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Conflict of Laws as the Legal Paradigm of the Postnational Constellation

Christian Joerges, Bremen

-- Very first draft --

Structure

The Bremen project on „Social Regulation and Free Trade" and its enquiries into the emergence of transnational governance structures long-term is embedded in long-term research activities which comprise in particular theories of post-formalist private law, the theoretical debates on post-interventionist legal methodologies and the problematic of risk regulation at national and European level. This background is to responsible for two of its specifics, namely its interest in market as "social institutions" and "polities" on the one hand and its comprehensive reference to conflict-of-laws methodologies within national systems, among separate jurisdictions, fragmented legal regimes, different levels of governance, and even the pluralism of state law and other legal orders. The paper seeks to compensate for the complexity of this background by a disentanglement of its various dimensions. In its first Section it will present a reconstruction of markets, which will underline their "politicisation" and introduce the conflict-of-laws paradigm as a response to that dimensions. The second Section will deal with the European level with a summary of previous presentations of "European law as a new type of conflict of laws" and remarks which contrast the EU with national systems. The third section will proceed to the international system, restricting itself, however, to WTO law and adjacent fields. The potential of the conflict-of-laws approach will again be explored once again and the specifics of the WTO-level be specified.

I. The Economy as Polity and its Challenges to Law at National Level

For an explanation of our understanding of "markets as social institutions" and of the "economy as polity", it may be helpful to Fred Block's assertion that distinctions made between liberal market economies and co-ordinated market economies, as well as the general tendency to analyse modern market developments in terms of how much a state should or should not intervene in a seemingly autonomous market sphere, are misleading. Along with Karl Polanyi, Block notes that:

> Once it is recognized and acknowledged that markets are and must be socially constructed, then the critical question is no longer the quantitative issue of how much state or how much market, but rather the qualitative issue of how and for what ends should markets and states be combined and what are the structures and practices in civil society that will sustain a productive synergy of states and markets.[1]

What I find particularly inspiring in this remark is Block's emphasis that what happens in markets cannot be understood by stimulus-response mechanics or any modelling which does not take the "political" (communicative/moral) dimensions of markets seriously. This core insight share a range of alternative theoretical approaches striving for an understanding of "markets as polities" such as those offered by the Varieties of Capitalism literature[2] or contributions from the risk and knowledge societies debate[3] or from systems theory[4] and evolutionary approaches.[5] These research strand are accompanied and complemented by a broad revival of the sociology of the economy[6] and historical studies reconstructing the transformation of the one-dimensionally construed consumer into a politically active market

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[1] F. Block; "Towards a New Understanding of Economic Modernity", in: Ch. Joerges, B. Stråth & P. Wagner (eds.), *The Economy as Polity: The Political Constitution of Contemporary Capitalism*, at 16 (Block develops this argument systematically in the context of his reconstruction of Karl Polanyi's political economy).

[2] As discussed by B. Amable, *The Diversity of Modern Capitalism*, Oxford: OUP2003.

[3] S. Maasen, „Das Wissen der Wissensgesellschaft", Contribution to the workshop on „Wissensordnung und Technikgestaltung in der Wissenschaftsgesellschaft", Karlsruhe Institute for Technology, 10-11 November 2008 (on file with author); N. Stehr, *Wissenspolitik. Die Überwachung des Wissens,* Frankfurt aM: Suhrkamp, 2003, at 222-244.

[4] H. Willke #:

[5] M. Amstutz, *Evolutorisches Wirtschaftsrecht*, Baden-Baden: Nomos 2001; Historizismus im Wirtschaftsrecht: Überlegungen zu einer evolutorischen Rechtsmethodik

[6] J. Beckert, *Grenzen des Marktes. Die sozialen Grundlagen wirtschaftlicher Existenz*, (Frankfurt aM: Campus). [=Beyond the Market. The Social Foundations of Economic Efficiency. Princeton: Princeton UP 2002]; more recently, see J. Beckert, "The Moral Embeddedness of Markets", MPIfG Discussion Paper 05/6, Cologne 2005 available at http://www.mpi-fg-koeln.mpg.de/pu/dp03-05_de.html.; V. Nee & R. Swedberg (eds.), *The Economic Sociology of Capitalism*, Princeton: Princeton University Press, 2005;

citizen[7] -- Nico Stehr does not shy away from proclaiming the birth of a "*Gesellschaftstheorie"* (social theory) of the market.[8]

Exempla trahunt. Arie Rip, Professor of Philosophy of Science and Technology in Twente University, in one of his studies on Nanotechnology,[9] observes that society does not leave this technology alone; he describes what happens instead in the following passages:

> Whatever governance arrangement or approach will be developed and implemented, this occurs in a context in which actors are already attempting to put forms of governance in place. And where patterns emerge which shape thinking (e.g. about risks) and action (e.g. about regulation) and thus have a governing effect without necessarily linked to intentional arrangements (e.g. a specific political culture).

Governance; he continues is hence to be

> understood as the result of interaction of many actors who have their own particular problems, define goals and follow strategies to achieve them. Governance therefore also involves conflicting interests and struggle for dominance. From these interactions, however, certain patterns emerge, including national policy styles, regulatory arrangements, forms of organisational management and the structures of sectoral networks. These patterns display the specific ways in which social entities are governed. They comprise processes by which collective processes are defined and analysed, processes by which goals and assessments of solutions are formulated and processes in which action strategies are coordinated. (…) As such, governance takes place in coupled and overlapping arenas of interaction: in research and science, public discourse, companies, policy making and other venues.

"De facto governance", is the notion, which Rip uses to capture these phenomena. The term signals some conceptual and theoretical uneasiness. Rip's descriptions are nevertheless plausible and that plausibility is by no means restricted to the handling of particularly sophisticated technologies. They confirm what we know since long about a wide range of social and economic regulatory policies and practices. It is by now a truism that policy makers need to resort to expertise and management capacities that are simply not available in the political and administrative sphere. It is equally uncontested that these processes have to cope with two genuinely political difficulties. One stems from the fact that so many issues are multi-faceted and require the coordination or balancing of potentially conflicting concerns. The second stems from the need to ensure the acceptance of products and services. Their proponents may have good reasons to qualify the anxieties of consumers as irrational. They will nevertheless have to care about the "trust" of the broader public.

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[7] K. Soper & F. Trentmann (eds.), *Citizenship and Consumption*, 2007.

[8] N. Stehr, *Die Moralisierung der Märkte. Eine Gesellschaftstheorie*, Ffm: Suhrkamp 2007.

