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Free Trade with Hazardous Products? The Emergence of Transnational Governance with Eroding State Government

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ABSTRACT

The historical evolution of free trade has been accompanied by a plethora of debates, concerning both its positive effects and social costs. During the last decade, the subject of these disputes has markedly changed. The main objective of the General Agreement on Tariffs and Trade (GATT) concluded 1947, was initially the reduction of tariffs introduced by states to protect their national economy. In this respect, the agreement has been markedly successful. Since the early 1970s, however, non-tariff barriers to free trade have moved to the centre of attention. This change of focus was fostered by more intensified domestic regulation especially in the fields of health and safety, consumer and environmental protection. These concerns are of such domestic significance that they cannot simply be abandoned for the sake of free trade; however, it also is common opinion that regulations in these areas cannot be accepted, if they merely mask protectionist interests. In 1994, the international trade system adapted to this situation by transforming the GATT into the World Trade Organization (WTO). The most important reforms included an overhaul of its procedures of dispute settlement and the conclusion of special agreements concerning non-tariff barriers to free trade such as the *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS) and the *Agreement on Technical Barriers to Trade* (TBT). These agreements aim at the balancing of their main economic objective, free trade, with domestic regulatory concerns of WTO members. This bundle of regulations has certainly furthered the emergence of transnational 'governance arrangements'. Such new forms of 'transnational governance' have lent renewed importance to 'old' legal issues: How can new forms of transnational governance be qualified legally? What can be said about their (social) acceptance and (normative) legitimacy? Can this form of governance be 'constitutionalized' in such a way that law can defend or even regain its function as guarantor of and yardstick for legitimate governing?

KEYWORDS

Governance – international regimes – legitimacy – multilevel governance – national autonomy – risk regulation – social regulation – standardisation – international trade –WTO

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Free Trade with Hazardous Products? The Emergence of Transnational Governance with Eroding State Government*

CHRISTIAN JOERGES

Introduction

When the European Commission, led by Jacques Delors, launched its well-known programme on the *'Completion of the Internal Market'* in the mid 1980s,[1] its proponents and critics expected both an intensified monitoring of regulations hampering competition and a 'regulatory competition' fostered by the planned obligation to mutually recognize national legal norms. In such a competition, EC Member States would seek to defend or strengthen their economic competitiveness by loosening their regulatory policies and, hence, a 'race to the bottom' would begin. Regulation was considered a cost factor, whereas deregulation was seen as a way to gain efficacy. However, these expectations were proven wrong. What followed, was no simple and broad de-regulation, but an intensified re-regulation, which resulted in new forms of collaboration between state and non-state actors—later termed 'new modes of governance'. The post-national constellation, which Europeanization has generated, has eroded the regulatory powers of nation states and their competence to assess the costs and benefits of opening national economies autonomously. Yet, Europeanization has also established sophisticated transnational governance arrangements, which could not have been achieved by nation states on their own.

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* Translated from the German by Harry Bauer, London/Florence. -- This essay owes much to the participants in the Bremen project on 'Social Regulation and World Trade' and in particular the research assistance provided by Christiane Gerstetter and David Gerl. I am equally indebted to Ernst-Ulrich Petersmann with whom I organized in September 2004 a conference on 'Legal Patterns of Transnational Social Regulation and International Trade' at which I defended some of the ideas developed here further. Last but not least I would like to thank the participants of the risk regulation seminars held together with Marie-Curie-Fellow Rainer Nickel in the Academic Year 2004/2005 for many inspiring comments.

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

Apparently, Europe has managed both to establish free trade and, simultaneously, to develop refined forms of regulatory policies. Can the European experience offer some lessons for the organization of free trade at the international level and, especially, for easing the tension between the objective of free trade and national regulatory policies? Do we have to attribute the regulatory embedding of free trade in Europe to institutional particularities and specific European interest constellations? To what degree should these developments simply be understood as responses to domestic concerns about safety at work, the interest of consumers and the environment, cleverly exploited by lobby groups and political industrialists? Or, should we assume that a smooth functioning of international markets rests upon 'social regulation'[2]—such as the reliable protection of consumers, the environment and safety at work—as a necessary precondition?[3] Indeed, if international free trade can only be realized by dint of transnational governance arrangements, how can then the 'appropriateness' of transnational governance be assessed and ensured? Does the 'market embedded nation state' have to accept the loss of its regulatory autonomy because the functioning of international markets requires this? Would this central function for the establishment of markets alone render transnational forms of governance legitimate to such an extent that they would 'deserve recognition', to take up a formula by Jürgen Habermas?[4]

This essay attempts to explore this bundle of questions in three steps: A *first* step will be concerned with Europe and its particular experience. In particular, we will argue that the 'completion of the Internal Market' required institutional innovations which established symbiotic relationships between markets and regulatory policies and which now represent a corner stone of European multi-level governance.

The *second* part of the essay will explore the regulatory room for manoeuvre within the international trade system. Its institutional core, the World Trade Organization (WTO), does not command those regulatory powers and resources Europe's Internal Market policies are able to draw on. Nevertheless, parallels are obvious: the WTO is confronted with similar non-tariff barriers to trade and, hence, similar types of regulatory concerns, Europe has responded to in its re-regulatory policies from the mid 1980s onwards. We would like to aver that the shift from the old GATT to the new WTO regime needs to be understood as a dual process, in which the regulatory autonomy of nation states erodes while their regulatory concerns are maintained within new transnational governance arrangements.

The *third* and concluding section touches upon the problem of the legitimation of transnational governance through law. It will further outline that there are striking parallels between the responses to regulatory concerns on different levels of governance—European as well as international. It is suggested that the emergence of novel forms of governance is a reaction to the impasse and gridlock of traditional regulatory modes, to which we cannot

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2 Here, I adopt Majone's concept of 'social' regulation as policies in the areas of consumer and environmental protection and of health and safety at work, explicitly excluding distributive policies with the aim of implementing standards of social justice; G. Majone, 'The Rise of the Regulatory State in Europe', 17 *West European Politics* (1994), pp. 77-101.

3 An elaboration of this argument can be found in C. Joerges and M. Everson, 'The European Turn to Governance and Unanswered Questions of Legitimacy: Two Examples and Counter-intuitive Suggestions', in C. Joerges, B. Stråth and P. Wagner (eds) *The Economy as Polity: The Political Constitution of Contemporary Capitalism* (London: UCL Press 2005, pp. 159-179. For more systematic studies see, e.g. see, pithy and in succession of Karl Polanyi, F. Block, Towards a New Understanding of Economic Modernity in C. Joerges, B. Stråth and P. Wagner (eds) *op. cit.,* pp. 3-16. or theoretically more comprehensive, J. Beckert, *Beyond the Market: The Social Foundations of Economic Efficiency* (Princeton UP, Princeton, 2002).

4 J. Habermas, 'Remarks on Legitimation through Human Rights' in J. Habermas, *The Postnational Constellation: Political Essays* (MIT Press, Cambridge MA, 2001) pp. 113-129 at p. 113.

resort to again. And yet, we should be careful when assuming that what already exists equals the reasonable. Moreover, the emergence of forms of transnational governance poses a challenge to those notions of legitimacy we have become accustomed to under the roof of constitutional democracy. Hence, we argue that the particular form and degree of legitimate governing within constitutional democracies cannot be achieved in transnational constellations. This reveals the limitations for strategies of 'juridification' at the international level, applied by law and politics

A note on terminology may be in order here. 'Juridification' is just one of those concepts—widely used, yet multifaceted, vague and hence contested—leaving indeterminate its conceptual foundation and normative aspiration. We, therefore, will briefly try to elaborate on our grasp of this and other key concepts either within the text itself or within its notes.[5]

I Non-tariff barriers in the European Community: the freedom of free trade as movens for regulatory innovation

The re-regulatory and modernizing strategies, developed to 'complete' the European Internal Market, have been documented in depth and breadth.[6] What we, thus, will focus on are those patterns of governance, which have to a remarkable extent enabled Europe to match market integration with the market-correcting logic of social regulation.

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 more in the debate about 'new modes of governance'. This innovation entailed substituting the

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5 'Juridification' is a particularly complex notion. The term is a translation of the concept of '*Verrechtlichung*', coined by leftist labour lawyers in the Weimar Republic in their criticism of law as a means to tame class conflicts [see G. Teubner, 'Juridification—Concepts, Aspects, Limits, Solutions', in G. Teubner (ed) *Juridification of Social Spheres* (de Gruyter, Berlin 1987) pp. 3-48 at p. 9] . Only decades later the term found its way into the law and society studies of the Anglo-Saxon academia. ; Currently, the use of the term changes, even on 'the continent': still the term carries a critical perception of law aware of its ambivalent effects. As such legal effects figured early the depoliticization of societal conflicts and later on, and most famously, the 'colonialization of the life-world' through welfare programs; see J. Habermas, 'Law as Medium and Law as Institution' in G. Teubner (ed.), *Dilemmas of Law in the Welfare State* (de Gruyter, Berlin 1985) pp. 203-220. In International Relations, however, the term 'legalization' has become popular, following K.W. Abbott, R.O. Keohane, A. Moravcsik, A.-M. Slaughter and D. Snidal, 'The Concept of Legalization', 54 *International Organization* (2000), pp. 401-419. Pertinent studies explore parallels and differences between the subordination of political process to rule of law requirements within states, and the causes and consequences of rule-bound governance beyond the nation state. Such analyses of the reasons and consequences of rule-bound governance hardly resemble the critical and normative approach of the debates about juridification. Yet, there is no consensus among political scientists, legal sociologists and theorists about the proper use of both terms. – For a comprehensive and clarifying excellent discussion carfully distinguishing between Juridification is related to two other concepts, 'judicialization' and 'legalization' cf. Lars Chr. Blichner, Anders Molander, 'Mapping Juridification', Oslo 2005 (on file with author).

