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# 5 Free trade: the erosion of national, and the birth of transnational governance

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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 nation-state, 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.

## Introduction

When the European Commission launched its legendary programme on the 'Completion of the Internal Market'[7] in the mid-eighties, both proponents and

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critics expected broad deregulation and a 'race to the bottom', wherein EC Member States sought to defend or strengthen their economic competitiveness by loosening the regulatory grip. Regulation was considered a cost, and deregulation a gain in efficiency. These expectations were thoroughly disappointed. Instead, we witnessed intense re-regulation and the emergence of new forms of cooperation among governmental and non-governmental actors. To use the terminology of the first essay in this work: the post-national constellation which Europeanization has generated has led to an erosion of the regulatory powers of TRUDI and of its capability to weigh autonomously the costs and benefits of opening the national economy. 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 organization of free trade at the international level? To what degree do we have to attribute the 'regulatory re-embedding' of free trade in Europe to specific supranational 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 realized 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 the formula of Jürgen Habermas[14], 'deserve recognition'?

This essay is going to explore this bundle of questions in three steps.

The first step will be concerned with the European experience. We will place special emphasis on Europe's institutional ingenuity in embedding its market-building efforts in the construction of sophisticated regulatory machinery as a key part of the European multi-level system of governance.

The second part will explore the regulatory choices open to the international trade system. Its institutional centre, the World Trade Organization (WTO), simply does not have the kind of regulatory powers on which Europe can rely. Nevertheless, it does have to deal with non-tariff barriers to trade, i.e. with precisely the type of regulatory concerns to which Europe has responded in its regulatory policies since the mid 1980s. We would like to underline here that the shift from the old GATT to the new WTO regime needs to be understood as a twofold process in which the regulatory autonomy of nation states is eroded while their regulatory concerns are built into the new transnational governance arrangements.

The third and concluding section takes up what has just been alluded to as Jürgen Habermas' concern for legitimacy. It will underline the parallels in the organization of responses to regulatory concerns at all 'levels of governance'. The emergence of novel forms of governance, it is submitted, is a response to the *impasses* of traditional regulatory techniques, which cannot be refuted. This development is, by the same token, a challenge to the notions of legitimacy that we have learned to appreciate within our national constitutional democracies. The legitimacy *problematique* is particularly precarious at the international level, and thus it is important to become aware of the prospects for law-mediated legitimacy in transnational constellations – and also for the limits of 'juridification' strategies.

A note on terminology may be in order here. 'Juridification' is just one of the concepts that we cannot avoid because they have come into use in pertinent academic circles. Other examples of what has been called 'Euro-speak' will follow. These terms are sometimes well defined; often, however, they are contested. We will try to explain the most important key concepts briefly either in the text or in notes.[a]

## Non-tariff barriers in the European Community: free trade as an 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, for example by Volker Eichener,[6] that we can refrain from reporting them in any detail. What we will instead focus on are the governance patterns that 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.

### *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 *Cassis de Dijon* case[8] saw the European Court of Justice (ECJ) declare that a German ban on the marketing of a French liqueur – the alcohol content of which

[a] 'Juridification' is a particularly tricky case. The term 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 their critique of the use of law to domesticate class conflicts, as Gunther Teubner[33:9] has shown. It hence carries with it a perception of the ambivalent effects of the use of law, which were characterized first as depoliticization, and later, and most famously, as a destruction of social relations, a 'colonialization of the life-world' in the view of Jürgen Habermas.[12] 'Legalization' analysis, as presented by Kenneth W. Abbott *et al.*,[1] is not linked to these traditions and their critical normative agenda. Pertinent studies explore parallels and differences between the subjection of political processes to rule of law requirements within states, and the causes and consequences of rule-bound governance beyond the nation states. But there is no consensus among political scientists and legal sociologists and theorists on the proper use of both terms.

was lower than its German counterpart – was incompatible with the principle of free movement of goods (Art. 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, on its own initiative, adopted the constitutional competence to review the legitimacy of national legislation that presented a non-tariff barrier to free intra-Community trade. This move was of principled theoretical importance and had far-reaching practical impact, as Miguel Poiares Maduro[23] has shown.