[9] Arie Rip, (University of Twente, "De facto governance of nanotechnologies", paper delivered at the TILTing Conference, 10-11 December 2008 (on file with author),

"De facto governance" is not only a societal fact. It has also infiltrated the law in partly subtle, partly clearly visible ways. The story of hare and hedgehog which Rip uses to characterise the relationship between regulators and regulated does not insinuate that "the economy" be autonomous in the sense that economic actors, contracting parties and firms are would be free in their responses or non-responses to various societal concerns. Even in the absence of legally binding substantive prescriptions, "the economy" cannot simply neglect the many facets of the politicisation of consumers, *e.g*. their preferences for environmentally friendly products, the fairness of prices paid to their producers or the conditions of their production in the fourth world. The borderlines of such freedoms are sensitive, Where producers and traders seek to respond pro-actively to politicised consumers they have to adapt their marketing strategies accordingly – and risk to get caught by rules against unfair competition, the sanctioning of questionable promises by sales law etc.[10] Practically more important and legally more stringent, however, operate outside observers, private, semi-private or public testing institutions, administrators and courts. And the politics of production and marketing are of course even more and directly constrained by standards which public and private bodies produce *in abondanza*, and they are also exposed to the constant flow of case law and legislation, which affects their activities less directly.

These sketchy remarks must suffice here as a basis for three bold assertion about the juridification of "de facto governance":

(1) That term captures the blurring of formerly clearer boundaries between public and private, hard and soft law.

(2) The exposure of economic activities to divergent and often conflicting concerns requires a constant management of conflicting objectives – through techniques of balancing, conflict avoidance or some camouflage.

(3) It is inconceivable to conceptualise these activities in some hierarchical decision-making model. Law production, "*Recht-Fertigung*" occurs instead in decentralised activities – and courts are required to exercise mediating and coordinating functions in such complex conflict constellations.

A very long time ago I have analysed similar phenomena at the crossroads of antitrust, consumer protection and contract law and characterised their handling as a "discovery procedure of practice".[11] The use of that term was meant as a countermove to the then so

[10] Ch. Schnieders, *Allgemeinintertessen im Wettbewerbsrecht,* Baden-Baden: Nomosa, 1999..

[11] See Ch. Joerges, "The Administration of Art. 85 (3) Treaty of Rome: The Need for Consultation and Information in the Legal Assessment of Selective Distribution Systems", 7 (1984) *Journal of Consumer Policy* 271-292; "Relational Contracts Law in a Comparative Perspective: Tensions Between Contract and Antitrust Law Principles", (1985) *Wisconsin Law Review* 581-613; "Quality Regulation in Consumer Goods Markets: Theoretical Concepts and Practical Examples", in T. Daintith and G. Teubner (eds.), *Contract and Organization*, Berlin: De Gruyter, 1986, 142-163.

popular "discovery-procedure of competition", the concept, which F.A. von Hayek has propagated in his defence of the normative values and economic effects of competitive behaviour. Then and now the core query with my countermove concerns exactly its methodologically equivalent twofold status: Under what conditions can we assume that the discovery procedure of practice will be functioning such a way that its operation, to take up a Habermasian formula, "deserves recognition".[12] My response has remained essentially the same since the 80s:[13] Its functioning depend upon the interactions among the law-producing actors and we therefore have to rely upon the law's potential to ensure their normative quality. You do not have a powerful ally there is the comment I have heard often enough – and I agree.[14]

A more powerful objection is in place after the steadily growing importance of Europeanisation and globalisation processes. None of the activities constituting "de facto governance" occurs in splendid national isolation. Administrators, professionals and experts, non-governmental organisations operate across territorial borders. This affects the not just the integrating potential of the "discovery procedure of practice" but each and every programmatic suggestions which is relying in some way on the formation and impact of public opinion, in particular hence on all facets of deliberative theories of democracy. I restrict myself to underlining and admitting that nexus and dependence,[15] but refrain from addressing it at that level of abstraction. I will instead start my discussion of the postnational problematic by its restatement in the more technical-legal terms in which Sol Picciotto has recently framed it.[16]

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[12] J. Habermas, "Remarks on Legitimation through Human Rights", in id., *The Postnational Constellation: Political Essays,* Cambridge, MA: MIT Press 2001, 113-129, at 113.

[13] See the concluding remark in Ch. Joerges, "Quality Regulation" (note 12) at 162.

[14] Because of this insistence on interactions and their synergetic and productive potential I refrain from using the by now fashionable notion of "network", which I reserve for more formalised cooperative arrangements (see *infra* II 2 and III,2#) although I fully agree with the analysis of network theorists who explain the emergence of the phenomena by the need to take a multitude of concerns into account (see, *e.g.*, I. Augsberg, "Das Gespinst des Rechts. Zur Relevannz von Netzwerkmodellen im juristischen Diskurs", (2007) 38 *Rechtstheorie*, 479-493.

[15] The problem addressed here in the societal sphere is present in a very similar way in the policy-making process in the public sphere. As Jürgen Bast explains: Es „kennzeichnet … in demokratischen Systemen sowohl die Politikformulierung als auch die Rechtserzeugung, dass Orte des Intersektoralen und des Generalistentums in den politischen Prozess bzw. das Verfahren der Rechtsetzung eingebaut sind: das Kanzleramt, das Kabinett, die Fraktionsführung, der Koalitionsausschuss, das Plenum des Parlaments, die Tagesschau. Zum anderen darf nicht übersehen werden, dass im nationalen Kontext der Pluralismus der ministeriellen Ressorts und, noch allgemeiner formuliert, die organisatorische Vielfalt der Verwaltung Binnendifferenzierungen innerhalb *eines* Verbands im Rahmen *einer* verfassungsrechtlichen Ordnung darstellen. ("Das Demokratiedefizit fragmentierter Internationalisierung", forthcoming in *Soziale Welt* 2009). The interaction between all these actors and the public is of constitutive importance for democratic legitimacy.