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

'traditional method' of integration policies, integration by dint of legislative acts aiming at legal harmonization, with the principle of 'mutual recognition', ultimately intended to take some load off European jurisdiction. Back in 1979, the new principle became manifest in the well-known *Cassis de Dijon* ruling by the European Court of Justice (ECJ): The Case saw the Court declare that a German ban on the sale of a French liqueur—the alcohol content of which was lower than its German counterparts—was incompatible with the principle of free movement of goods (Article 30 EC Treaty, now 28 EC).[7] The principle of free movement of goods stood not in the way of national regulations protecting consumers' health and their right to information, yet, generally, regulations by different Member States had to be treated as equal and worth of mutual recognition. In the case of conflict, regulatory differences have to be balanced in accordance with the principle of free movement of goods.

In the *Cassis* case, this was rather simple: confusion among German consumers could be avoided by the relatively mild measure of clearly indicating the low alcohol content of the French liqueur instead of a ban. 'Easy cases can make tough law': the ruling was 'simply' convincing, yet far from being trivial. With its legal argument, the Court, on its own initiative, granted itself the competence to review the legitimacy of national legislation—it appointed itself as constitutional court. This move was of principle theoretical importance and had far-reaching practical ramifications.[8]

In our comparison of European and international legal responses to non-tariff barriers to trade, it is important to stress that the ECJ's renowned line of reasoning can easily be translated into the vocabulary of a much older discipline, i.e., that of conflict of laws. Indeed, the ruling was about a conflict of laws to the extent that German law did not tolerate the French product, whereas France did perceive its liquor as tradable. In its response to the legal conflict among German importers and producers concerning the dissimilarities between German and French law, the ECJ identified a 'meta-norm' which both legal systems were able to accept: since both countries were committed to the objective of free trade, the ECJ was able to prevent Germany from implementing a regulation, which did not guarantee an indispensable (yet legitimate) protection of consumer interests. The general importance of this type of conflict resolution becomes apparent, once we take into account that market-constituting and market-correcting regulatory policies are the rule when it comes to more complex and hazardous products than liquor. To the contrary, markets rely on regulatory measures securing 'trust' into products on the side of both traders and consumers.[9]

I.2 A new approach to technical harmonization and standardization: 'private transnationalism'

In the presentation of its White Paper on *'the Completion of the Internal Market*', the European Commission stressed that the basis of its new integration strategy was to be found in the ECJ's jurisprudence in general and its *Cassis* ruling in particular. The White Paper's proposals were, however, far more radical. This holds especially true for the *'New Approach to technical harmonization and standardization'*.[10] What it entailed was more than the

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7 Case 120/78, *Commission v. Germany*, [1979] ECR 649—*Cassis de Dijon*.

8 See M.P. Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart, Oxford, 1997), p. 150 et seq.

9 For the argumentative context of this claim, see note 3.

10 European Commission, *The New Approach to Technical Harmonization and Standardization*, COM (85) 19 final, 31 January 1985.

mediation between conflicting regulatory notions of Member States. With the new approach, a transnational mode of governance was established replacing the public regulation of product safety with a 'private transnationalism'.[11]

The history of the new approach has often been reconstructed, most recently and superbly by Harm Schepel.[12] To summarize: the endeavour to establish a common market confronted the EC with a plethora of dilemmas: under the umbrella of the paradigm of 'integration by law', the common market should be achieved by harmonizing the relevant national norms. This task required positive legislation to a Sisyphean extent. The situation was hardly affected by the replacement of the old unanimity rule of Article 100 EC Treaty with qualified-majority voting in 1987 (Article 100a EC Treaty). Similarly, the implementation of the new obligation to mutually recognize legislation, arguably imposed by the *Cassis de Dijon* decision of 1979, caused complex issues but did not lead to wide-ranging changes. On the other side, even private norm systems, widely used in Germany to guarantee product safety, were not more pro-integration. These voluntary, sub-legal product standards were by definition merely 'private' obstacles to trade, which could not be overcome by legislative measures meant to press for the harmonization of public law. The point of the 'new approach' was covered by a bundle of well-tuned measures: European legislation was markedly relieved by its exclusive concentration on 'essential safety requirements'; whereas the task of detailing these general requirements was delegated to experts of European and national standardization bodies. The involvement of non-state actors implicated a *de facto* 'delegation' of law-making powers, which could, however, publicly not be admitted. Harm Schepel[13] cites, with a degree of ironic distance, a renowned member of the standard-setting community:

> The new approach 'makes it possible better to distinguish between those aspects of Community harmonization 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'.[14]

Unsurprisingly, this wording veils the political dimensions of product standardization. In order to overcome the dilemmas of the 'traditional' community method, the protagonists of the new approach had to aver that legislation should be content with setting 'essential safety requirements' without delegating norm-setting functions to non-state actors. The collaboration between state and non-state actors in the field of standardization, however, has a long tradition, which lays the foundation for the general trust in its capacity. At the same time, national and European public authorities maintained the possibility to intervene in cases of mishandling.

I.3 The Administration of 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-constitution and social regulation. Similarly to the new approach, these institutions complement community law, here understood according to the conflict of laws approach, in a particular way: they achieve what Niklas Luhmann has termed the 'cognitive opening' of

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11 H. Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Hart, Oxford, 2005), p. 37.

12 Ibid., pp. 37-76.

13 Ibid., p. 17.

14 F. Nicolas, *Common Standards for Enterprises* (Office of Official Publications, Luxembourg, 1995), p. 94.

law,[15] enabling to draw on sources of knowledge beyond law caused by issues of Internal Market constitution and management.

The European committee system is particularly important, interesting—and contested. Through this system, the Commission organizes, in collaboration with experts appointed by national administrations, the implementation of Community law in issue areas such as food safety, health and safety at work and consumer protection. The Committee system was established both to compensate for the lack of genuine Community administrative powers and to allow the Member States control of the Commission. Moreover, it also fosters the acceptance of European decisions by involving national bodies. The committees' core function is to 'shred' the functional and structural tensions of the Internal Market project into workable pieces. This 'comitology' system is concerned with 'technical' and 'political' considerations, functional needs and normative issues. The committees' fluid composition reflects upon their main task, i.e., to balance the available stock of technical knowledge with regulatory concerns and to match both. They, however, also mirror the multitude of interests and political discrepancies inherent in the process of implementation itself. The committees often act as 'mini-councils' balancing market-integration and Member State interests, which carries strong indications that their considerations take place in an issue-oriented, deliberative manner.[16] Reflecting their hybrid nature, these activities can be characterized as 'political administration',[17] i.e., administration bound by legal principles, yet cognitively open and paying attention to public acceptance.[18]

Independent agencies featured as core institutions in Giandomenico Majone's conception of the EU as a 'regulatory state'.[19] Majone's suggestions found much attention, yet they were never implemented completely. Europe has, however, adopted his term and established an impressive number of bodies under that name. Their current and future nature, however, remains indeterminate. What continues to be uncontested is that the new European Agencies just partly share features with their American counterpart, the Independent Regulatory Agencies. They are no self-sufficient bureaucracies and hold no law-making powers. These agencies are charged to administer licensing procedures, such as in the case of pharmaceutical products, to informally support and accompany policy-making by gathering and providing policy-relevant information. The new European entities meet a demand for market-corrective and sector-specific regulation, yet, according to the Commission's conception only indirectly or by doing the latter's groundwork.[20]

Official statements hold that their purpose is merely 'technocratic'. This notion mirrors their semi-autonomous status, indeed, and is well compatible with their function of

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15 N. Luhmann, *Das Recht der Gesellschaft* (Suhrkamp, Frankfurt a. M., 1995), pp. 77 et seq.

16 T. Roethe, *EG-Ausschusswesen und Risikoregulierung: Ein Problem von Handlungsstruktur und Rationalität* (San Domenico di Fiesole: EUI Working Paper Law 94/7, 1994); C. Joerges and J. Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology', 3 *European Law Journal* (1997) pp. 273-299.

