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**RECON**  
**Reconstituting Democracy in Europe**

Integrated Project  
Priority: 7 - Citizens and Governance in a Knowledge-Based Society

**Deliverable No. 87**  
**Conference on ‘After globalization’ – conceptualising postnational  
patterns of conflict and exemplary analyses**

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Partner 14 UniHB  
University of Bremen, Germany

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Dissemination Level		
<b>PU</b>	Public	
<b>PP</b>	Restricted to other programme participants (including the Commission Services)	
<b>RE</b>	Restricted to a group specified by the consortium (including the Commission Services)	X
<b>CO</b>	Confidential, only for members of the consortium (including the Commission Services)	

## 1. Introduction

RECON Deliverable No. 87, *Conference on 'After globalization' – conceptualising postnational patterns of conflict and exemplary analyses*, is part of work package 9 – Global Transnationalisation and Democratisation Compared. The objective of WP 9 is to examine how globalisation and transnationalisation processes shape the conditions for democracy within and beyond Europe, and to compare the European case with certain particularly relevant non-European instances of democracy and democratisation. WP 9 is divided into two collaborative sub-projects. Sub-project 1 explores the impact of globalisation processes, in particular the liberal trading regime of the WTO, on nation state democracies and on the democratisation of the European Union. Sub-project 2 examines the cosmopolitan pull on the state-centred model, through comparing the EU with Canada, the latter as a possible example of 'state-based cosmopolitanisation', and assesses the democratic implications of these processes.

Within the first sub-project, work in the final project period would focus on European and transnational governance, and it would establish the character of key EU governance norms and processes – in comparison to those of other transnational fora – with focus on WTO. The sub-project would further establish conditions of, and prospects for, the social embedding of transnational markets and develop the conflict-of-laws approach as a conceptual background to the postnational constellation. The ambition was to conclude with a quite elaborate framework and case studies of exemplary importance. The leitmotif of this subproject in the fourth year of the project was 'after globalization: new patterns of conflict'. The follow-up conference (D87) in the fifth and final year would further elaborate the theoretical frameworks and place emphasis on the new conflict patterns in field studies, including food safety, environmental protection, social standards, and health services.

## 2. Presentation of the workshop

A three-day workshop on 'The Conflicts-Law Approach on Trial' was hosted at the Evangelische Akademie Loccum 17–19 October 2011, within the framework of WP 9 and organised by Prof. Christian Joerges at the Centre for European Law and Politics (ZERP), University of Bremen. It was the last of five joint workshops of RECON and the University of Bremen Collaborative Research Centre 'Transformations of the State' (CRC 597). The event aimed at exploring the potential to evaluate normatively and to conceptualise legally – with the help of the conflicts-law approach to European multi-level system – conflicts generated in what Habermas called the 'postnational constellation'. This is a continuation of the goal of elaborating on a systematic evaluative framework of conflicts law, which is a part of both the third phase of the CRC 597 project A 1 'Trade Liberalisation and Social Regulation in Transnational Structures' as well as WP 9 of RECON. The workshop had eight panels. The 25 participants came from both RECON-affiliated and other institutions.

In an opening session, chaired by co-leader of WP 9 Christian Joerges (University of Bremen), the co-convenor of the workshop and the inventor of the conflicts-law approach, debate focused on the theoretical and sociological reconstructions of postnational patterns of conflict. Poul F. Kjaer (Johann Wolfgang Goethe University, Frankfurt am Main) stressed the need for descriptive theory to support the normative reasoning by legal scholars. Kjaer presented the beginnings of his own effort at a theory of transnational constitutionalism in the form of three steps: formal organisations (as the true object of constitutions), the relations of

these organisations to their social environment, and constitutionalism as the exercise through which the entities stabilise their expectations. Regina Kreide (Justus Liebig University Giessen) was equally critical of elaborating normative attempts to justify justice, and presented an informative overview of current theoretical approaches to transnational political conflicts, culminating in a sketch of an approach that she called 'radical democracy'. Karl-Heinz Ladeur (Bremen International Graduate School of Social Sciences) acted as the discussant for the first two contributions.