[16] "Constitutionalising multilevel goverrnance?", (2008) 6 *Icon* 457-#

Picciotto reminds us of the specific perspectives in which our legal systems perceive cases with international connections: they react to such connections by a re-nationalisation of the concerned *Rechtsverhältnis* (legal relationship): "the choice between national system of rules applied to the activities of private actors was determined by principles of jurisdictional allocation and choice of law".[17] This is "methodological nationalism"[18] which amounts to a systematic disregard of both the substantive transnational impact on national legal systems *and* the premises upon which the normative claims societal *Recht-Fertigung* rests. As Picciotto underlines, "various forms of supranational and infranational law have created complex interactions between a variety of adjudicative and regulatory bodies at different levels".[19]

The follow-up problem is of course whether we have to forget about the law's normative legacy or whether there are chances to re-constitute it. The rest of this contribution is a defence of the constructive option. That option is announced in the title of this contribution. Its elaboration has already somewhat subversively started with the present section and will now first be continued at European and then at the international level. It may be useful to underline an at first sight paradoxical and often misinterpreted implication of the turn to conflict of laws:

(1) The new type of conflict-of-laws is not meant as a rescue of the nation state or a defence of territoriality as a legal principle.[20] It refers to constitutionalism as developed in (a considerable number of) nation states as a normative yardstick and achievement, which must not be jettisoned without further ado because of the emergence of powerful transnational regimes.[21]

(2) Just because of the erosion of the national constellation, and apparently somewhat surprisingly, the defence of the law's normative *proprium* in the postnational constellations requires some re-formalisation. It is simply inconceivable that the normative quality of national legal systems can be substituted by pure deliberation, or, in the language of our conference, that an embedding of transnational markets can be accomplished through communicative interactions. Conflict-of-laws is to operate as the hard mediator of legitimate European and transnational governance.

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[17] S.Picciotto, #

[18] As defined by M. Zürn, THE STATE IN THE POST-NATIONAL CONSTELLATION—SOCIETAL DENATIONALIZATION AND MULTI-LEVEL GOVERNANCE, ARENA Working Paper No. 35/1999 (1999).

[19] *Ibid.* (note 17).

[20] D. Chalmers (in Kohler & Rittberger; P. Kjaer

[21] See, with quite similar intuitions, Lars Viellechner, „Können Netzwerke die Demokratie ersetzen?", in S. Boysen *et al.*, (eds.), *Netzwerke -- 47. Assistententagung Öffentliches Recht*, Baden-Baden: Nomos 2008, 36-57, at 48 ff.

II. European Law as a Three-dimensional New Type of Conflict of Laws

Whatever "the nature of the beast" may be, the European Union is certainly not a comprehensive polity; it lacks a *Kompetenz-Kompetenz* and its legislative activities remain restricted to "limited fields" even though their indirect impact is much broader.[22] Thanks to the enormous enlargement of the Union in various rounds, its cultural, legal and socio-economic diversity is deepening. Because of that ever increasing diversity the perception of European law as an ever more comprehensive legal system is misleading. European law has instead to respond to, to respect and to manage diversity. This is the sociological basis for our suggestion that European law should be re-conceptualised in conflict-of-laws perspectives. It should be underlined at the outset of this section that the respect for diversity, which is inherent in the conflict-of-laws paradigm, is a counter-intuitive suggestion not only theoretically but also practically. The so-to-speak natural response to European diversity in the establishment of "sectorial" European regimes has been characterised by Sol Picciotto very lucidly: The legitimacy of important and increasingly extensive international regulation has come to rely, substantially, on expertise, since much of the activity of international regulatory networks is done by cadres of technical specialists, sometimes described as 'epistemic communities' ."[23] This is true at all transnational levels and I have no problem with characterising the resort to technocratic rule as a "conflict-of-laws" solution. Conflict-of-law rules, like the rules of any legal disciple, can be good or bad, right or wrong. Supranational technocracy is the false response. The type of conflict-of-laws I am going to submit is specific in that it is meant to provide a normatively valid response to the problematic of transnational governance. As far as Europe is concerned, I can draw upon various publications[24] and will therefore restrict myself here to a brief summary. What I wish to underline, however, are two aspects, namely for one, the difference between traditional jurisdiction-selecting conflicts of

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[22] See Th. König & L. Mäder, „Das Regieren jenseits des Nationalstaates und der Mythos einer 80-*Prozent*-Europäisierung in Deutschland", (2008) 49:3 *Politische Vierteljahresschrift*, 438-463; A. Töller, #

[23] *Ibid.* (note 17) at 459. For a challenging variant *cf.,* J.P. McCormick, "Habermas, Supranational Democracy and the European Constitution", (2006) 2 *European Constitutional Law*, 398-423 ("This political configuration is comprised of: (a) the transnational 'comitological or 'infranational' policy-making that presently operates under the auspices of the European Commission; and (b) the eventuality of 'multiple policy Europes' within the EU, a scenario in which different combinations of member states will constitute separate energy, defense, trade, communications, welfare, and environmental regulatory regimes", 415); see also his *Weber, Habermas, and Transformations of the European State*, Cambridge: Cambridge UP 2007, at 231 ff.

[24] *E.g.,* "Rethinking European Law's Supremacy: A Plea for a Supranational Conflict of Laws", in: B. Kohler-Koch & B. Rittberger (eds.)*, Debating the Democratic Legitimacy of the European Union,* Lanham, MD: Rowman & Littlefield, 2007, 311-327; more recently with Florian Rödl, "Zum Funktionswandel des Kollisionsrechts II: Die kollisionsrechtliche Form einer legitimen Verfassung der post-nationalen Konstellation", in Gralf-Peter Calliess *et al.*, (eds.), *Soziologische Jurisprudenz. Festschrift für Gunther Teubner zum 65. Geburtstag,*Berlin: De Gruyter Recht 2009 (forthcoming).

laws and the new type of conflict of laws, which the European multi-level system requires, and, then, in view of the focus of this conference on the social embeddedness of transnational markets, the normative potential of the European constellation.

The new type of EU conflict of laws operates in three modes:[25] through European primary law (1), the political generation of solutions to controversies in particular over regulatory politics (II.2.1, and the supervision of private governance regimes (II.2.2).

II.1. First Order Conflict of Laws

The conflict-of-laws idea seeks to bridge facticity and validity; it not only mirrors Europe's diversity but also provide a new response to the Union's legitimacy problematic. Europe can "re-constitute" democracy,[26] or, to put it more cautiously, remain a democracy-compatible project even if it does not strive for statehood.

One element of that re-orientation which Jürgen Neyer and I have suggested in 1997 is the replacement of traditional (in our terminology "orthodox" doctrinal understanding of legal suprantionalism by the notion of "deliberative suprantionalism". We sought to avoid the debate about Europe's democratic deficit by inverting the usual perception of Europe's legitimacy dilemma. Rather than complaining that Europe does not meet the standards of democratic constitutional states we suggested that European law could be legitimated because of its potential to cure structural democracy failures of the nation states.

This argument may date back to Rousseau; its topicality, however, rests upon Europeanisation and globalisation processes. As we have framed it back in 1997: "The legitimacy of governance within constitutional states is flawed in so far as it remains inevitably one-sided and parochial or selfish. The taming of the nation-state through democratic constitutions has its limits. [If and, indeed, because] democracies presuppose and represent collective identities, they have very few mechanisms to ensure that 'foreign' identities and their interests are taken into account within their decision-making processes".[27] If the legitimacy of supranational institutions can be designed so as to cure these deficiencies – as a correction of 'nation-state failures', as it were – they may then derive their legitimacy from this compensatory function.