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

18 M. Everson, 'Administering Europe?', 36 *Journal of Common Market Studies* (1998), pp. 195-216.

19 G. Majone, 'The Rise of the Regulatory State in Europe', 17 *West European Politics* (1994) pp. 77-101..

20 See C. Joerges, The Commission's White Paper on Governance in the EU: A Symptom of Crisis?'. Guest Editorial, 39 *Common Market Law Review* (2002) pp. 441-445. '"Deliberative Supranationalism"- Two Defences', 8 *European Law Journal* (2002), pp. 133-151.; E. Chiti, 'On European Agencies', in E.O. Eriksen, C. Joerges and J. Neyer (eds) *European Governance, Deliberation and the Quest for Democratisation* (EUI-RSCA/Arena: Fiesole, Oslo, 2003), pp. 271-322.

supporting the 'stakeholders' of the Internal Market in the articulation of their interests. It is equally compatible with the claim that 'administering' the Internal Market has more to do with the 'neutral' support of industrial activities than with the conception and implementation of politico-social values and objectives. The legal view, however, that the new agencies are merely the Commission's auxiliary bodies is deficient, if not misleading. Although they formally are subordinate and despite the membership of national representatives within their management structures, the agencies seem to be relatively well shielded against direct, explicitly political interventions due to their founding statutes (Council directives and regulations), their organizational stability, their relative (and varying) budgetary autonomy and their close collaboration with national bureaucracies. However, all these embeddings implicate that the agencies cannot autonomously develop their agenda.

None of the above outlined forms of transnational governance—the new approach to technical harmonization and standardization, the comitology system and the new agencies—resembles the Weberian type of state bureaucracy. None of the involved actors serves as transmission belt or merely as a cog in the works of hierarchical administrative machinery, executing the legally constituted will of the political sovereign. Rather, their mode of action is communication. Communication alone allows them to build and maintain networks of independent, yet relatively autonomous decision-makers in European multi-level governance; by dint of communication they are able to induce those netted actors to a more deliberative style of problem-solving.[21]

II Non-tariff barriers to trade and the WTO: a survey of conflict-resolving and policy-integrating mechanisms

European law and WTO law embody different legal realms. Comparisons, drawing upon the experience of both institutions, are often considered as all too precarious due to the obvious and significant institutional discrepancies. And yet, some functional parallels are so striking that a contrasting comparison might help to answer our main questions:[22] both institutions deal with the tension-ridden relationship between free trade objectives and regulatory concerns, with the 'shared, but sometimes competing, interests of promoting international trade and of protecting […] life and health'—to quote the WTO-Appellate Body in the *Hormones* case.[23] The non-tariff barriers to trade, to which the proponents of international free trade have to pay more and more attention in the last decades, are frequently identical with those requirements the EU tends to recognize as legitimate restrictions to the freedom of intra-Community trade. At the international level as well, the SPS and the TBT Agreements are institutionalized responses to the issue, under which preconditions social-regulatory concerns need to be respected and might even evolve into 'positive' requirements to international trade. Various, winded paths might lead to such a development.

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[21] C. Joerges, 'Comitology and the European Model?'; J. Neyer, 'Discourse and Order in the EU: A Deliberative Approach to Multi-Level Governance', 41 *Journal of Common Market Studies* (2003) pp. 687-706.

[22] J. Peel, *Risk Regulation Under the WTO/SPS Agreement: Science as an International Normative Yardstick* (Jean Monnet Working Paper no. 2/04, New York University School of Law, New York, 2004).

[23] Appellate Body Report *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R and WT/DS48/AB/R, 16 January 1998, para. 177.

Our exploration of the parallels between the EU and WTO in this section will merely deal with the 'juridification' and 'judicialization' of conflict resolutions in the field of product regulation. Product regulation is obviously closer linked to the realization of free trade than 'process regulation': product-related mandatory requirements directly prevent the import of goods, whereas process regulations do not necessarily directly affect the production quality; they are hard to justify and implement: just think of an importing state demanding certain labour and environmental standards from an exporting state. This, however, does not qualify a categorical or normative difference. We merely assume that legal transnational product regulation is more likely than 'juridification' in the fields of health and safety at work or environmental protection.

More important than this pragmatic consideration is a qualitative one. Its line of reasoning may be briefly introduced with the help of two strands of argument: first, we claim that both community law and WTO law can be understood—and justified—as 'conflict of laws'. Second, we claim that the emergence of transnational governance, which aims at conflict-resolution by dint of expert knowledge, resembles the secular trend towards both the 'cognitive opening'[24] of national legal systems and the coupling of 'authority by office' and of 'authority by expertise'[25]. In a particular respect, these phenomena fit into our conflict of laws approach: even 'scientifically' grounded solutions are not necessarily backed by a higher authority, they have to gain legitimacy according to conflict of laws. The combination of normative expectations (resistant to change, according to Luhmann) and cognitive expectations ('learning') partly leads to a de-legalization of governance, escaping traditional legal methodology. In the following, these hitherto rather abstract claims will be illustrated.

II.1 The limits of 'judicialization': procedural policy-coordination via conflict-of-laws methodologies

As emphasized in the previous section, the ECJ's jurisprudence on Article 28 EC should be understood as a new type of conflicts law, seeking to 'harmonize' the principle of freedom of intra-Community trade with the legitimate regulatory concerns of EC Member States. Our use of the conflict of laws needs to be defended against likely misunderstandings. It starkly differs from classical '*Kollisionsrecht'* (private international law) in the tradition of Friedrich Carl von Savigny, which sought decisions by the criteria of 'spatial' justice applying that law with the closest resemblance to the given legal state of affairs. In contrast, conflicts law seeks to overcome legal differences by dint of meta-norms, which the jurisdictions involved can accept as supra-national yardsticks in the evaluation and correction of their own jurisprudence.

The same holds for the reports of the WTO Appellate Body assessing whether health and safety related non-tariff barriers to trade are compatible with the SPS Agreement. To generalize this observation: the SPS Agreement does not refer to some supranational legislative authority. It provides a framework that allows WTO Members to seek the resolution of conflicts, arising out of the extra-territorial effects of their regulatory policies. In fundamental congruence with EU law, it seeks to identify a conflict-resolving meta-norm via a cognitive opening of legal decision-making—via references to 'scientific' knowledge and 'methods of risk assessment'.

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[24] N. Luhmann, *Das Recht der Gesellschaft*, pp. 77 et seq.

[25] W. Schluchter, *Aspekte bürokratischer Herrschaft: Studien zur Interpretation der fortschreitenden Industriegesellschaft* (Suhrkamp, Frankfurt a. M., 1985), pp. 145 in seq.

It is not just of theoretical interest to highlight these parallels; it is also of politico-practical relevance as a conflict-of-laws approach treats the sovereignty and regulatory concerns of affected jurisdictions more prudently. Conflict of laws does not replace national law with transnational substantive law; instead it seeks to establish rules of compatibility. However, it is hard and not merely 'soft law': conflict of laws 'constitutionalizes' conflict-settlement procedures within the EU and at the international level. If it mingles normative standards with cognitive elements, it still does so in the name of law. This type of constitutionalization has not been considered by Robert Howse and Kalypso Nicolaïdis in their critique of a 'constitutional' understanding of WTO law as going 'a step too far'.[26] Indeed, the particularity of conflict of laws is that it does not need to invoke some supranational legislator, let alone some kind of regional, sectoral or functionaldemos—in stark contrast to orthodox suprantionalism and conventional constitutionalism. Moreover, conflict of laws is tolerant; it respects the legitimacy of different legal systems. It insists, however, that none of these norm systems holds universal validity. Hence, this resolves Nikolaus von Cues' *unitas in diversitas* paradoxon that found its way into the European Draft Constitutional Treaty.[27]

It might seem unconventional if not idiosyncratic to assign to conflict of laws a constitutional function and to conceptualize EU law and WTO law in that terminology. What these fields have in common, however, with post-classical conflict of laws is the task of mitigating between competing legitimate legal systems and their validity claims. The adoption of the conflict of laws termoin0olkgy is hence by no means simply arbitrary. It rather reflects long-term and irreversible developments: here the transformation of the GATT dating back to 1947 into the WTO 1994 is only one element of many. It must suffice here to outnie these complex developments briefly.[28]

The disciplines of international private, economic and administrative law have all, albeit often reluctantly, become aware of the modern legal systems' regulatory dimensions. These have to be taken into account, if law is given the task to 'appropriately' respond to international or transnational constellations. From the age of state sovereignty on, the main difficulty of conflict law has been that there is no 'super-law', which could take on the function of genuine law. Even if the classical international private law demands to apply alien (private!) law, it does this by dint of its own national legal powers. All subject matter under public law or relevant to sovereignty hardly overcome both the 'classical' fundamental arguments and the 'unilateral' or 'one-sided' definitions of how to apply national law internationally (the *lex fori*). The rejection of validity claims rooting in alien legal systems is mainly founded in the traditional notion of sovereignty but can also be based on good 'constitutional' reasons, e.g., if the legitimacy of legal validity claims are doubted given they originate from an undemocratic processes. But even if we suspended the latter fundamentalist objection, courts apparently exceed their constitutionally legitimated mandate when they are expected to handle transnational matters and/or to mediate between autonomous state orders. Thus, the American conflict lawyer Brainerd Currie has claimed this issue fundamentally

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[26] R. Howse and K. Nicolaïdis, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step too Far' in R. B. Porter, P. Sauve, A. Subramanian and A. Beviglia Zampetti (eds) *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millenium* (Brookings Institution Press, Washington DC, 2000) pp. 227-252.