Continuing on the interdisciplinary approach of conflicts law, Sabine Frerichs (University of Helsinki) gave an economic sociologist's view on the legal dimension of the globalised market society. Her argument matched ideas of conflicts law with those of conflict sociology, notably of the Polanyian kind, and canvassed a conflict between a commodified consumption/production of law (as economic choice) and a de-commodified reconstruction of normativity (as social obligation). Tommi Ralli (University of Bremen) inquired about the analytical coherence and unity of the multi-dimensional, multi-level conflicts-law approach and its typology of conflicts, suggesting that differences between legal and political responsibility might help to illuminate the core of conflicts law. This second part of the first section was chaired by Florian Rödl (Johann Wolfgang Goethe University) and with Regina Kreide acting as discussant.

The second day started with a session on re-conceptualising the law of postnational conflict constellations and was chaired by Tobias Pinkel (University of Bremen), and with Daniel Augenstein (University of Tilburg) acting as discussant. In a manifesto on the problems of democratic and social union, Florian Rödl emphasised the democracy-preserving role of a law of conflict of laws. He noted that, in the European Union, voting rules balance between democracy and federalism, and this deficiency makes conflicts law the preferred alternative, over a federalism-beyond-the-state approach, for preserving democracy in Europe. Rainer Nickel (Johann Wolfgang Goethe University) argued likewise that democratic legitimacy is a justification for European constitutional pluralism. However, Nickel concluded that the conflicts-law approach needs intensely a normative core – a core of constitutional *ius cogens*.

The third session focused upon the legitimacy of global administrative law and was chaired by Robert Wai (Osgoode Hall Law School). Harm Scherpel (The University of Kent's Brussels School of International Studies) was the discussant for this section. Ming-Sung Kuo (University of Warwick) viewed the equal treatment of the regimes involved as the starting point for understanding democracy in conflicts law. Without prejudicing the internally democratic decisions, the approach ascribed democracy to existing regimes and maintained the integrity of each regime. Kuo also drew comparisons with the global administrative law project which could be understood under the 'second dimension' of conflicts law. Karl-Heinz Ladeur warned, in turn, of a risk of overreach with the conflicts-law approach, when questions of democracy and subsidiarity and the second or third dimensions are addressed, as conflict-of-laws methodology always presupposes that conflicting norms should be on a par with each other. Nevertheless, Ladeur saw that administrative action was an area where the reach of conflicts law could be broadened; namely, to include the organisation of legal procedures for governing the 'pre-decisions' produced in many projects before, or instead of any legally binding decision that could be taken to court.

The fourth session on conflict resolution and mediation, chaired by Joost Pauwelyn (Graduate Institute of International and Development Studies, Geneva), began with a paper by Alexia Herwig (University of Antwerp). She summarised both analytic and normative dimensions of

the conflicts-law approach, and applied the ideas to a situation where openness by the Appellate Body of the World Trade Organisation leaves states to come to an agreement. In a discussion on regime collisions in *Tuna-Dolphin III*, Carola Glinski (University of Bremen) considered using general clauses of state law, together with certain principles of conflicts law, as vehicles for selecting what private rules from other levels than the state can be recognised as law. She included among the principles of conflicts law such standards as subsidiarity, consensus and public interest, and effectiveness. By contrast, Robert Wai applauded conflicts law for being an analytical method that does not start from divisions such as ‘democratic’ or ‘undemocratic’, but allows a range of matters to be taken in. Wai regarded inter-systemic collisions, including those of state and private ordering, as an area where conflicts law has a lot to contribute. The discussion of the fourth session’s was Hui-Wen Chen (Harvard Law School).