[25] The follwong section draws on Ch Joerges & F. Rödl (previous note).

[26] For thesis tem see E.O. Eriksen and J.E. Fossum,

[27] Ch. Joerges and J. Neyer, "From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology", 3 (1997) *European Law Journal* 273-299, at 293.

Is all this just some normative fantasy and wishful thinking? A very considerable body of both primary law and so many methodologically and theoretically bold and practically successful ECJ decision can be rationalised in our perspectives. All one has to do is look: The Members States cannot implement their interests or laws unconstrained, they are obliged to respect the European freedoms, are not allowed to discriminate, they can pursue only legitimate regulatory policies blessed by the Community; they must, in relation to the objectives they wish to pursue through regulation, harmonise with each other and they must shape their national systems in the most community-friendly way possible. If that is so we can claim: the European "federation" found a legal constitution that did not have to aim at Europe's becoming a state but is able to derive its legitimacy from the fact that it compensates for the democratic deficits of the nation states. This is precisely the point of Deliberative Supranationalism. Existing European law had, we argued, brought into validity principles and rules that meet with and deserve supranational recognition because they constitute a palpable community project. This kind of law, we concluded, was not undemocratic but was compensating for the nation state's democratic deficits.

Does all this entail a retraction from democratic commitments, from the quest for a democratic legitimacy of supranational law? Does the conflict-of-laws approach suggest that the enactment of binding European provisions should be replaced by some sort of soft co-ordination, that European law should be understood as handling conflicts arising out of the diversity of national systems of law by some more or less sophisticated device and that this kind of assistance would not be based on permanently institutionalised mandates of constitutional dignity? No such heresies are intended. The conflict-of-laws perspective defends the supranationality of European law and its "hard law" quality in its re-conceptualisation of supranationalism. It takes away from European law the practical and legitimatory expectations it cannot reasonably hope to fulfil. At the same time, it opens a window on the manifold vertical, horizontal, and diagonal[28] conflict situations in the European multilevel system. It promotes the insight that the Europeanisation process should seek flexible, varied solutions to conflicts rather than strive for the perfecting of an ever more comprehensive body of law.[29] It retains commitments towards a "European common good".

[28] These conflicts arise out of the allocation of powers needed for problem-solving and therefore objectively connected to different levels of government. It follows from the principle of limited individual empowerment that the primacy rule can find no application here.

[29] This is readily compatible with the existence of European secondary law and does not in any way in principle call its legitimacy into question. There are important problem areas in which the "second order" law of conflict is insufficient and the "federation" has to develop supranational substantive law. This question cannot be dealt with systematically here

What we have failed to substantiate in our focus on interdependence, the avoidance of externalities and the compensation of structural democracy failures of national polities is the basis of this type of supranationalism.

II.2 Second and Third Order Conflict of Laws v."Technicisation"?

Europe cannot restrict itself to handing down legislation. It must also ensure its proper "implementation". This is an enormous challenge because the institutional framework of the EEC had not anticipated the emergence of the regulatory machinery which was build up in particular in the context of the internal market programme. The response of the European praxis was first the strengthening of its regulatory instruments, which led Giandomenico Majone to announce the advent of a European "regulatory state"[30], and then the "turn to governance" officially proclaimed by the Prodi Commission in its White Paper of 2001.[31] Informality, softness, the establishment of pan-European networks and the inclusion of both European and national non-governmental actors are the characterising features of these practices. The rhetoric was new, the phenomena not so "new", let alone in every respect specifically European.[32] This observation is valid for both the primarily administrative and the primarily private regimes between which we distinguish here. .

Both of them face a similar dilemma that any evaluation of Europe's practices has to take into account. On the one hand, the logic of the internal market seems to militate in favour of uniform regulatory rules and standards; on the other hand, in view of Europe's socio-economic diversity, uniformity may simply be both economically and politically unreasonable. This is because the weighing of costs and benefits is context dependent. In particular, the distributive implications of regulatory standards are likely to impede uniform solutions. In view of these difficulties the management of implementation strategies can be expected to resort to institutional techniques, which avoids such confrontation. It is hence unsurprising that the administration of the internal market in tends in its decision modes to rely on technical expertise and seeks to avoid any comprehensive evaluation of its measures. The development of the European committee system and the growing importance of European agencies mirror this background.

[30] Majone, #

[31] White paper on European Governance 2001 #.

[32] See R. Mayntz, "Governance Theory als fortentwickelte Steuerungstheorie", in G.F. Schuppert, (ed.), *Governance-Forschung. Vergewisserung über Stand und Entwicklungslinien*, Baden-Baden: Nomos 2005, 11-20.

II.2.1"Second Order" Conflict of Laws: the Example of Comitology

Among all modes of European governance, the infamous committee system with comitology at its core in the whole realm of social regulation provides the most challenging example. The committee system with its various procedures was originally developed in the agricultural domain. It became really prominent, however, only with the "completion" of the internal market. Regulatory Committees staffed with bureaucrats from the member states and assisted by social and scientific advisory committees became the most important devices to keep the internal market project compatible with concerns of "social regulation" (safety at work, consumer and environmental protection). For the conflict-of laws-perspective, which we are submitting for the comitology system, it is important to underline its discursive potential. To be sure, the issues committees deal with typically require that expert knowledge be taken into account. However, because of the involvement of member states through their representatives on the regulatory committees and their exchanges with a plural expert community it seems reasonable to expect that these bodies will find solutions which are both politically legitimate and in line with the state of the art in the concerned field. Furthermore, all pertinent directives contain safeguard clause procedures, which allow a correction of agreed upon standards when new knowledge is acquired or a regulation proves insufficient. A conflict-of-laws interpretation of this form of governance seems appropriate because the coordination efforts of the committees aim at solutions, which are acceptable to still relatively autonomous jurisdictions.

Can one really equate the normative quality of decision-making in such a system with that of democratic constitution states, R. Schmalz Bruns has asked rhetorically?[33] Yes, one can, provided the procedural guarantees for a fair and comprehensive evaluation of the concerns of all affected jurisdictions are sufficiently strong.[34] Admittedly, a broad range of issues needs to be considered: the selection of the expert circles to be included. Ties with parliamentary bodies on the one hand and with civil society on the other; reversibility of decisions taken in the light of new knowledge or changes in social preferences. A "constitutionalisation" of comitology as requested by Jürgen Neyer and myself 12 years ago is still conceivable – but

[33] Cf., R. Schmalz-Bruns, 'An den Grenzen der Entstaatlichung', in P. Niesen & B. Herborth (eds.), *Anarchie der kommunikativen Freiheit*, Frankfurt a.M.: Suhrkamp 2007, 269-94 (290).