[27] The motto of the Union according to Art IV-1 of the Draft Constitutional Treaty as signed by the European heads of government, OJ C 310/2004, 1 of 16 December 2004, available also at http:// http://european-convention.eu.int/.

[28] See for an elaboration of the argument C. Joerges, 'Constitutionalism and Transnational Governance: Exploring a Magic Triangle' in C. Joerges, I.-J. Sand and G. Teubner (eds) *Transnational Governance and Constitutionalism* (Hart, Oxford, 2004) pp. 339-375 at 345-348.

irresolvable—even before the backdrop of 'interlocal' US-American conflict law: state courts are neither legally authorized nor substantially competent to decide on competing validity claims of different legal systems and on their ramifications for the communities involved.[29]

This argument seems to be too rigid in an age of 'late sovereignty' and hardly acceptable for a union perceived by itself as a 'legal community'. Although our appeals can hardly been seen as a sufficient solutions to those problems brought forward by Curie, it might still be possible to transfer them into legal arguments given that conflict law is understood and applied in a proceduralist manner. Exactly this is possible and imperative for the EU and even more, *pace* Curie, for federal states like the US. 'Proceduralization' in a conflict-of-laws approach implies that such a meta-norm is found which allows all jurisdictions involved both to cope with their genuine functions and to maintain their legitimate concerns, respected by community law. Hence, Currie's caveats against the decision-making powers of courts are not convincing. Conflicts are caused by democratically legitimized polities and not by courts, which move within the typical realm of law when seeking a conflict norm. They gain their transnational legitimacy simply by responding to the systematic failure of national democracy and by referring to exactly those principles and rules established by constitutional states themselves.[30] That courts are substantially overtaxed in their pursuit of appropriate conflict norms is a caveat hardly coherent as well. Courts cannot take on the work of those numerous experts involved in problem-solving within the Internal Market project. What they can do is to 'constitutionalize' new forms of governance.[31]

Instead of further systematically elaborating on these considerations, in the following, I will illustrate their significance and limitations by two famous examples from the EU and the WTO context. To take up first the putatively 'trivial' *Cassis* case again and to rephrase its holding: France does not need to adapt the alcohol content of its liqueur to German legal requirements. At the same time, Germany can continue to protect its consumers from misinformation. The interests of both jurisdictions can be satisfied by a conflict norm demanding the suppliers of *Cassis de Dijon* in Germany to mandatory declare the alcohol content of their product. However, convincing solutions of such a kind are rarely as simple and unproblematic. They often require a 'cognitive opening' of the legal system and quite sophisticated responses to intricate regulatory issues. The 'new modes of governance' which the EU has established, especially its comitology system, can be inbterpreted as systematically completing conflict of laws. This is not to suggest that these hybrid institutions are operating always successfully. However, In the context of the EU, they have proven to be productive and efficient, and their further constitutionalization seems at least conceivable.

Beyond the EU, issues are more complex as the transatlantic conflict over hormones illustrates.[32] In the most notorious of all transatlantic conflicts brought before the WTO, the subject matter was the administration of growth hormones to cattle—illegal in the EU, common practice in the US. Face to the free trade objective within WTO law, the Europeans

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29 B. Currie, 'The Constitution and the Choice of Law: Governmental Interests and the Judicial Function', in B. Currie (ed.) *Selected Essays on the Conflict of Laws* (Duke University Press, Durham NC, 1963) pp. 188-282.

30 C. Joerges, 'Rethinking European Law's Supremacy: A Plea for a Supranational Conflict of Laws', in B. Kohler and B. Rittberger (eds) *Debating the Democratic Legitimacy of the European Union* (Rowman and Littlefield, Lanham MD, forthcoming), available at www.iue.it/LAW/05-12.pdf.

31 C. Joerges and J. Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes'; C. Joerges and M. Everson, 'Re-Conceptualising Europeanisation as a Public Law of Collisions: Comitology, Agencies and an Interactive Public Adjudication', in H. Hoffman and A. Türk (eds), *EU Administrative Governance* (Edgar Elgar, Aldershot, forthcoming).

32 Appellate Body Report *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R and WT/DS48/AB/R, 16 January 1998.

could not explicitly refer to the genuine interest of their agriculture. An obligation to information, according to the *Cassis* case, would have been possible, yet it remained problematic: the Americans feared that the well-known and commercially exploitable preferences of European consumers would lead to a *de facto* discrimination of their products. Furthermore, a reliable labelling system seemed to be difficult to establish. But first and foremost, would the administered hormones turn out to be unhealthy indeed; their mere labelling would not suffice.

All this seems to suggest an appropriate conflict norm already entailed in the SPS Agreement: measures by WTO members cannot be 'maintained without sufficient scientific evidence' (Article 2.2) and must be based on the risk assessment methods of the relevant international organizations (Article 5). Yet, a meta-norm, referring to scientific knowledge as peacemaker, is not that innocent—actors involved know this quite well. Three reasons might suffice to illustrate this point: first, science typically provides no clear answers to questions posed by politicians and lawyers; second, it cannot resolve ethical and normative controversies about numerous technologies; third, consumer *Angst* might be so significant that neither policy-makers nor the economy dare to ignore it, although scientific experts might assess a risk as tolerable or even marginal.[33]

All these difficulties, however, do not stand in the way of applying conflict of laws and its problem structure to WTO law. This does not jeopardize the insight that—when dealing with regulatory differences—the pursuit of a meta-norm might be more successful than the search for substantive transnational rules, as the former intervenes less than the latter in WTO members' competences. Even when the meta-norms remain too hard to find or indeterminate, they may nevertheless further the resolution of the conflict as, for instance, in the hormone conflict. The Appellate Body was able to structure the ongoing controversy by pointing to risk analyses and the interpretation of this measure in a report and, thus, led to a generally civilized conduct of the conflict.

Hence, Currie's argument holds that conflict of laws is, in cases of 'true conflicts', a political exercise at the margins of law.[34] This does not, however, exclude that decision-making is aware of these margins and, yet, still endeavours to promote international *comitas* or,[35] at least, diplomacy in the 'shadow of the law'.[36] The borders between both are not as strict as legal formalists tend to portray them. Andreas F. Loewenfeld, a Grand Master well-

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[33] C. Godt, 'Der Bericht des Appellate Body der WTO zum EG-Einfuhrverbot von Hormonfleisch-Regulierung im Weltmarkt', 9 *Europäisches Wirtschafts- und Steuerrecht* (1998) pp. 202-209; O. Perez, *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict* (Hart, Oxford, 2004).

[34] B. Currie, 'Notes on Methods and Objectives in Conflicts of Laws', in B. Currie (ed.) *Selected Essays on the Conflict of Laws* (Duke University Press, Durham NC, 1963) pp. 177-187.

[35] *Comitas* is, again, a rather complex and ambivalent term of the world of conflict of laws: *Comitas* is a 'doctrine' interpreted on the one hand as the subordination of law in favour of political prerogatives and, hence, as the denial of alien validity claims, see J. Paul, 'Comity in International Law', 32 *Harvard Journal of International Law* (1991), pp. 1-79. On the other hand, its civilizing function is emphasized: the establishment of commitments, which do not arise out of legal obligations, but out of friendship and trust among states, see P. Späth, 'Zum gegenwärtigen Stand der 'Doctrine of Comity" im Recht der Vereinigten Staaten von Amerika', *Praxis des Internationalen Privat- und Verfahrensrecht* (2005: 3) (forthcoming). Such commitments might even turn into 'hard' law, as in the case of the EU, see J. Israël, *European Cross-Border Insolvency Regulation* (EUI, Ph.D. Thesis, Florence, 2004), pp. 129-136 <www.xs4all.nl~monk/jona/thesis.pdf>, 17 September 2005, now with Intersentia: Antwerp-Oxford 2005, pp. 123, 150-152.

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

versed in *all* international legal disciplines and rapporteur to the *Restatement (Third) of the Foreign Relations Law of the United States* in 1987, does not shy away from interpreting the 'reasonableness'-formula, as drafted by himself and included in the restatement for the application of alien law, its vagueness notwithstanding as hard law,[37] as a so-to speak 'juridified' *comitas*.[38] He might, however, underestimate the difficulties involved in a problem-appropriate juridification. The latter has, first, to guarantee a cognitive opening of law—taking into account non-legal expert knowledge—which has been established by numerous institutional innovations in the EU; this might be very hard to replicate on the international level. The main difficulties are caused by the different conditions for governance on the national, European and international level. These discrepancies hinder the development of similar and equivalent forms of legally bound governance.