The fifth session ‘Complementary and Competing Approaches’, chaired by Rainer Nickel, opened with a paper by Joost Pauwelyn, entitled Public International Law and the Conflicts-Law Approach’. Pauwelyn provided a reality check at the international level for the three dimensions of conflicts law: law as a system (that is open to other legal systems), law as regulation (open to non-legal disciplines such as economics and science), and law as governance (open to private actors). Pauwelyn noted that the World Trade Organisation, for instance, had opened up to other regimes, and that legal questions were being decided with reference to science and economic expertise. He paid special attention to the field of ‘informal international law-making’ and the accountability questions that come with it (non-binding transnational norms, concluded by non-traditional actors and/or outside formal international organisations), and argued that, where non-law has legal effects, it should be regulated by law. The discussant for Pauwelyn’s paper was Ulf Uetzmann (University of Bremen).

According to the next presenter, Ralf Michaels (Duke University School of Law), there would be no ‘conflicts-law approach’ without the technique of conflict of laws (private international law). He illustrated this technique using ‘characterisation’ as an example, calling characterisation a contingent, thus political, move translated into a doctrinal step, but a useful fiction in that it enables lawyers to get a grasp of the issues as if they were private and technical. Harm Schepel acted as discussant for this paper.

The third day started with the sixth session ‘Interinstitutional and Administrative Conflict resolution in the EU’, chaired by Alexia Herwig. Within the second dimension of conflicts law, Henning Deters (University of Bremen) presented a case study on the abolition of the *Haushaltsglühhbirne incandescent bulbs* in the European Union. Deters argued that comitology was in this case used not so much to deliberate, but as a subterfuge to obtain an internal ban as a substitute for a prior anti-dumping measure. Josef Falke and Olga Batura (both University of Bremen) discussed comitology after the Lisbon Treaty and the turn to agencification. They suggested a study of new European agencies for testing the applicability of the conflicts-law approach, and asked whether the agencies were an improvement as compared to comitology. These two papers received comments from Anna Baumann (University of Bremen).

In a concluding seventh session, chaired by Josef Falke, Maria Weimer (Maastricht University) commented on the lack of normative criteria for a legitimate transnational conflicts-law norm (noted by Nickel and others earlier). Drawing partly on the work of Howse and Nicolaïdis, Weimer enumerated several principles for conflicts law, including external accountability, deference to other legal orders, inclusiveness, review and revision, and contestation, illustrating how these criteria could be applied to the transnational governance of

GMOs. Finally, Karolina Zurek (Swedish Institute for European Policy Studies, Stockholm) revisited the debate on the European GMO regulation and the emerging conflict between the rule of sound science and trans-scientific socio-economic concerns. Zurek analysed recent developments, in particular the examples of the new internal conflicts with recently acceded States. Alexia Herwig provided the comments for this final session.

### 3. List of participants

Daniel Augenstein	<i>University of Tilburg</i>
Olga Batura	<i>University of Bremen (RECON WP 9)</i>
Anna Baumann	<i>University of Bremen</i>
Hui-Wen Chen	<i>Harvard Law School</i>
Henning Deters	<i>University of Bremen</i>
Josef Falke	<i>University of Bremen</i>
Sabine Frerichs	<i>University of Helsinki</i>
Carola Glinski	<i>University of Bremen</i>
Alexia Herwig	<i>University of Antwerp</i>
Christian Joerges	<i>University of Bremen (RECON WP 9)</i>
Poul F. Kjaer	<i>Johann Wolfgang Goethe University (RECON WP 9)</i>
Regina Kreide	<i>University of Gießen</i>
Ming-Sung Kuo	<i>University of Warwick</i>
Karl-Heinz Ladeur	<i>Bremen International Graduate School of Social Sciences</i>
Ralf Michaels	<i>Duke University</i>
Rainer Nickel	<i>Goethe University Frankfurt am Main (RECON WP 9)</i>
Joost Pauwelyn	<i>The Graduate Institute of International and Development Studies</i>
Tobias Pinkel	<i>University of Bremen</i>
Tommi Ralli	<i>University of Bremen (RECON WP 9)</i>
Florian Rödl	<i>Johann Wolfgang Goethe University (RECON WP 9)</i>
Harm Schepel	<i>The University of Kent's Brussels School of International Studies</i>
Ulf Uetzmann	<i>University of Bremen</i>
Robert Wai	<i>Osgoode Hall Law School</i>
Maria Weimer	<i>Maastricht University (RECON WP 9)</i>
Karolina Zurek	<i>Swedish Institute for European Policy Studies</i>

### 4. Programme

See attachment.