[34] Again (see note 16 *supra*) Jürgen Bast's analysis of fragmentation provides a useful parallel. The legitimacy of comitology procedures rests upon – and depends upon – their potential to deliver decisions which can be understood as an element of the ensemble of both EU and national policy-making.

less likely to occur. The cultural and socio-economic homogeneity in "old Europe" was such that the coordinative function of the committee system was much easier than it is in the enlarged Union. Unsurprisingly, the enlarged Union has reacted with a centralising "scientification" of its regulatory practices. The scope of comitology seems to be narrowing and the road towards a comprehensive constitutionalisation has not been taken.[35] Increasingly, comitology is being replaced by European agencies, which work on cognitively understood risk analyses, while the risk management itself remains with the politically responsible actors -- as if the cognitive-scientific and practical-political dimensions of risk regulation could be clearly kept apart.

II.2.2 "Third Order" Conflict of Law: the Example of the New Approach to Harmonisation and Standards

Standardisation in Europe is officially recognized and promoted since the "New Approach" was developed in the early eighties and then presented as a core element of Jacques Delors' internal market initiative.[36] Interestingly enough, this mode of governance not only has strong and quite ancient national roots; it also has from its inception been predominantly "privately" constituted even before it was adopted at the European level. This may seem downright paradoxical. A plausible explanation is that the "juridification" of this "private transnationalism" (Harm Schepel) has taken much more intensive form than that of the traditionally public law areas. This seems true not only for European but also for international standardisation. Generally recognised and stable procedures have matured that combine legal principles, professional standards and opportunities to participate and keep on leading to consensual solutions to problems. Significantly, European standardisation has taken on many of the features of the comitology. Its non-unitary network structure ensures that national delegations each bring in their own views, *de facto* enabling learning processes. Administrations and the courts are sometimes actually and always latently present in

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[35] The Commission proposed new provisions in 2002 (COM(2002) 719 final, 11. December 2002), which were taken into account in the Constitutional Treaty (see ; http://european-convention.eu.int/). In July 2006, a Council Decision was adopted, which strengthens Parliament's rights in areas which are subject to the co-decision procedure (Council Resolution 2006/512/EC 17.7.2006, O.J. L 200/2006, 11; consolidated version in O.J. C 255/2006, 4).

[36] Ch. Joerges, J. Falke, H.W. Micklitz, G. Brüggemeier, European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards*, EUI Working Papers LAW, nos. 91/10-14, Florence, 1991* European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards, EUI Working Papers LAW, nos. 91/12, Florence, 1991, available at ## H. Schepel #

standardisation questions. This "private transnationalism" has broken from national law, but is not delegalised.

Law and politics both remain present. Admittedly, the political processes ordered by the law of private transnationalism are not directly reached by public policy or public law. In other words, their juridification seemingly emanates "from below". This sort of "law-making" takes account of the fact that the modern economy and its markets simply are not executing some economic *Gesetz* but need to address politically sensitive issues. How likely is it that the political processes within economy and society will be socially responsible and that they will constitute themselves in such a way that they "deserve recognition"? A parallel with comitology but also with the emerging law of the new agencies suggests itself: comitology operates reasonably well thanks to the principles and rules it follows, and in the shadow of democratically legitimated institutions and their law. Similarly, the legitimacy that Schepel attributes to standardisation is based on the compatibility of its institutionalisation with the legal institutions that surround it, which are able to see that they cannot themselves achieve what the standardisation process can. Is all this still accessible to conflict-of-laws patterns of thought? The step to be taken is not too difficult. Conflict of laws deals with the acceptability of laws of "foreign" jurisdictions. Once we are to recognize that our statal law cannot operate autonomously but is dependent upon the norm generation in non-statal spheres, we need to define criteria for their recognition. These criteria will primarily concern norm-generation processes and their implementation will have to engage various legal areas such as antitrust and tort law. This, then, is the model for the constitutionalisation of private governance.

One objection, which suggests itself here as in the case of the first and also the second order conflict of laws is the lack of a robust sociological background which would explain the kind of performance on which our suggestions build. However, the third order of conflict of laws is by no means without teeth. European standardisation is bound by agreements with the European Commission, supervision of standardisation practices are in place, European competition law can be used as a means of structuring standardisation procedures, product liability law and tort law can exert indirect control and mechanisms, reporting systems are in place and private testing has is quite intense.[37]

II.3 An Interim Conclusion

[37] Schepel; Falke; Ch. Joerges, H. Schepel & E. Vos, "'Delegation' and the European Polity: The Law's Problems with the Role of Standardisation Organisations in European Legislation", EUI Working Paper in Law 9 (1999), http://www.iue.it/LAW/WP-Texts/law99_9.pdf.

The conflict-of-laws approach sketched out here retains a strong normative links not with "the state" as such but with the kind of legitimate *Herrschaft* – the rule of law and law-mediated legitimacy of rulers – constitutional democracies have *cum grano salis* accomplished. It seeks to avoid the equation of is and ought, to which advocates of transnational self-generating world law tend to resort. What we understand as the normative strength of the approach is neither a guarantee of its effectiveness nor an in-built practical weakness. This holds true for all of the three dimensions of the conflict-of-laws approach. "I was struck by the way Joerges presented the recent rulings of the European Court of Justice (ECJ)…. in *Viking, Laval, Rüffert* and some other cases… the Conflicts of Law approach is no longer in touch with the legal reality of the EU and therefore is no longer appropriate to capture what is really going on", Philip Klages has commented.[38] That remains to be seen. It is the conflict-of-laws perspective in which it becomes most clearly visible *why* the ECJ's new jurisprudence does not "deserve recognition", how markedly it contrasts with the great bulk of supremacy and pre-emption cases which mitigated much more prudently between "community and autonomy".[39] One should not, and one cannot, rule out the possibility that the ECJ will find a way out of the impasse in which it has led European law. Similarly, the perspective of a constitutionalisation of the second order of conflict of laws is, as far as comitology is concerned, by no means promising. Last but not least, one cannot be sure that the standardisation system will defend its apparent qualities which we have underlined. One variable of critical importance for the future development is the globalisation process to which we now turn.