We will later come back to this claim, for the moment we may just point to a central implication for our argument: it cannot be expected that the 'judicialization' of the WTO-procedures,[39] as implemented by the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), guarantees legally perfect solutions, yet one has to assume that the Appellate Body will refer issues of dispute back to politics and diplomacy. This claim is certainly in need of some elaboration. We will, hence, proceed by introducing several examples in order to further clarify our concerns.

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

Internationally established product standards, ensuring a sufficient level of protection, are seen as the safest way to coordinate both the concern with free trade and with health and safety. The process of international standardization, involving—non-state—international organizations, has been enormously impressive, indeed; just think of, the International Organization for Standardization (ISO), the International Electrotechnical Commission (IEC) and the International Telecommunication Union (ITU). The ISO, alone, administers around 14,000 standards. Some 30,000 experts, organized in Technical Committees, Sub-committees and Working Groups, work on their elaboration.[40] The—intergovernmental—Codex Alimentarius Commission (CAC), established by the World Health Organization (WHO) and the Food and Agriculture Organization (FAO), is the relevant body in the foodstuffs sector.[41]

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[37] A. F. Loewenfeld, 'The Limits of Jurisdiction to Prescribe' in *idem, International Litigation and the Quest for Reasonableness. Essays in Private International Law,* (Clarendon Press, Oxford, 1996) pp. 15-28, at pp. 18-20.

[38] J. Israël, *European Cross-Border Insolvency Regulation* (note 35).

[39] De Bièvre defines 'judicialization' as 'the presence of binding third party enforcement'. This is an acceptable, albeit not sufficiently complex, definition due to two reasons: first, the process of the 'enforcement' of WTO reports must not be equated with the enforcement of court rulings, as de Bièvre himself emphasizes; second, international organizations do not hold the competence to legally decide upon political differences and their economic implications, see D. de Bièvre, *Governance in International Trade: Judicialization and Positive Integration in the WTO* (Max Planck Institute for Collective Goods, Reprints WP 2004/7, Bonn, 2004), pp. 3, 7. These differences come to the fore in the institutional design of arbitration, the jurisprudence of international bodies and its ramifications, see, C. Joerges, 'Constitutionalism and Transnational Governance: Exploring a Magic Triangle'; C. Joerges, 'Compliance Research in Legal Perspectives' in M. Zürn and C. Joerges (eds) *Governance and Law in Post-National Constellations: Compliance in Europe and Beyond* (Cambridge University Press, Cambridge, 2005), pp. 218-261.

[40] H. Schepel, *The Constitution of Private Governance* (Hart, Oxford) pp. 191-242.

[41] For its workings, see A. Herwig, 'Transnational Governance Regimes for Foods Derived from Biotechnology and their Legitimacy' in C. Joerges, I.-J. Sand and G. Teubner (eds) *Transnational*

Fundamentally, both bodies follow a harmonization philosophy based on the TBT Agreement in the case of the ISO and on the SPS Agreement in the case of the CAC. Yet, on a near global scale, any stringent harmonization is neither economically reasonable nor politically possible. Moreover, the WTO holds no regulatory competences, which could be delegated to the ISO or the CAC. The difference to the EU is obvious. However, those sufficiently familiar with the jurisprudence of the ECJ on Article 28 EC might expect that forms of transnational governance emerge on a global level as well, despite such legal deficiencies.

The TBT Agreement prescribes in its Article 2.2 that the technical regulations by 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 those concerns recognized by European law, in particular, the protection of health and safety at work and the environment. Unsurprisingly, there exists no equivalent to the European precept of mutual recognition, instead Article 2.7 demands that members 'give positive consideration' to alien regulations in order to prove whether 'these regulations adequately fulfil the objectives' of the importing member state. All this resembles the well-known preference for *performance* in contrast to *construction* standards in European law, yet Article 2.8 only reluctantly formulates: 'Wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics'.'. Despite this reluctance, the TBT Agreement has quite efficiently fostered the use of international product standards. This is mainly due to its Article 2.4 which provides:

> 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 […].

The SPS Agreement has pursued a very similar strategy, which proved to be quite effective as well. Prior to the adoption of the SPS Agreement, the impact of CAC standards was ostensibly quite limited. They had no legally binding power whatsoever. The SPS Agreement has changed the situation quite dramatically by requiring in its Article 3.1 that WTO Members 'base' SPS measures on international standards, guidelines and recommendations. In legal terms, the SPS requirement is clearly much less stringent than a mandatory supranational norm. *De jure*, the 'right' of a single WTO member to autonomously determine the level of risk their population has to live with remains untouched. Therefore, the SPS Agreement had to apply a regulatory strategy close to the European *New Approach to harmonization and standardization*. Article 3.2 provides that national 'measures which conform to international standards, guidelines or recommendations' have to be recognized as necessary protection measures. This is a preferential treatment apparently well received.

Neither the TBT nor the SPS Agreement seeks to prescribe a substantive yardstick for the evaluation of product standards, which would necessarily lead to uniform results. This is why the Agreements' means of aiding decision-making can be understood with the conflict-of-laws approach. In the case of the SPS Agreement, 'science' is the point of reference, although

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Governance and Constitutionalism (Hart, Oxford, 2004) pp. 199-222; S. Poli, 'The EC and the Adoption of International Food Standards within the Codex Alimentarius Commission', 10 *European Law Journal* (2004) pp. 613-630, more recently and more thoroughly, Thorsten Hüller, Leo Maier, 'Fixing the Codex? Global Food-Safety Governance under Review', in C. Joerges / E.-U. Petersmann (eds.) *Multilevel Governance, socil regulation and the Constitutionalization of International Trade* (forthcoming, available at http://www.sfb597.uni-bremen.de/TransGov/ - Publication

not as an objective standard prescribing the content of regulatory decisions. Moreover, the function of 'science' is to discipline and rationalize disputes about regulatory policies. Nevertheless, even this cautious interpretation of the potential function of commitments to 'science' needs to be qualified further. The account of hormone administering, which is of exemplary importance here, did not end in any clear-cut agreement detailing the kind of scientific evidence the conflict parties could submit to. The famous formula in the Report of the Appellate Body speaks for itself:

> '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'.[42]

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 enables political processes while it remains embedded in them. Thus, the limits of scientific objectivity mark the limits of the juridification of conflict settlement.

II.3 Two interim observations

Our analysis, hitherto, warrants two conclusions, logically leading to the two issues discussed in the following section. The *first* concerns the emergence of transnational 'law'. We have argued that processes of juridification, responding to concerns of social regulation, most likely emerge in the field of product regulation. However, neither the norm-creation of the WTO-TBT-ISO nor of the WTO-SPS-CAC must be equated with law-making in constitutional democracies. The described mechanisms of coordination and norm-creation might be more adequately characterized as governance arrangements— 'governance' is, hence, the category we turn to first.

The *second* observation concerns the relationship of law and politics, more precisely the embeddeding of legal regimes in transnational political processes. The kind and extend of their nexus is by no means one and the same. Where conflicts can be resolved by dint of conflict norms, the law is in so far a 'strong' one as it guides decisions, it, however, is in so far an 'imperfect' one as it does not prescribe any substantial norm with the claim to supranational validity. Where ever transnational governance operates with substantive norms, such as on the field of product or process regulation, it will provoke an intensified political supervision. For social and political scientists, our conclusion may sound vague and hardly exiting, lawyers, however, have to take it seriously: We claim that there is a strong nexus between the tension and interdependence of law and politics on one side and the *problématique* of legitimate transnational governance on the other. More precisely, it is the difficulty to rephrase at the international level the democratic notion of legitimacy as legal mediator under the rule of law. This is the second aspect the following section will turn to.

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[42] Appellate Body Report *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R and WT/DS48/AB/R, 16 January 1998, para. 187.

III. The 'turn to governance' and its legal-constitutional risks

In Europe, governance has become an extremely popular concept ever since the Commission President, Romano Prodi, referred to it in a programmatic speech to the European Parliament on 15 February 2000 in Strasbourg. The occasion for this speech was the BSE crisis, which kept Europe in its grip and threatened to discredit its institutions. Far-reaching and ambitious reforms, Romano Prodi announced, were the needs of the moment. An inventive vocabulary mirrored these expectations, heralding a fresh agenda and a novel form of governing: a re-organization of the relations between political and civil society actors; a democratization of the relations between the different layers of governance in Europe. To numerous political scientists and even some lawyers, this vision had the potential of bringing order to those legally diffuse spaces between technocratic and administrative action and of leading to a renewed democratization of European governing.[43]

One of the insights of the debate concerned the phenomenon's ubiquity: the 'turn to governance' is by no means a purely European *Sonderweg*. It happens everywhere—within and beyond the nation state. 'Governance' ostensibly is a response to interdependent phenomena: to deficits of traditional interventionist law, to the erosion of state government and to the emergence of post-national constellations.