## **The Conflicts-Law Approach on Trial**

### ***Seminar at the Evangelische Akademie Loccum***

Monday 17 October, 14:30 – Wednesday, 19 October 2011, 15:00

### **CONTEXT**

This seminar is both a concluding and an opening event. It is the concluding workshop of the project “Transnational governance and constitutionalism”, a contribution to the European RECON project, which started in January 2007 and will end in December 2011.<sup>1</sup> It marks at the same time the commencement of the third phase of the project on “Trade liberalisation and social regulation in transnational constellations” which Josef Falke and Christian Joerges will be directing for further four years in the context of the Collaborative Research Centre “Transformations of the State” in Bremen.<sup>2</sup> The workshop will explore the potential to conceptualise in legal terms the transformation of the state and the postnational constellation – and to orient normative evaluations of the conflict constellations which these processes have generated and still generate.

This is by no means to suggest that the conflicts-law approach as developed so far should be privileged in our discussions. Our agenda should instead further three objectives, namely, first, to contrast the conflicts-law approach with pertinent international debates, second, to intensify discussion of its interdisciplinary background, and, third, to inspire the development of frameworks for exemplary case studies.

The proceedings of last year’s seminar (“Loccum I”) are being published in the RECON Report Series: Christian Joerges (ed.) in co-operation with Tommi Ralli (“After Globalisation – New Patterns of Conflict and their Sociological and Legal Re-constructions”, RECON Report No. 15). The Report is available in print and can be downloaded from the RECON web-page

[http://www.reconproject.eu/projectweb/portalproject/Report15\\_AfterGlobalisation.html](http://www.reconproject.eu/projectweb/portalproject/Report15_AfterGlobalisation.html) .

Loccum II is considerably more ambitious in intellectual and production terms. and will require considerable efforts. We envisage a book publication with Hart Publishing, Oxford. The book should address our stated objectives in a transparent and coherent manner. We therefore urge you to take your preparation for Loccum seriously, but also be prepared to invest time and energy in the elaboration of your contribution in the light of our discussions in Bremen and further editorial activities.

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<sup>1</sup> <http://www.reconproject.eu/>.

<sup>2</sup> <http://www.sfb597.uni-bremen.de/pages/ueberPresseStimmen.php?SPRACHE=en..>

## Steps to be taken

Here is how we hope to proceed:

1. Think-pieces of some 12-14 pages by Monday, 10 October. Please take this date seriously, consider that in particular the commentators need some time and that we should all try to get prepared comprehensively.
2. An elaborated version of the seminar contributions should be delivered by 10 January 2012. We are not envisaging a follow-up meeting but will discuss your work intensively in our project meetings in Bremen. You will receive comments and be hopefully prepared to take them into account in your final version.
3. Delivery of final versions: 14 August 2012.

**Organisational matters:** Please contact Olga Batura: [Batura@zerp.uni-bremen.de](mailto:Batura@zerp.uni-bremen.de)

## Seminar Agenda

Presentations should be not much longer than **20 minutes** so that we have enough space for discussion.

Please note that our hosts in Loccum take the timing of meals very strictly.

### Monday, 17 October

14.30 Arrival at Loccum

15.00 Coffee and Welcome

### Section I: Theoretical and Sociological Reconstructions of Postnational Conflict Patterns

15:30 – 17:00

Chair: Christian Joerges, Bremen

Poul F. Kjaer, Frankfurt aM

*Towards a General Socio-Legal Theory of Constitutionalism Beyond the State*

Regina Kreide, Gießen

*Repressed Democracy: Legitimacy Problems in World-Society*

Discussion impulse: Karl-Heinz Ladeur, Bremen

17:00 – 18:30

Chair: Florian Rödl, Frankfurt a.M.