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 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 could be expected to accept that restrictions of free trade must be based on credible regulatory concerns. The general importance of this type of conflict resolution becomes immediately apparent once we take into account the fact that market-creating and market-correcting regulatory policies are nothing exceptional and that they are the cause of the non-tariff barriers to trade with which the WTO regime seeks to cope. Without going into the theoretical underpinnings of this argument in any depth here, we simply submit that trade with increasingly sophisticated products 'requires' the development of regulatory machinery to ensure the 'trustworthiness' of such products to both traders and consumers.[3]

### *The new approach to technical harmonization and standards: towards 'private transnationalism'*

In the presentation of its White Paper on Completion of the Internal Market, the European Commission[7] 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 harmonization and standards was the most significant contribution to this new orientation.

The story of the new approach has often been told, most recently and brilliantly by Harm Schepel[31:243–279]. In its efforts to build a common market, the EC found itself in a profound dilemma: market integration depended upon the 'positive'

harmonization of countless regulatory provisions. Harmonization was difficult to achieve even after the old unanimity rule of Art. 100 EC Treaty was replaced in 1987 by qualified-majority voting (Art. 100a EC Treaty). 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 could the EU get out of this *impasse*? The new approach achieved exactly that 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 the European and national standardization organizations. The involvement of non-governmental actors involved a *de facto* 'delegation' of law-making powers, which could not be openly admitted. Harm Schepel[31:70] cites a leading representative of the standardization community:

> The new method 'makes it possible better to distinguish 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'.[26]

The language covers and hides the political dimensions of standardization. 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 standardization process. But they had good reasons to trust in the responsibility of the standardization process – and in the readiness of national and European public authorities to intervene should that trust be misplaced.

### *Administering the Internal Market: European committees and European agencies*

Two more European institutional innovations need to be mentioned, the European committee system and European agencies. Both operate at the crossroads of market building and social regulation.

The European committee system is particularly interesting and contested. In it, the Commission organizes, in cooperation with experts and administrators appointed by the Member States, the implementation of Community legislation – technically speaking of 'comitology committees' – and the work on new regulatory projects for policy areas such as food safety, occupational health and

safety. The Committee system was established to compensate for the lack of genuine Community administrative powers and the scarcity of its resources. It also fosters the acceptance of European prerogatives through the involvement of national bodies. These committees embody the functional and structural tensions, which characterize internal market regulation. They hover between 'technical' and 'political' considerations, between the functional needs and the ethical/social criteria, that inform European regulation. Their often very fluid composition not only reflects upon the regulatory endeavour to balance the rationalization 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. Their activities can be characterized as 'political administration', an oxymoron, which reflects their hybrid nature, as is shown in detail by Christian Joerges,[19] also with reference to earlier work.

Independent agencies were the core institutions advocated by Giandomenico Majone[24] 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. 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, organizational 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 cooperate with a web of national authorities in accomplishing the tasks laid down in European legislation. 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 for, and even build upon, the institutionalization of political (deliberative) processes.[19,25]

## Non-tariff barriers and the World Trade Organization: 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, as Jacqueline Peel[27] shows in detail: 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'.[2:para 177] 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 EC tends to recognize as legitimate restrictions to the freedom of intra-Community trade. The SPS and the TBT Agreements are institutionalized 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,[b] as opposed to political conflict resolution. We will focus here 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 realization 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. It seems therefore plausible to assume that the juridification of transnational product regulation will be more intense than transnational standardization in the field of safety at work and environmental protection.

[b] Dirk De Bièvre[5:3] defines 'judicialized' as 'the presence of binding third party enforcement. This is a workable, albeit undercomplex, definition for two interdependent reasons: first, because the process of 'enforcement' of WTO reports cannot be equated with the enforcement of court judgments, as De Bièvre[5:7] himself underlines; second, because the authority of international bodies to decide about political differences and their economic implications poses thorny normative problems.

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### *Alternatives to substantive transnationalism: proceduralized policy coordination 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 assessing 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'.

