comitology and the European Model? Towards a *Recht-Fertigungs-Recht* in the Europeanisation Process’. In E. O. Eriksen, Ch. Joerges and J. Neyer (eds.) European Governance, Deliberation and the Quest for Democratisation Oslo: Arena Report 2/2003, pp. 501-540.

Joerges, Ch. (2004a) ‘Constitutionalism and Transnational Governance: Exploring a Magic Triangle’. In Joerges *et al*. 2004, pp. 339-375

Joerges, Ch. (2004b) What is Left of the European Economic Constitution? – A Melancholic Polemic http://www.iue.it/PUB/law04-13.pdf. .

Joerges, Ch. (2005) ‘Compliance Research in Legal Perspectives’. In M. Zürn and Ch Joerges (eds.) *Governance and Law in Post-National Constellations. Compliance in Europe and Beyond* Cambridge: Cambridge University Press, 218-261.

Joerges, Ch., Y. Mény and J. H. H. Weiler (eds.) (2001) Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance, Jean Monnet Working Paper No. 6/01, New York: NYU; available at <http://www.jeanmonnetprogram.org/papers/01/010601.html.

Joerges, Ch. and J. Neyer (1997) ‘From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology’ *European Law Journal* 3:3, 273-299.

Joerges, Ch. and J. Neyer (2003) ‘Politics, risk management: World Trade Organisation governance and the limits of legalisation’ *Science and Public Policy* 30:3, 219-225.

Joerges, Ch., I.-J. Sand and G. Teubner (eds.) (2004) *Transnational Governance and Constitutionalism* Oxford: Hart Publishiing.

Joerges, Ch. and E. Vos (eds.) (1999) *EU Committees: Social Regulation, Law and Politics* Oxford: Hart Publishiing.

Kingsbury, B., N. Kirsch and R.B. Stewart (2004) The Emergence of Global Administrative Law, Ms. New York University School of Law.

Luhmann, N. (1992) *Beobachtungen der Moderne* Opladen: Westdeutscher Verlag.

Maduro, M.P. (1997) *We the Court. The European Court of Justice and the European Economic Constitution*, Oxford: Hart Publishing.

Majone, G. (1989) ‘Regulating Europe: Problems and Perspectives’ *Jahrbuch zur Staats- und Verwaltungswissenschaft* 3, 159-177.

Majone, G. (1994) ‘The Rise of the Regulatory State in Europe’ *West European Politics* 17:3, 77-101.

Mehde, V. (2002) ‘Kooperatives Regierungshandeln’ *Archiv des öffentliches Rechts* 127:4, 655-683.

Neyer, J. (2003) ‘Discourse and Order in the EU: A Deliberative Approach to Multi-Level Governance’ *Journal of Common Market Studies* 41:4, 687-706.

Neyer, J. (2004) *Postnationale politische Herrschaft: Vergesellschaftung und Verrechtlichung jenseits des Staates* Baden-Baden: Nomos.

Nicolas, F. (1995) *Common Standards for Enterprises* Luxembourg: Office of Official Publications.

Pauwelyn, J. (2002) ‘The Use of Experts in WTO Dispute Settlement’ *International and Comparative Law Quarterly* 51:2, 325-364.

Paul, J. (1991), ‘Comity in International Law’ *Harvard Journal for International Law* 32:1, 1-79.

Peel, J. (2004), Risk Regulation Under the WTO/SPS Agreement: Science as an International Normative Yardstick, Jean Monnet Working Paper 02/04, New York University School of Law.

Perez, O. (2004) Ecological Sensitivity and Global Legal Pluralism: Rethinkung the Trade and Environment Conflict Oxford: Hart Publishing.

Poli, S. (2004) ‘The EC and the Adoption of International Food Standards within the Codex Alimentarius Commission’, *European Law Journal* 10:5, 613-630.

Petersmann, E.-U. (2003) ‘Constitutional Economics, Human Rights and the Future of the WTO’ *The Swiss Review of International Economic Relations (Aussenwirtschaft)* 58:1, 49-91.

Pollack, M.A. and G.C. Shaffer (2004) Reconciling (or Failing to Reconcile) Regulatory Differences: The Ongoing Transatlantic Dispute over the Regulation of Biotechnology. Paper prepared for presentation at the Workshop on The New Transatlantic Agenda and the Future of Transatlantic Economic Governance, European University Institute, Florence, 18-19 June 2004.

Scharpf, F.W. (1994) ʻCommunity and Autonomy: Multi-Level Policy Making in the European Union, *Journal of European Public Policy*, 1: 219-238.

Schepel, H. (2005) *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets*, Oxford: Hart Publishing.

Scheuerman, W.E. (2004) ‘Democratic Experimentalism or Capitalist Synchronization? Critical Reflections on Directly-Deliberative Polyarchy’, *Canadian Journal of Law and Jurisprudence* 17:1, 101-127.

Scheuerman, W.E. (2001) ‘Reflexive Law and the Challenges of Globalization’, *Journal of Political Philosophy* 9:1, 81-102.

Schmalz-Bruns, R. (2004) Reflexive Integration in the EU: Some Conceptual Remarks, Typescript, University of Technology, Darmstadt (on file with author).

Sciulli, D. (1992) *Theory of Societal Constitutionalism*, Cambridge: Cambridge University Press.