Sabine Frerichs, Helsinki

*Conflicting Laws? On the Legal Dimension of the Globalized Market Society*

Tommi Ralli, Bremen

*National Responsibility and Conflict of Laws*

Discussant impulse: Regina Kreide, Gießen

18:30 Supper

Free evening

**Tuesday, 18 October 2011**

8:30 Breakfast

**Section II: Re-conceptualising the Law of Postnational Conflict Constellations: Holistic Approaches**

9:15 – 11:00

*Panel on Conflicts Law and Democracy*

Chair: Tobias Pinkel, Bremen

Florian Rödl, Frankfurt a.M.:

*On the Problems of Democratic and Social Union*

Rainer Nickel, Frankfurt aM and Alicia Cebada Romero, London

*Conflicting Constitutional Laws and Constitutional Pluralism in an Asymmetric World*

Discussant: Daniel Augenstein, Tilburg

11:00 – 11:15 Coffee Break



11:15 – 12:30

### **Section III: The Legitimacy problématique of Global Administrative Law**

Chair: Robert Wai, Toronto

Karl-Heinz Ladeur, Bremen

*The Emergence of Global Administrative Law and Transnational Regulation – On the Necessity to Broaden the “Conflicts of Law” Approach*

Ming-Sung Kuo, Coventry (Warwick)

*Judging Constitutional (Un)Ambition in Academic Minds: A Critical Juxtaposition of the Constitutional Deficit of Global Administrative Law and the Democratic Aspiration of the Conflicts-Law Approach*

Discussant: Harm Schepel, Brussels/ Kent

12:30 Lunch

### **Section IV: Conflict-Resolution and Mediation: Applications**

14.15 – 15.30

Chair: Joost Pauwelyn, Geneva

Alexia Herwig, Antwerp

*The Precautionary Principle as a Conflicts-of-Laws Norm*

Carola Glinski, Bremen

*General Clauses and Private Regulation – Regime Collisions in Tuna-Dolphin III*

Robert Wai, Toronto

*Dealing with True and False Conflicts in the Transnational Law Market*

15.30 – 16.00 Coffee Break

16.00 – 16.30

*Discussion*

Impulse: Hui-Wen Chen, Harvard law School

## **Section V: Complementary and Competing Approaches**

16.30 – 18.30

*Panel on Alternative Queries with Conflicts-Law Constitutionalism*

Chair: Rainer Nickel, Frankfurt a.M.

Joost Pauwelyn, Geneva

*Public International Law and the Conflicts-Law Approach*

Discussant: Ulf Uetzmann, Bremen

Ralf Michaels, Durham, NC

*Post-critical Private International Law: From Politics to Technique*

Discussant: Harm Schepel, Brussels/ Kent

18: 30 Supper

Free evening

## **Wednesday, 19 October**

8.30 Breakfast

9.15 – 10.15

## **Section VI: Interinstitutional and Administrative Conflict Resolution in the EU**

Chair: Alexia Herwig, Antwerp

Henning Deters, Bremen

*Comitology's Lightbulb-Moment. The Role of Committee-Governance in Facilitating (Over)ambitious Environmental Standard-Setting*

Josef Falke, Bremen and Olga Batura, Bremen

*Comitology after the Lisbon Treaty and the Turn to Agencification*

Discussant: Anna Baumann, Bremen

10:15 – 10:30 Coffee Break

## **Section VII: Genetically Modified Organisms as Regulatory Challenge**

10.30 – 11.30

Chair: Josef Falke, Bremen

Maria Weimer, Maastricht

*Constitutionalising Transnational Governance of GMOs Through Conflicts Law – in the Search for Legitimate Meta-Norms*

Karolina Zurek, Stockholm

*Escape from the Rule of Sound Science: The Impact of Socio-economic and Trans-Scientific Concerns in the Regulation of GMOs*

Discussant: Alexia Herwig, Antwerp

11:30 – 12.15

### **Epilogue, Outlook and Organisational Issues**

Christian Joerges, Bremen

*Contested Legitimacy in Conflicts-Law Perspectives*

12.30 Lunch

13.30 Departure for Wunstorf