To assign to conflict of laws a constitutional function in the sense that it has to deal with the competing validity claims of legitimate legal systems is an unavoidable consequence of the developments that led to the transformation of the GATT of 1947 into the WTO in 1994. These developments challenged the traditional understanding of the various legal disciplines dealing with the international system for decades.[20:345–348]

The disciplines of international private economic and administrative law have all, albeit often hesitantly, become aware of the regulatory dimensions of modern legal systems. They have to be taken into account in determining the law that should apply in international or transnational constellations in the choice-of-law process. The core difficulty, which conflict scholars are struggling with, stems from the 'fact' that there is no comprehensive super law available that can guide this process. To rephrase the problem in more technical terminology, their difficulty lies in getting beyond 'unilateral' or 'one-sided' definitions of the international sphere of application of domestic law (the *lex fori*), and conceptualizing cooperative legal responses for all concerned jurisdictions. This hesitancy to subject their own legal system to the commands of a foreign sovereign is often expressed in the language of traditional notions of sovereignty, 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 move beyond their constitutionally legitimated functions. Thus, a 'judicialized' solution of international conflicts is a challenge to legal theory. The reasons have already been outlined in the explanatory note[a] to this term: the courts of national states are neither legitimated nor well equipped to take substantive decisions upon competing validity claims and their economic implications, or to hand down solutions to the challenges of transnational governance.

Once one has become aware of these difficulties, the virtues of the conflict-of-laws alternative to 'substantive' supranationalism become apparent. The search for a conflict norm can be understood as a 'proceduralization'[c] of the conflict between competing validity claims, namely, 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. Taking up the trivial *Cassis* case again: France does not need to adapt the alcohol content of its liqueur to German legal requirements. Germany can continue to protect the expectations of its consumers. Both jurisdictions can live with a consumer information requirement. Solutions of this kind are not always as unproblematical and soft. The transatlantic conflict over hormones in beef[2] provides another instructive example. 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 Members must not be 'maintained without sufficient scientific evidence' (Art. 2.2) and be 'based on' a risk assessment (Art. 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 that innocent. Three reasons are sufficient to illustrate this point: firstly, science 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.[11,28]

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

[c] 'Proceduralization' is another term that would merit extensive explanations. In a nutshell: 'proceduralization' substitutes immediate decision-making by a search for innovative problem-solving. This implies the imposition of rules and principles which ensure a deliberative style among the parties to the conflict.

This is not, of course, to equate 'deliberation' with democracy, or to suggest that deliberation may be sufficient to generate legitimacy. The issue will be taken up in the first part of the section on governance below.

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[4] argued. 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*[d] or diplomacy.[35] The borderlines are not as strict as legal formalists tend to portray them. It follows that 'judicialization', as achieved by the WTO through the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), does not guarantee definite solutions, but may instead initiate a re-politicization of the whole process. Is this a failure, an advantage, or simply unavoidable? We will return to this question in the concluding section.

### *Limits of juridification: the example of product-related transnational governance arrangements*

Internationally accepted product standards, so we have argued, best ensure the compatibility of free trade with concerns over safety and health. Unsurprisingly, international standardization is taking place on a great scale in the ISO, the (non-governmental) International Organization for Standardization, the IEC (International Electrotechnical Commission) and the ITU (International Telecommunication Union). The ISO is administering around 14,000 standards. Some 30,000 experts, organized in Technical Committees, Sub-committees and Working Groups, are engaged in their elaboration.[31:191–242] The CAC, the (intergovernmental) Codex Alimentarius Commission, an institution established by both the World Health Organization (WHO) and the Food and Agriculture Organization (FAO), is the relevant body in the foodstuffs sector, and Alexia Herwig[16] and Sara Poli[30] report on its operation.

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, in the case of the CAC, in the SPS Agreement. But on an almost global scale, any stringent harmonization is neither economically reasonable nor politically conceivable. Moreover, contrary to the situation in the EC, the WTO-ISO or WTO-CAC compound has no supranational legal competence that could trump the validity of national legislation. Anybody sufficiently familiar with the jurisprudence of the ECJ on Art. 28 EC and on the New Approach knows that

[d] 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 commitments which do not arise out of juridified obligations, but out of friendship and trust among nations, as Jona Israël[18:129–136] reminds us.

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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 recognized by European law, in particular the protection of health, safety and the environment. 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 basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance, because of fundamental climatic or geographical factors or fundamental technological problems.

The SPS Agreement pursues a very similar strategy, which has proved to be quite effective. 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 that is similar to the safety 'presumption' upon which the European New Approach to harmonization 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 Agreement imports these norms into the WTO system.