III. Transnational Law

The "logic" of globalisation and its impact on the social embeddedness of transnational markets are the focus of this conference and will be the central issue in the elaboration of my contribution. The present draft, however, will be quite narrow in its scope. I will refrain from evaluating comprehensively the theoretical approaches presented in Section I of the Conference, from commenting on the cases studies submitted in Section II and even from any systematic discussion of the legal concepts submitted in Section III. My objective is instead to explore the potential of the conflict-of-laws approach at the international level, to contrast it

[38] Ph. Klages, Comment on Joerges : Conflict of laws as constitutional form in postnational constellations, Villa Vigoni, July 24, 2008.

[39] F.W. Scharpf #.

with the European level of governance and to illustrate my concepts with the help of a few well-know WTO cases.

There is some "Global Law Without a State", as Gunther Teubner has put it famously more than a decade ago.[40] His proclamation helped to initiate the search not only for law beyond the state, but also for a law in the international system which traditional international law was not able to conceptualise. By now, pertinent efforts abound at all levels. [41] B now, and in light of the title of this contribution, the assertion that the conflict-of-laws paradigm is a useful conceptual response to globalisation will no longer come as a surprise. As in the example of the EU, the conflict-of-laws approach is not meant to imagine some completely new legal reality; it seeks instead to restructure our understanding of the state of the law, in particular the tensions between the sociological premises of its inherited structures and its present functions, the reasons for, and the implications of, the so-called fragmentation of international law, the multi-level dimension of transnational governance which can be read as both a deepening of the impact of international law which is eroding the autonomy of national legal system and an extension of the reach of national policy-making which is responding to the interdependence of formerly more independent polities. The example of the EU will also provide the model for suggesting again a three-dimensional model, albeit with distinctive features – and one particular feature: The notion of constitutionalisation as we use it in our title and throughout the whole argument denotes the need for "laws of lawmaking"[42], a "*Rechtfertigungs-Recht*";[43] it retains the quest for legitimacy in the specific (*alt-europäisch)* meaning of "legitimation through law" and law-mediated legitimacy of *Herrschaft.* The defence of these notion has an implication which has become counter-intuitive only because of an inflationary, under-theorized use of the concepts of "legalisation" and "constitutionalisation", namely to return to the age-old realistic insight that there are spheres of "naked law",[44] of functioning "regimes" and "de facto governance" which do *not* "deserve recognition". To put it differently: Our use of the term seeks to identify the limits of legitimated law.

[40] G. Teubner, 1997 #.

[41] Note on terminology, including transnational law.

[42] F.I Michelman, *Brennnan and Democracy,* Princeton, NJ: Princeton UP, 1999, at 48

[43] R. Wiethölter, "Recht-Fertigungen eines Gesellschafts-Rechts", in: Ch. Joerges & G. Teubner (eds), *Rechtsverfassungsrecht. Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie*, Baden-Baden: Nomos, 2003, at 13-21.

[44] Source cited in Viellechner#

III.1 Supranational Conflict-of-Laws and the Limits of Constitutionalisation

European law can be understood as a means of compensation the failure of national constitutional states to give voice to foreign concerns. External effects of the decision-making within entities are obviously even more drastic in the international sphere. The first lesson students of private international law have to learn concerns exactly that problematic. The term "international" is misleading, so they are told, because the national lawgivers remain the masters of its content. Each state determines on its own the scope of application of its law.[45] The supranationalism we have attributed to *European* conflict of laws is a new and unique achievement which rests upon a series of common rules and principles and legally binding commitments to co-operate – the *Bund* which the Europeans have established.[46] There is no equivalent to the European constellation at international level ands hence no solid legal grounds for the abolition of the in-built methodological nationalism of private international law or its neighbouring disciplines.

And yet, globalisation and the increasing interdependency of formerly "sovereign" orders are furthering cosmopolitan orientations within national legal systems and complementary transnational developments (III.1.1). One such development is the emergence of transnational regimes. To be sure that notion reminds us of the fact that global ordering remains multi-rational, highly fragmented, and at best networked.[47] It is difficult to reject the realism in such characterisations. It seems possible, however, to overcome the one-dimensional rigidity of transnational regimes through their re-orientation with the help of a conflict-of-laws-approach. That suggestion will be illustrated through WTO law (III.1.2)

III.1.1 Elements of a Transnational First Order Conflict of Laws in a Kantian Weltrepublik

The expectation that growing awareness of extraterritorial effects and the insight into international interdependences will further cosmopolitan orientation in particular of courts is widely shared. Encouraging signals that the bearers of such hopes are more than *leidige Tröster*[48] can be found in Lars Viellechner's contribution to this conference.[49] His prime

[45] Kegel/Schurig #.

[46] Ch. Schönberger, *Schönberger,* "Die Europäische Union als Bund. Zugleich ein Beitrag zur Verabschiedung des Staatenbund-Bundesstaats-Schemas", (2004) 129 *AöR*, 81-120.

[47] See A. Fischer-Lescano, & G. Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law", (2004) 25 *Michigan Journal of International Law,* 999–1046; *Regime-Kollisionen. Zur Fragmentierung des globalen Rechts*. Frankfurt a.M.: Suhrkamp 2006.

example are human rights, which have – just as in European conflicts law! – the potential of providing widely recognised elements of a truly supranational conflict of laws.

Similar consideration nurture the hope that courts will move beyond the selfishness and one-sidedness of legislative intentions and become courageous enough to weigh prudently the values, regulatory concerns and interests which are at stake in international cases. [50] Florian Roedl[51] has made me aware of an outstanding scholar who has addressed the methodological nationalism openly and suggested a response, namely Andrew F. Lowenfeld.[52] He was the *spiritus rector* of the Third Restatement of Foreign Relations[53], which reads in § 402 and § 403, the pertinent provisions on the "Bases of Jurisdiction to prescribe":

> "Subject to § 403, a state has jurisdiction to prescribe law with respect to
>
> (1)
> (a) conduct that, wholly or in substantial part, takes place within its territory;
> (b) the status of persons, or interests in things, present within its territory;
> (c) conduct outside its territory that has or is intended to have substantial effect within its territory
>
> (2) the activities, interests, status, or relations of its nationals outside as well as inside its territory …"
>
> § 403
> "(1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of jurisdiction is unreasonable.
>
> (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including …"

Lowenfeld is outstanding, but not unique. The general clause of the Third Restatement rephrases the just mentioned suggestion to base the choice of law on a "weighing" of the interests of the concerned jurisdictions, developed in particular in the tradition of Brainerd

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48 I Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf* (1795) [Perpetual Peace. A Philosophical Sketch, in *Political Writings* (2nd ed., Hans Reiss ed., Cambridge UP, 1991, 103]**.**

[49] The Transnational Dimension of Constitutional Rights: Constitutionalizing Transnational Governance Regimes; see earlier Netzwerke (note 22).