The interdependence of these phenomena is the starting point of our argument, which will be presented in three steps. First, we begin with a reflection on the national level. The shift from government to governance was already portrayed and discussed decades ago, albeit in a somewhat different vocabulary—thus, the responses developed in the 1980s, we argue, are worthwhile re-discovering. They remain attractive because they opened law to new requirements without to betray its *proprium*, i.e., its potential to control and legitimize the exercise of public power. Second, at the European level the turn to governance came about for similar reasons. The intensified Internal Market policy confronted the EC with tasks, which could only be tackled with 'new forms of governance'. Although similarities between the turn to governance at the European and the national level are striking, a marked discrepancy remains. Europe has to 'govern' a 'market without a state' and, therefore, can only stick to the notion of a legally mediated legitimacy by matching law to this non-state constellation. The third and final step concerns the international (WTO) level. Here neither national nor European reactions to 'the turn to governance' provide a valid model. Due to this difficulty, only technocratic notions of legitimacy might provide a solution. However, one can imagine alternatives, indeed.

III.1 Practices of governance in constitutional states: 'bringing the 1980s back in'

The apparently unstoppable career of the conception of governance is novel. The phenomena the concept denotes, however, are by no means new. In particular in Germany the involvement of non-state actors into law-making and their engagement in political programmes, designed by governments to tackle social problems, is as old as the country's 'organized capitalism'. Especially in the wake of privatization and deregulation initiatives, in the context of 'risk society' with its demanding requirements and in Europeanization and globalization processes, the reflected use and sophisticated design of contemporary 'modes'

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[43] C. Joerges, Y. Mény, and J. H. H. Weiler (eds) *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance* (Jean Monnet Working Paper 6/01, NYU, New York, 2001) <www.jeanmonnetprogram.org/papers/01/010601.html>, 17 September 2005.

of governance is what has changed and is innovative. In all issue-areas and on all levels, new practices of governance collide with more traditional concepts of 'the private' and 'the public'. This leads to the ubiquitous question—alas mainly tackled by lawyers[44]—what legal costs the turn to governance involve and what politico-societal potential it has to offer.[45]

Naturally, this provokes sceptics and proponents simultaneously. In a traditionally conservative discipline, proponents have a particularly hard time, although their arguments are well worthwhile engaging with. The American administrative lawyer Jody Freeman defines 'governance' as a 'set of negotiated relationships between public and private actors', which may concern 'policy-making, implementation and enforcement'.[46] Its ever widening use is remarkable. Freeman points to the generation of norms and standards reaching from health care to the management of prisons. Some of these activities clearly touch upon public functions. Does this imply that any involvement of non-state actors is illegitimate? It is most interesting, how Freeman responds to this problem: 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'.[47]

Given that all this would apply, the performance of such partnerships would be by far superior to the achievements of governmental actors and bureaucracies. Justifications, arguing for the 'turn to governance' with reference to its 'output', would then be pointless. Instead, we would deal with an *aliud* to traditional administration, with a productive reaction to the impasse of traditional forms of politico-administrative performance within the modern welfare state. This complex *problématique* cannot be elaborated in the brief space given here. It might, however, be instructive to remember the criticism of legal theory towards political and legal interventionism back in the 1980s—and their following quest for conceptions of a 'post-interventionist' law. Doubtlessly, the governance debate would benefit from a fresh look at this debate.

The disappointment about ineffective, 'purposive' legal programs[48] coexisted with the concern about the 'colonization of the life-world'[49] through welfare programs, their legal and administrative implementation. These perceptions shared the understanding that economic and social processes in modern societies were embedded in far more complex ways than the common simple dichotomies—market and state, economy and intervention, law and politics—suggested. This triggered a further search for new modes of legal rationality, which

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44 If a concept receives so much attention in two disciplines at the same time, it is almost impossible to fulfil the requirement of a coherent definition and use: this is, first, due to the complex nature of the object of study itself, which appears in different legal systems and on different levels and second, it is due to a immanent legal factor, namely the complex evolution of the term for more than 100 years. For the EU, we follow the official definition of the term 'governance'; see European Commission, *European Governance: A White Paper*, COM (428) final, 25 July 2001.. Our use of the term 'new modes of governance' follows the official formula as well, disregarding its actual plausibility. Concerning the translation and transfer in different languages and legal worlds, we can only proceed selectively and refer, concerning German law, to G.F. Schuppert, 'Governance im Spiegel der Wissenschaftsdisziplinen', in G.F. Schuppert (ed.), *Governance Forschung* (Nomos, Schriften zur Governanceforschung, vol. 1, Baden-Baden, 2005), pp. 371-469.

45 For an overview, see ibid.

46 J. Freeman, 'The Private Role in Public Governance', 75 *New York University Law Review* (2000) pp. 543-675 at 546 and 548.

47 J. Freeman, 'Symposium: Public Values in an Era of Privatization: Extending Public Law Norms through Privatization', 116 *Harvard Law Review* (2003) pp. 1285-1352 at 1290.

48 For this category and its criticism, see N. Luhmann, *Das Recht der Gesellschaft*, pp. 195 et seq.

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

were to replace interventionism within the welfare state and its 'material' legal rationality but without falling back into classical legal formalism and its characteristic weakness in the face of economic and social power. Furthermore, the new legal rationality was supposed to uncover the myth that law might be able to control social reality via the 'application' of social theories.

The 'proceduralization' [50] of legal categories and 'reflexive law' became the new promising centres of attention.[51] Both strands of thinking have engaged with numerous dimensions of legal praxis: with implementation deficits, alternatives to 'command and control' regulations,[52] alternatives to strict (judicial) conflict settlements, alternatives to 'hard law', etc. These considerations anticipated topics of the current governance debates, as law—intending to foster the effectiveness of economic and social regulation and to guarantee its far-reaching social legitimacy—is drawn into the re-conceptionalization of constitutional, administrative and private legal spheres. Furthermore, law has to go through a cognitive opening of exactly those normative expectations, it once had entirely focussed on.

III.2 The constitutionalization of European governance practices: perspectives

The praxis of European governance preceded the conceptual debate by far. It established numerous institutional innovations before the concept of 'governance' itself gained any prominence. To recall the most prominent examples, already touched upon in this essay: at the beginning of the 1980s, the 'new approach to technical harmonization and standardization' established stable and cooperative relations between non-state organizations, administrative bodies and experts from industry and science. Europeanization has managed to re-shape these, formerly national, arrangements in such a manner that they are able to operate across borders and on different levels. In the governance arrangements within the food sector, the presence of administrative bodies has been relatively strong—here the long tradition continues to have an effect that 'food safety' is seen as a primary domain of state administration. However, especially this sector has become the key example for the European comitology system. And yet it has as well become a governance arrangement *par excellence*. How do such arrangements match with our more traditional notions of government, administration, and the separation of powers? Can such hybrid arrangements be legitimate at all? Is it likely that their legitimacy can be mediated by law?

Primarily, these questions concern the 'nature' of the European political system, nowadays widely characterized as a multi-level system organizing political action in the form of

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[50] The use of the term 'proceduralization' is multifaceted. A brief summary might suffice here: 'proceduralization' substitutes immediate decision-making in cases of conflict with the search for innovative problem-solving. However, it would be misleading to characterize this move as the substitution of substantial law with procedural law. Moreover, 'proceduralization' seeks to achieve substantial problem-solving, already lost in legal programs, and, therefore, focuses especially on innovation via processes whose the deliberative qualities it seeks to guarantee through law. This should, of course, not lead to the simple equation of 'deliberation' with democracy, or suggest that deliberation alone may be sufficient to generate legitimacy.

[51] J. Habermas, 'Paradigms of Law' in M. Rosenfeld and A. Arato (eds) *On Law and Democracy: Critical Exchanges* (Berkeley University Press, Berkeley CA, 1998) pp. 13-25; G. Teubner, 'Substantive and Reflexive Elements in Modern Law', 17 *Law and Society Review* (1983) pp. 239-285.

[52] SeeG. Teubner, 'Juridification—Concepts, Aspects, Limits, Solutions', in G. Teubner (ed) *Juridification of Social Spheres* (de Gruyter, Berlin) pp. 3-48.

networks.[53] Such claims have far-reaching implications. If competences and resources for political action are located at various and relatively autonomous European levels of governance, the problem-solving ability of politics hinges upon the smooth communication between functionally link, yet relatively autonomous actors.

Compelling normative reasons can be identified to institute a commitment to cooperation even in such constellations. Such obligations can even be directly derived from the post-national constellation, in which the Member States of the EU find themselves. At the same time, these obligations systematically hinge upon the so-called democratic deficit of the EU: not only the mutual dependence of the Member States, rooting in their interconnections and interdependence, provides arguments in favour of an obligation to cooperate. These interconnections at the same time imply that no state in Europe can take decisions of some political weight limited to itself: There is no decision without 'extra-territorial' effects on neighbouring states.

Put provocatively, but indisputable: the Member States of the EU have lost their ability to act democratically, as their decisions are not legitimized by all those affected by them. This counter-objection, responding to the popular lament about the European democratic deficit, is not meant to argue that the deficit does not exist or should not be taken seriously. Our point, here, is that the EU can be understood as an institutionalized compensation of democratic deficits of its Member States. The deficit is caused by the European nation states' inability to include all those citizens affected by their decisions in elections, decision-making and will-formation. These lapses are structural and of fundamental importance. This holds, of course, for the OECD-world in general—and this is why an international conflict of laws, reacting to such deficits, is 'legitimate'. However, within the EU, the interdependence of national societies is very substantial. The legal framework which has emerged to cope with these interdependence is so far unique and not available beyond the EU itself.