Scott, J. (2002) ‘Mandatory or Imperative Requirements in the EU and the WTO’. In C. Barnard and J. Scott (eds.) *The Law of the Single European Market - Unpacking the Premises*, Oxford: Hart Publishiing, pp. 269-294.

Scott, J. (2004) ‘International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO’, *European Journal of International Law* 15:2, 307-354.

Selznick, Ph. (1985) ‘Focusing Organizational Research on Regulation’. In R.G. Noll (eds.) *Regulatory Policy and the Social Sciences*, Berkeley/Los Angeles: University of California Press, pp. 363-367.′

Slaughter, A.-M. (2004) *A New World Order*, Princetown and Oxford: Princeton University Press.

Stewart, R.B. (2004) U.S. Administrative Law: A Resource for Global Administrative Law?. Ms. New York University School of Law.

Stone Sweet, A. (1997) ‘The New GATT. Dispute Resolution and the Judicialization of the Trade Regime’. In M.L.Volcansek (ed.) *Law Above Nations. Supranational Courts and the Legalization of Politics*. Gainesville, FL 118-141.

Streinz, R. (1996) ‘Die Bedeutung des WTO-Übereinkommens für das Lebensmittelverkehr’ *Jahrbuch des Umwelt- und Technikrechts* 36, 435-458.

Teubner, G. (2004) ‘Societal Constitutionalism: Alternatives to State-centered Constitutional theory?’ In Joerges *et al*. 2004, pp. 3-28.

Teubner, G. (1983) ‘Substantive and Reflexive Elements in Modern Law’ *Law and Society Review* 17:2, 239-285.

Teubner, G. (1987) ‘Juridification – Concepts, Aspects, Limits, Solutions’. In id. (ed.) *Juridification of Social Spheres* Berlin-New York: de Gruyter, pp. 3-48.

Teubner, G. (2003; 2004), ‘Der Umgang mit den rechtsparadoxien: Derrida, Luhmann, Wiethölter’. In Ch. Joerges and G. Teubner (eds.), *Rechtsverfassungsrecht. Recht-Fertigung zwischen Privatechtsdogmatik und Gesellschaftstheorie* Baden-Baden: Nomos , pp. 25-46. (‚Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter. In O. Perez and G. Teubner (eds.) *Paradoxes and Self-reference in Law* forthcoming).

Tietje, C. (2002) ‘Transnationales Wirtschaftsrecht in öffentlich-rechtlicher Perspektive’ *Zeitschrift für Vergleichende Rechtswissenschaft 101*, 404-420.

Tietje, Ch. (2001) *Internationalisiertes Verwaltungshandeln* Berlin: Duncker & Humblot.

Trute, H.-H. (1996) ‘Die Verwaltung und das Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung’ *Deutsches Verwaltungsblatt* 111:17 950-964.

Victor, D. (2000) ‘The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment After Five Years’ *New York University Journal of. International Law and Policy* 32:4, 865-937.

Vogel, K. (1965) *Der räumliche Anwendungsbereich der Verwaltungsrechtsnorm* Frankfurt a.M.: Metzner.

Vos, E. (2004) *Overcoming the Crisis of Confidence: Risk Regulation in an Enlarged European Union* University of Maastricht.

Walker, N. (2001) ‘The EU and the WTO: Constitutionalism in a New Key’. In G. de Búrca and J. Scott (eds.), *The EU and the WTO. Legal and Constitutional Issues*, Oxford: Hart Publishing 31-58.

Walker, V.R. (2003) ‘The Myth of Science as a “Neutral Arbiter” for Triggering Precautions’ *Boston College International and Comparative Law Review*, 26:2, 197-228.

Weiler, J.H.H. (1999) *The Constitution of Europe*, Cambridge: Cambridge University Press.

Weiler, J.H.H. (2001) ‘The Rule of Lawyers and the Ethos of Diplomats: Reflections in the Internal and External Legitimacy of the WTO Dispute Settlement’ *Journal of World Trade*, 35:2, 191-207.

Wiethölter, R. (1977) ‚Begriffs-oder Interessenjurisprudenz—falsche Fronten im IPR und Wirtschaftsverfassungsrecht: Bemerkungen zur selbstgerechten Kollisionsnorm’. In *Internationales Privatrecht und Rechtsvergleichung im Ausgang des 20. Jahrhunderts, Bewahrung oder Wende? Festschrift für Gerhard Kegel.* Frankfurt a,.M.: Metzner, 213-263.

Wiethölter, R. (1989) ‘Proceduralisation of the Category of Law’. In Ch. Joerges and D. M. Trubek (eds.) *Critical Legal Thought: An American-German Debate*, Baden-Baden: Nomos, pp. 501-510.

Zangl, B. and M. Zürn (2004) ’Make Law, Not War: Internationale und transnationale Verrechtlichung als Baustein für Global Governance’. In M. Zürn and B. Zangl (eds.) *Verrechtlichung – Baustein für Global Governance?* (EINE Welt-Band der Stiftung Entwicklung und Frieden), Bonn: Dietz-Verlag, 12-45.

M. Zürn (2005), ‘Introduction - Law and Compliance at Different Levels’. In M. Zürn and Ch. Joerges (eds.) *Law and Governance in Postnational Europe.Compliance Beyond the Nation-State*, Cambridge: Cambridge University Press, 1-39.

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