As has become apparent, neither the TBT nor the SPS Agreement seek to prescribe some substantive uniform yardstick for the weighing of the costs and

benefits of product standards. They remain akin to a conflict-of-laws approach in that they identify meta-norms that 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 that could prescribe the contents of regulatory decisions. The function of appeals to 'science' is to discipline and rationalize regulatory debates. But even this cautious interpretation of the potential function of commitments to 'science' needs to be qualified further. 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. The Report of the Appellate Body even explicitly recognized that 'the risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also 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'.[2:para187] 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.

### *Two interim observations*

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

The first concerns the emergence of transnational 'law'. Juridification processes that 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 coordination and norm-generating mechanisms that we observe may be more adequately, albeit somewhat vaguely, characterized as 'governance arrangements' – and 'governance' is the category which we will explore first.

The second observation concerns the relation between law and politics, i.e. the embeddedness of juridification in political processes at the 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 covered here, to which the following section will turn.

## The turn to governance and its distinct legitimacy problematique

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. On this occasion, with Europe in the grip of the BSE crisis, with its impact on the reputation of the European regulatory state being felt, 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 democratization of the European Union, that attracted the attention of political scientists and lawyers.[21]

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. First, 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. Then, second, at the 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 own '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 *problematique* is distinct in one important respect: it is different in that Europe has to conceptualize 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. And, third, the *problematique* 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, as our conclusion will submit.

### *Governance practices in constitutional states: bringing the 1980s 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 that 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 Europeanization and globalization processes. What may also be new is their international salience. To cite one particularly interesting American contributor, Jody Freeman[9] defines 'governance' as a 'set of negotiated relationships between public and private actors', which may concern 'policy-making, implementation and enforcement'. 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[10] 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'.

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 *problematique* 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 *problematique* in an older language, what is at issue here are the failures of the legal system of the modern welfare state, of TRUDI. And these failures 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'[12] 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, 'proceduralization'[13] and 'reflexive law'[32] 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.[32,33] 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 a far more differentiated view of the constructive and legitimate synergies between markets and hierarchies.

### *Constitutionalizing European governance practices through deliberative processes*

The most important and most successful innovations of European governance were achieved before this concept became so popular. To recall the most prominent examples mentioned in the first part of this essay: under the new approach to technical harmonization and standards, non-governmental organizations with links to administrative bodies, industry, and expert communities are all engaged in long-term cooperative relationships. Europeanization 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 standardization. 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 organize 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 cooperative 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.

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 those 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 'TRUDI' in general – and one of the reasons on 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 conceptualize the potential of European law to cure the democracy deficits of European nation-states. Such a vision of European law does not suggest 'democratizing' the European institutions as if they were separate bodies. It seeks to conceptualize the whole of the European multi-level construction in such a way that the European polity will not just be compatible with, but will even strengthen, democratic processes.

This is the task that has been assigned to European law under the heading of 'deliberative' – as opposed to orthodox – supranationalism.[22] These normative claims are based upon important legal 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 must not discriminate. They may only pursue 'legitimate' regulatory policies approved by the Community. They must coordinate with respect to what regulatory concerns they may follow, and design their national regulatory provisions in the most Community-friendly way.

In the field of social regulation, Christian Joerges and Jürgen Neyer[19,25] have taken a further and more daring step: the EU-specific context of risk regulation,

so they 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 'constitutionalize' 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 between conflict-of-law methodologies and transnational governance arrangements in the European Union, which we presented elsewhere at some length, and were recently summarized by Christian Joerges:[19] 'Deliberative Supranationalism Type I' should respond to the interdependence of semi-autonomous polities by identifying rules and principles that respect the autonomy of democratically legitimated units and restrict the controls to their design. 'Deliberative Supranationalism Type II' should also cope with the apparently irresistible transformation of institutionalized government into under-legalized governance arrangements. Such supranationalism must avoid two dead-end alleys: it cannot hope to destroy, in a constructive way, the turn to governance through which legal systems have, at all levels, responded to the *impasses* of traditional (administrative, interventionist) regulation. It cannot hope to achieve at the European level that which could not be accomplished at the 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, deliberative supranationalism should build three types of mechanisms by

- attracting the interests of non-governmental (in particular, of standardization) 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'.