[50] Most prominently in Europe by A. K. Schnyder, *Wirtschaftskollisionsrecht*, Zürich: Schulthess/Schaffer, 1990. For a recent instructive survey *cf.*, H. Sauer, *Jurisdiktionskonflike in mehrebenensystemen* (Conflicts of jurisdictions in multi-level systems), Berlin-Heidelberg-New York: Springer, 56 ff., 345 ff.

[51] "'No Legitimacy Beyond Democracy!' -- and its Consequences: A Few Recommendations for Rethinking European Law in Terms of Conflict of Laws", in Ch. Joerges, D. Chalmers, R. Nickel, F. Rödl, R. Wai, "Rethinking European Law's Supremacy", EUI Working Paper Law 12/05; id. "Weltbürgerliches Kollisionsrecht", PhD Thesis EHI Florence 2008, 118 ff.

[52] A. Lowenfeld, *International Litigation and the Quest for Reasonableness. Essays on Private International Law, Oxford* 1996, 88 ff.

[53] American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States, 1987.

Currie's "governmental interested analysis" (and against the latter's intentions). The problematic of this suggestion is twofold. It does not reflect, or can do nothing about asymmetric conditions between the concerned jurisdictions, as they tend to prevail in the international system. This dimension is even more dramatic than the social deficit of the EU. In addition, a weighing of interests by courts takes place in a politically empty space and is hence even more questionable than the recently over-expansive jurisprudence of the ECJ in the field of labour law.

To bridge the gap between factual constraints and truly transnational aspirations Florian Rödl[54] invokes Kant's *„Erlaubnisgesetz" der Vernunft* [55] This, however, may be too bold a suggestion, which fails to take sufficiently seriously the fragmentation phenomena through which both national conflict of laws and international law have responded to regulatory needs and concerns. These developments are irresistible and will not be tamed by noble normative suggestions. They require instead a "second order conflict of laws".[56]

III.1.2 The Example of WTO Law

The best-known example of a transnational legalized regime is provided by the WTO. It is at the same time an intensively debated issue of the constitutionalisation problematic in international economic law.[57] This debate focuses on two issues, One is responding to the one-dimensional commitment of the WTO to the furthering of free trade, This one-sidedness has provoked an intense scholarly debate on the need and the potential of WTO law to respond to other, often enough conflicting regulatory concerns and values, such as environmental protection, the protection of consumers or even of human rights and social protection. The second reference point of constitutionalist is the relation of WTO law to other legal orders, in particular to EU law and national law.[58] Both topics are, more intertwined than is usually acknowledged. The non-trade objectives may be laid down in international agreements; they may also be the background for a resistance to WTO-law, to which the conflict-of-laws approach provides better answers that an understanding of constitutionalisation which seeks to justify that law's supremacy.

[54] Note 52, at 103, 240.

[55] As understood by I. Maus, Zur Aufklärung der Demokratietheorie, Frankfurt/Main 1994, 62 ff.

[56] See III.2 *infra.*

[57] For an instructive overview *cf.*, D.Z. Cass, *The Constitutionalization of the WTO. Legitimacy, Democracy, and Community in the International Trading System*, Oxford: OUP, 2005.

[58] See for a recent overview H.Sauer (note 51), 207-260.

The brief discussion here focuses on the second dimension and the most challenging examples. Its objective is to document the – partial! – compatibility of the WTO jurisprudence with the conflict-of-laws approach and its normative merits. It is not by chance that one can discover in this jurisprudence two competing trends, one seeking to establish "science" as an supposedly objective arbiter, the other accepting a broader variety of concerns. I can build upon prior analyses in which I have evaluated the holding of the Appellate Body in the first Hormone case,[59] while criticising the panel report in the GMO case.[60] The GMO case stand in my reading for the first trend, the claim for a "sound science" rule to which the parties to the WTO proceedings are subjected and which indirectly disciplines the Member States of the EU. I refrain from restating my comments on *Hormones I* and the *GMO* case and restate my argument in light of the Appellate Body's recent second hormones decision.[61]

In *Hormones*[62] the subject matter was the administration of growth hormones to cattle; a practice illegal in the EU, but common in the US. Which law is applicable? This is the question traditional conflict of laws would pose. But this is not the question the Appellate Body had to answer. The Appellate Body had to look for guidance in the *The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)*. According to that Agreement trade restricting measures 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): These provisions can be interpreted as the search for a transnationally acceptable, meta-norm institutionalising "science" as peacemaker. All WTO lawyers know, however, about the limits of scientific authority. Science typically provides no clear answers to questions posed by politicians and lawyers; it cannot resolve ethical and normative controversies about numerous technologies; and consumer *angst* might be so significant that neither policy-makers nor the economy can ignore it.

All these difficulties, however, do not stand in the way of applying a conflict-of-laws approach to transnational trade governance. The Appellate Body wisely refrained from

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[59] Ch. Joerges & J. Neyer, "Politics, risk management, World Trade Organisation governance and the limits of legalization", 30 (2003) *Science and Public Policy* 219-225.; Ch. Joerges & Ch. Godt, "Free Trade: The Erosion of National and the Birth of Transnational Governance", in: St. Leibfried & M. Zürn (eds.) *Transformation of the State*, Cambridge, CUP 2005, 93-117.

[60] Ch. Joerges, Sound Science in the European and Global Market: Will Karl Polanyi Ever Arrive in Geneva?*, Forthcoming in M. Everson & E. Vos (eds.), *Uncertain Risks Regulated in National, European and International Context,*London: Routledge-Cavendish 2008.

[61] UNITED STATES – CONTINUED SUSPENSION OF OBLIGATIONS IN THE EC – HORMONES DISPUTE, AB-2008-5, WT/DS320/AB/R, 16 OCTOBER 2008.

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

referring to science as the ultimate authority, which would be legitimated to resolve the conflict. It nevertheless channelled the ongoing controversy thus promoting a civilized conduct of the conflict.[63]

Hormones I had opened the way for policy review within and among the concerned polities – and for further litigation. Following the WTO panel, the EU amended its pertinent Directive 2004/74/EC in the light of a series of scientific reports. That amended directive, however, again contained a prohibition of one specific growth hormone and provisional prohibitions of 6 others. The Dispute Settlement Body was notified on 27 October 20003 with the EC accordingly expecting that Canada and the US would now terminate their suspension measures vis-à-vis the EC. Canada and the US, however, contended that the measure taken was not "based on science" and hence not in compliance with the AB's requests. They upheld their measures and therefore the EC brought on 13 February 2005 WTO complaints against both Canada and the US.