We conclude, therefore, that the widespread complaint about the democracy in Europe is biased towards the democratic deficits of the European political edifice. However, it neglects the structurally caused democratic inability of the Member States. It fails, hence, to utilize the potential of European law to remedy the democratic deficits of European nation states. Such a vision of European law suspends the notion that European institutions should be 'democratized' according to a national model. Moreover, it seeks to conceptualize the European multi-level construct in such a way that it is not just compatible with democratic processes, but might even strengthen them.

This is the program of a 'deliberative' supranationalism in stark contrast to the orthodox claim of a supremacy of European law.[54] It turns the common view of the EU's legitimacy problematic upside down. But it relmians nevertheless faithful to the grand principles of European law: the Member States of the Union are not allowed to define and implement their interests and laws in a prejudiced manner. They are obliged to respect the four freedoms. The regulatory policies, they want to pursue, have to be recognized by the Community as legitimate. Provisions concerning non-discrimination are the strongest indication for such a post-national re-orientation of the nation state. It follows, therefore, that the Member States have to coordinate their policies and set up national regulations in the most Community-friendly way.

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[53] For the state of the art, see M. Jachtenfuchs and B. Kohler-Koch (eds), *Europäische Integration* (2nd edn, Leske + Budrich, Opladen, 2003); A. Benz (ed.), *Governance—Regieren in komplexen Regelsystemen* (VS Verlag für Sozialwissenschaften, Wiesbaden, 2004).

[54] C. Joerges and J. Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes'.

In the field of product regulation, we have attributed crucial qualities to 'deliberative supranationalism':[55] the empirical claim goes that the EU-specific comitology system in the area of food fosters a deliberative mode of interaction in its process of problem-solving. The normative-legal dimension of this line of reasoning takes up our previous consideration concerning the conflict-of-laws approach. Following such argument, European law gains its legitimacy by providing meta-norms which allow dealing and coping with legal differences; we coined this 'deliberative supranationalism I'.

Especially, the area of product regulation raises issues demanding a cognitive opening of decision-making processes. Such epistemic problems, however, cannot simply be tackled in an objectivist-scientific or technocratic manner, as they always mingle with normative, political and ethical concerns. This is where the 'deliberative supranationalism II' comes into play: it organizes and structures a second order conflict of laws. Its intricacies are substantial. Can such a transnational kind of problem-solving still figure as rule-bound governing? What criteria are available in order to evaluate the legitimacy of such rules? Will they impinge on the praxis of governance to an extent which finally warrants them 'constitutional' qualities? Are they sufficient to 'constitutionalize' the European system of comitology, for instance? Conclusive answers, covering all 'new forms of governance', are hardly conceivable. The 'deliberative supranationalism II', however, provides at least some reference points.

Two such points can easily be constituted by negative exclusion: the 'turn to governance' seems irreversible, hence the difficulty cannot be avoided such a constitutionalization of legal justifications beyond established constitutional patterns poses. Furthermore, should we not expect for the EU level, what has become impossible on the national level, namely the establishing of a transnational, administrative machinery led by the European Commission and responsible towards the European Parliament. [56] Instead we argue that the constitutionalization of 'European governance' should further explore three strategies in particular:

- It should build on *the self-interests of non-state actors* and, especially, of standardization bodies into fair, politically and socially responsive procedures. This interest is grounded in the need to generate public trust in their capabilities.[57]
- They should build on the '*shadows of the law*', which provide space for the activities of non-state actors and bureaucracies without prescribing them in detail and, therefore, allowing them to concretize its intention via their justifications.
- By introducing 'hard' procedural requirements, they should ensure that the 'governance' of the Internal Market remains open for revision, e.g. in cases in which new insights gain prominence among politically accountable and legitimate actors or in which preferences change due to good reasons.

III.3 Towards ('constitutionalized') law-mediated legitimacy of transnational governance

All legal difficulties of governance at the national level can be found again at the European level, albeit in even more complex and challenging variants.

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[55] Ibid.; C. Joerges, 'Comitology and the European Model?'; J. Neyer, 'Discourse and Order in the EU: A Deliberative Approach to Multi-Level Governance'.

[56] C. Joerges, The Commission's White Paper on Governance in the EU: A Symptom of Crisis?'. Guest Editorial; '"Deliberative Supranationalism"- Two Defences'.

[57] H. Schepel, *The Constitution of Private Governance* (note 15), pp. 101 et seq.

As defined in the preceding sections, governance phenomena are reactions to regulatory 'needs' that the traditional legal system paradoxically could neither satisfy nor reject.[58] The reasons for both these lapses and the learning processes the law has gone through at the national and European level provide the starting points for the following concluding remarks, which will proceed in three steps. First, we will outline the special characteristics of juridification in the area of transnational market governance; second, we will review three types of responses to its legitimacy *problématique*, i.e., technocratic rationality, transnational 'administrative' law and societal constitutionalism. Third, due to the limitations of all these approaches, one non-judicializable element remains partly latent, partly manifest effective: this alternative to conflict of laws is *comitas*.[59]

(1) 'Juridification'

The 'juridification' of international and transnational politics has certainly intensified in recent decades. So much so that all legal disciplines as well as the theory of International Relations, Political Theory and philosophy are in the process of re-defining their established premises. In the post-national constellation a new law emerges, a 'law without a state', yet we should not equate this law with the law of constitutional democracies.[60]

The governance phenomena explored in this essay just concern one facet of these developments. From the vantage point of both the theory of international law and idealist notions of transnational democracy, this segment may even seem mundane. We argue, however, that it is theoretically explosive. In fact, it concerns regulatory issues and practices of governance, which cannot be pigeonholed within traditional legal categories, normally allowing perceiving, structure and solving legal issues. We have repeatedly argued that this situation applies to all levels of governance. Yet, the difficulties to legally embed diverse forms of governance increase with the level they are situated on.

(2) Forms of transnational governance

In this essay, we have strongly argued in favour of one variant of juridicialization—a conflict-of-laws approach to transnational juridification. It is by no means the only variant, but one hardly known. Face to its alternatives, conflict of laws should, however, become ever more attractive. Its competing alternatives outlined here cannot figure as substitute for the democratically constituted nation state, yet they are of interest because they rely on different forms of rationality and legitimacy.

(a) Economic constitutional law

In this respect, the constitutive phase of the European Community is particularly instructive. Then, one answer to the democratic deficit within the integration process—nowadays almost ubiquitous—was developed, which has hitherto not lost importance and which has been transferred to the international level as well: the ordo-liberal theory of economic constitution sought both to structure and limit European governance through supranationally institutionalized economic freedoms, through the guarantee of free trade and through a system of effective competition.[61] The constitutional view of WTO law,

[58] For pertinent literature, see note 3.

[59] Cf. note 35.

[60] J. Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?' in *idem*, *Der gespaltene Westen* (Suhrkamp, Frankfurt a. M., 2004) pp. 113-193.

[61] C. Joerges, 'What is left of the European economic constitution? A melancholic eulogy' 30 *European Law Review* (2005) pp. 461-489, also at http://www.iue.it/PUB/law04-13.pdf..

particularly present in the works of Ernst-Ulrich Petersmann, rests in this tradition.[62] In our context, we will leave this strand of argument aside as the protection of economic freedoms and competition does not touch upon concerns related to 'social regulation'. Such disregard, however, rests upon a well-founded criticism:[63] we assume that markets are social institutions which react among others to social concerns; thus, it is that we are interested in their normative infrastructure, their networks of formalized and semi-formal relations channelling decisions, which economic analyses of the working of markets mainly ignore or overlook.

(b) Technocratic rationality

A second answer to the democratic deficit of European 'governance' emerged in early years and has hitherto remained of importance too: in this view, Europe is confronted with substantial issues of 'technical and social realization', which can best be tackled by a self-restrained apolitical elite of experts and technocrats.[64] A contemporary version of this argument might be found in the new approach to harmonization and standardization. 'Scientific expertise' is its most prominent equivalent at the international level; a fact we have extensively highlighted in the discussion of the hormones case. Again, there are compelling reasons for the attractiveness of science as the medium of legitimation for transnational governance. 'Science' claims and gains genuine authority. This authority is perceived as objective, without interest and apolitical. The standards of good science are not bound to a specific legal system, which fosters the binding quality of scientific results, yet the latter are quasi by definition transnationally and universally valid. Legal systems subject themselves to 'external' validity criteria by resorting to scientific expertise—and overcome their territorial parochialism precisely for this reason. This, hence, requires that an objective science is, indeed, possible and able to provide answers to questions posed to it. However, the myth of scientific objectivity has irreversibly collapsed.[65]

Experts and science need an institutional framework in order to be able to govern. The EU puts new agencies to the test, yet they do not resemble a transnational technocracy similar to the European comitology system and the new approach with its 'private transnationalism'. There are no equivalents to European agencies or the comitology system at the international level. However, the international markets still get 'their law'.