### *Towards law-mediated legitimacy of ('constitutionalized') transnational governance*

All the difficulties experienced by the law with respect to governance at the national and at the European level are present at the 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 the national and 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 *problematique*, 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 the 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 an intensity that we have to take the notion of 'law without a state' seriously, as even Jürgen Habermas[15] concludes.

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 that do not fit into the traditional categories in which legal systems perceive problems, and through which they operate. This, as we have argued again and again, holds true at all levels of governance. But the difficulties of adjusting the law to the 'new modes of governance' are significantly greater at the international than at the European level.

(2) These differences become apparent because the approaches tried out at the 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 so famous – democracy deficits were developed, which have been important up to the present and have their equivalents at the 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[29] defends, are anchored in this tradition. 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. 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 harmonization and standards in the analysis of the European example. Its most prominent equivalent at the international level is 'science'. There are many reasons for its attractiveness. Scientific expertise tends to 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 could be that objective and find answers to the questions that we pose! Unfortunately, the real expert will only tell us why he cannot perform such functions. This is so widely known that the objectivity myth cannot even serve as a workable fiction, as Jacqueline Peel[27] has most recently and comprehensively shown for the WTO.

(b) The standardization bodies for foodstuffs (CAC) and technical products (ISO, IEC, ITU) are both linked to the WTO, to other governmental and non-governmental actors, and also to national legal systems. Their authority in the field of product regulation depends upon the concrete contents of these links – and on the trust that they build up. 'Expertise' is crucial in this respect. However, it is not sufficient. Since standardization involves decision-making, the quality of standardization procedures is a second dimension on which the impact of these organizations depends.

Unsurprisingly, their record is contested. The technique of incorporating the CAC standards into the WTO system (Art. 3.2 SPS Agreement) has been criticized specifically in the light of the internal CAC procedures. These procedures, the critics argue, 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.[e] The WTO, we can conclude, has accepted the need to integrate regulatory policies into the free trade system. Although it has not pushed the case for juridification, food standardization remains closely embedded in

[e] '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 Art. 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.'[2:para 165]

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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, 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 legalized, proceduralized endeavour that 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 ISO and IEC. But these are minority opinions. The assessment of ISO and IEC is, in general, much more favourable. The most positive evaluation is Harm Schepel's. It is also the most challenging interpretation theoretically.

In Harm Schepel's[31:191–242] account, 'good' governance, as we observe it in standardization both within the EU and at the 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 the public sphere). How can this be? To cite Harm Schepel[31:241] again:

> 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.

This is a message with many theoretical premises and practical provisos. To relate it back to the beginnings of this essay: the modern economy and its markets are 'politicized' 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 that 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. However, it too is a notion in need of further explanations. Those (the few) who advocate it accentuate different aspects.[20,31,34] In the version adopted in this essay, societal constitutionalism seeks to respond to three interdependent phenomena: the 'politicization' 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. 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 standardization organizations seek to establish procedures in which society as a whole can trust, and that sufficiently self-critical law-makers and regulators realize they would not be able to substitute what standardization accomplishes. In short, standardization both integrates and coordinates private governance actors across national and international levels, and reconnects national and international public spheres; standardization is functioning 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 that 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 responses 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 that result in barriers to free trade. The European experience is encouraging and can be developed further at the 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 proceduralizing 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 the 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 decentralizes the management of such difficulties, can be advantageous – provided that the international level proceeds with sufficient sensitivity to national concerns.

## Conclusion

The type of proceduralized conflict resolution advocated here for international disputes is less juridical than its European counterpart. The search for conflict avoidance through deliberative processes within the EU has become a constitutional commitment. As Jona Israël[18:136–159] recently put it, the EU has turned comity among the European nation states into a duty of cooperation. The European system of multi-level governance is operating within legally defined limits. The law-mediated legitimacy of its new modes of governance – their 'constitutionalization' – is at least conceivable.

At the WTO level, the transformation of *comitas* into mandatory commitments may be, to rephrase a famous reservation against constitutionalization of the WTO,[17] 'a step too far'. 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 legitimized 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 does or did 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 a forum and as an instigator of fair and workable compromises.

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