The standardization bodies for foodstuff (CAC) and technical products (ISO, IEC, ITU) are all linked to the WTO, to other governmental and non-state actor and to national legal systems. Their authority in the field of product regulation hinges upon the issue-orientation of these links—and on the mutual trust that they are able to generate. Here 'expertise' is a necessary, yet not a sufficient condition. A second potential source for legitimacy is the quality of their standardization procedures as their decisions might be difficult and beyond a simple application of objective, scientific knowledge.

Relevant studies about these organizations come to more sophisticated conclusions. Before the backdrop of internal CAC procedures, the technique of incorporating CAC standards into

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62 E.-U. Petersmann, 'Constitutional Economics, Human Rights and the Future of the WTO', (2003) 58 *The Swiss Review of International Economic Relations* pp. 49-91.

63 For detailed literature, see note 3.

64 C. Joerges, '"Good Governance" in the European Internal Market: Two Competing Legal Conceptualisation of European Integration and their Synthesis' in A. von Bogdandy, P. C. Mavroides and Yves Mény (eds) *European Integration and International Co-ordination. Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (Kluwer, Den Haag–London–New York, 2002) pp. 219-242..

65 G. Bechmann and I. Hronsky, *Expertise and its Interfaces: The Tense Relationship of Science and Politics* (Edition Sigma, Berlin, 2003).

the WTO system (Article 3.2 SPS Agreement) has especially been criticized. The criticism goes that these procedures do not justify the preferential treatment provided within the SPS Agreement. In the Hormones case, the Appellate Body had typically been very cautious in determining the legal status of the CAC standards and was reluctant to perceive them as legally binding norms.[66]

The Appellate Body, we can conclude, has accepted the need to integrate regulatory policies into the system of free trade but shies away from imposing them as legal obligations. Foodstuff standardization, hence, remains closely embedded in the political process. This embeddedness, however, shares hardly any resemblance with the European comitology system as the latter's legitimacy rests upon the epistemic *and* political, legally protected potential of deliberative processes.

(c) Societal constitutionalism

Caveats, similar to those raised against the CAC procedures, are hardly brought forward in the criticism of international standardization by ISO and IEC. In general, their evaluation is more favourable. The most positive one can be found in Harm Schepel's line of reasoning, which at the same time offers the most challenging theoretical account in this area of study.

In Harm Schepel's argument,[67] there is hardly any resemblance between practices of 'good governance' in the area of European and international standardization and those forms of political rule established within the institutional setting of constitutional states. Instead, he argues, that 'good governance' hinges on the innovative practices of networks as horizontal forms of interaction with their particular method of dealing with political controversies, allowing actors, political and non-political, public and private, to arrive at mutually acceptable decisions via negotiation and deliberative processes. This observation and its evaluation might surprise: a productive and legitimate synergy of market forces and civil society finds no room within traditional theories of democracy, neither in theories revolving around elective majorities and rooting in the notion of *demos* nor in deliberative accounts substituting the *demos* with a reasoning public. How is this possible? According to Schepel, the paradox is simply that the mechanisms themselves are political.[68] Those principles fundamental to the process of standardization—fairness, transparency, openness, unbiased interest representation—are all norms fostering constructive and substantial deliberation. They are by no means mere mechanisms seeking to establish scientific 'truth' or propagating an 'invisible hand'.

Schepel coins this phenomenon 'private transnationalism'. The legal order of this transnationalism finds itself beyond the private and public law established by the state's legal order.[69] For Schepel, this proves the claim that a 'legal pluralism' has replaced the hierarchically structured, unified law.[70] However, we cannot simply draw on his arguments, when taking up our initial claims again.[71] They, however, match well both with the assertion that modern economy and markets should be seen as 'polities'—sites of politically significant

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66 See Appellate Body Report *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R and WT/DS48/AB/R, 16 January 1998, para. 165.

67 H. Schepel, *The Constitution of Private Governance* (note15), pp. 191-242.

68 Ibid., p. 241.

69 Ibid., pp. 32-34.

70 In this context prominent G. Teubner; see recently G. Teubner, 'Societal Constitutionalism: Alternatives to State-centered Constitutional Theory?' in C. Joerges, I.-J. Sand and G. Teubner (eds) *Transnational Governance and Constitutionalism* (Hart, Oxford, 2004) pp. 3-28.

71 See note 3.

processes—and with the conclusion that state constitution has to be supplemented by a constitutionalism involving society.

Our argument is that such a societal constitutionalism simultaneously responds to three interrelated phenomena:[72] the 'politicization' of markets; the emergence of governance arrangements recognizing and drawing on the problem-solving capacities and managerial qualities of private actors; and the appearance of transnational governance in post-national constellations. All this, however, does not imply that the era of legally bound governing and legally mediated legitimacy has come to an end. Even if non-state actors strongly commit themselves to established, normative standards, following Harm Schepel, their legitimacy and autonomy still rests upon the compatibility of their institutionalization with their legal vicinity. Hence, it is hardly surprising that standardization bodies seek to establish such procedures in which society can trust as a whole, and that sufficiently self-critical law-makers and bureaucracies admit their inability to substitute what standardization accomplishes.

(3) Conflict of laws and comitas

Are the limitations of transnational juridification a malady we should try to remedy? There are compelling normative arguments against an ill-pondered, ever denser and deeper transnational legalization. In sum, they claim that there is no political authority entitled to take the type of decisions constitutional states are legitimated for. And yet, such a type of decisions, integrating and unitary, are neither needed nor appropriate in all contexts. The alternative, we have emphazised in this essays, is the conflict-of-laws paradigm. The European example, i.e., our suggested interpretation of European law as a conflict of laws of constitutional quality, can certainly be further developed at the WTO level. Conflicts between different legal systems are usually numerous and become apparent in legal differences in the area of social regulation. These conflicts encompass political preferences, economic interests, industrial policy objectives, distributional politics, cultural orientations and ethical concerns. A proceduralizing approach to such conflicts offers the potential of revealing the nature of such differences and, therefore, of initiating the quest for meta-norms rendering conflicts bearable. The scope and impact of conflict of laws is, however, limited: conflict of laws might leave all those issue to national jurisdiction, which cannot find a fair decision on the international level. Such a point is the distributive consequences of regulatory decisions.[73]

Conclusion

The type of proceduralized conflict resolution, we have suggested and advocated for international disputes here, resembles its European counterpart in so far as it propagates the deliberate seek for those principles and rules, which allow to keep free trade and regulatory

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[72] C. Joerges, 'Constitutionalism and Transnational Governance: Exploring a Magic Triangle' (note 28).

[73] In his conception of the EU as a 'regulatory state', Majone sought to restrict Europe to social regulatory policies as already detailed above (see note 2). 'Distributive' policies require democratic legitimation, only available on the nation state level and, here, compensating for the limitations of the European 'regulatory state'. The allocation of such compensatory functions, well plausible within the EU, is however unfeasible in the WTO context. The fact that the WTO system neglects the distributive consequences of regulatory decisions and seeks 'reasonableness' in its dealing with conflicts does not warrant the direct equation of 'reasonableness' and 'law'; yet, for such a argument, see A.F. Loewenfeld, 'The Limits of Jurisdiction to Prescribe' in A.F. Loewenfeld (ed.), *International Litigation and the Quest for Reasonableness: Essays in Private International Law* (Clarendon Press, London, 1996), pp. 15-28.

policies compatible. This has been remarkably successful within the EU. As Jona Israël recently put it,[74] the *comitas* of the European Member States has transformed into a legal duty of cooperative problem-solving. However, the conditions for such a development have been favourable: on the one hand, the distributive implications of regulatory policies are, still, relatively cushioned. On the other hand, in it's seek for problem-oriented regulations, the EU was able to establish effective governance arrangements—a 'second order conflict of laws' whose 'constitutionalization' seems at least possible.

At the WTO level, the wide-ranging general conversion of *comitas* into mandatory commitments may be 'a step too far',[75] to rephrase a famous caveat concerning the constitutionalization of the WTO. Arguing in favour of a conflict of laws juridification of international economic law based on the 'standard of reasonableness', Andreas F. Lowenfeld might reply that such formulas seem only then insufficient when jurisprudence is understood as a mechanistic quasi-scientific process, suspending the laborious intellectual task of rendering general clauses more concrete.[76] Intellectual efforts alone cannot overcome structural obstacles to justice and they are insufficient too, where knowledge beyond the legal realm is needed in order to come to problem-oriented decisions.

[74] J. Israël, *European Cross-Border Insolvency Regulation*, (Intersentia: Antwerp-Oxford 2005), pp. 123, 150-152, 325-334.

[75] R. Howse and K. Nicolaïdis, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step too Far' (note 26).

[76] A.F. Loewenfeld, 'The Limits of Jurisdiction to Prescribe' (note 37), p. 20.