The WTO Panel, which dealt with this matter, was established on 17 February 2005. In its report, circulated on 31 March 2008, it concluded that the EC measures were not founded on an appropriate risk assessment as prescribed by Art. 5.1of the SPS Agreement and that because of their insufficiency, Canada and the US were not required to lift their suspensions. The Appellate Body, then, accepted that interdependence existed 'in principle': *i.e*., made up of proper implementation by the EC on the one hand and the terminations of the other. This is an important finding because it subjects WTO members to a disciplined resolution of their disagreement as to the adequacy of the implementing measure.[64] It presupposes, however, that the Panel's views on the inadequacy of the EC measures were rejected. This is indeed what occurred. Two of the objections of the Appellate Body deserve to be underlined. The first concerns the famous distinction between "risk management" and "risk assessment". The

[63] This type of restraint was wise for an additional reason. The standards to which the TBT and the SPS Agreement refer are produced "outside" any legal system. At national and European level, the generation of non-state "law" is operating in the shadow and under some supervision of politically accountable actors, courts and other authorized bodies. At the international level, conflict of laws can again deliver an *ersatz*. It can develop the conditions--especially procedural requirements--under which "private transnationalism" (as in standardisations) or more intergovernmental systems (like the CAC) "deserve recognition." The parallel to the recognition of foreign law and foreign judgments seems obvious but is rarely drawn. See E. Schanze, "International Standards - Functions and Links to Law", in Peter Nobel (ed.), *International Standards and the Law*. Bern: Stämpfli 2005, at 84-103, esp. at 90-91 and Joanne Scott, "International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO", (2004) 15 *EJIL,* 307-354.

[64] The basis for this requirement was found in Art. 21.5 DSU: "Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report".

Appellate Body did not accept the Panel's[65] exclusion of risks arising from the abuse or misuse of hormones from the factors to be taken into account in a risk assessment under Art. 5.1. SPS Agreement.[66] More important for our argument, the AB rejected the Panel's views on the legal importance of international standards. Where international standards exist, so the panel had explained, "there must be a critical mass of new evidence and/or information that calls into question the fundamental precepts of previous knowledge and evidence so as to make relevant, previously sufficient, evidence now insufficient" within the meaning of Article 5.7 of the SPS agreement.[67] There are illuminating parallels here with the so-called safeguard clauses, which can be found in all European directives in the fields of safety regulation. These clauses provide for a renewal of existing standards in the light of new findings. In a similar vain, the AB found the Panel's "too inflexible. Although the new evidence must call into question the relationship between the body of scientific evidence and the conclusions concerning risk, it need not rise to the level of a paradigm shift".[68] It is one thing to find errors in the yardsticks the Panel defined, it is quite another to replace it by a proper assessment. This, then may be the wisest element in the hundreds of pages: "In light of the numerous flaws we have found in the Panel's analysis, and the highly contested nature of the facts, we do not consider it possible to complete the analysis in this case...".[69]

All this seems to confirm our reading of the first hormones report. The AB does not refuse to take a decision. It rather clarifies the limits of its competences. The political dimensions of risk regulation must be clarified by the politically accountable actors. They must not be substituted by "scientific findings" and the law ends in the determination of the procedural yardsticks risk assessors and risk managers have to respect. There is of course a prize to pay for the abolition of the fiction of scientific objectivity and the rejection of this type of "cognitive opening" of the law. That price is legal certainty, albeit a certainty which would rest on shaky grounds.

III.2 A Transnational Second Order Conflict of Laws?

[65] See Panel Report, *US – Continued Suspension*, paras. 7.519 and 7.520; Panel Report, *Canada – Continued Suspension*, paras. 7.491 and 7.492.

[66] See paras. 548-555.

[67] Panel Report, *US – Continued Suspension*, para. 7.648; Panel Report, *Canada – Continued Suspension*, para. 7.626.

[68] Para. 705

[69] Para. 620.

In an instructive sketch of the development of international law, J.H.H. Weiler has identified various "geological layers" – "International law as Transaction, international law as Community, and international law as Regulation" -- each of them specific in its normativity and legitimacy.[70] Weiler's interpretations mirror the changing functions of law at all levels of governance as we have characterised them in our first sections. WTO law with its close links to the SPS and the TBT Agreements is a particularly instructive example to transnational regulatory policy making. This example stands by no means alone The establishment of transnational regimes, the cooperation of administrations in transnational networks the inclusions of non-governmental actors and the resort to expertise in regulatory politics all are responses to the interdependence and cooperative exigencies in the postnational constellation.

An analysis of pertinent developments can build upon a broad variety of European experiences or the similarity of suggestions:

(1) A European Administrative Procedures Act, which would ensure both the effectiveness and legitimacy of European market governance, has for a good while been on the agenda of prominent scholars.[71] Equivalent suggestions have been submitted within the "Global Administrative Law" project, in particular by one of its organisers who happens to be the author of a seminal analysis of the American Administrative Procedures Act.[72]

(2) Coordinating cooperation among representatives from national administrations as analysed and defended by Anne-Marie Slaughter[73] resembles the cooperation in Europe's Regulatory Committees and deals with the same difficulty, namely the risks of technocratic governance and the difficulty to reconcile problem-solving by administrative networks with the standards of democratic constitutionalism.

(3) Transnational governance can establish an infrastructure, which mirrors the European Committee system even stronger in that it relies on epistemic communities and the integration of non-governmental actors. This is the variety we have already started to consider when mentioning the linkages between WTO Law, the SPS and the TBT Agreements.

This last-named variant has of course been intensively explored within the Bremen project,[74] albeit not (yet) in the perspectives of the conflict-of-laws approach I am trying to develop. In such a perspective one would consider:

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[70] See J.H.H. Weiler, "The Geology of International Law – Governance, Democracy and Legitimacy", *ZaöRV* 2004, 547 ff., at 552.

[71] Majone#; Dehousse#

[72] R.B. Stewart, U.S. ADMINISTRATIVE LAW: A MODEL FOR GLOBAL ADMINISTRATIVE LAW? (2005) 68 LAW AND CONTEMPORARY PROBLEMS 63-#

[73] *A New World Order,* Princeton-Oxford: Princeton UP 2004.

[74] Th Hüller & M.L. Maier, „Fixing the Codex? Global food-safety Governance under review, in Ch. Joerges & E.-U. Petersmann (eds.), *CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION,* Oxford: Hart 2006, 267-300; M.L. Maier, Maier, „Normentwicklung durch WTO-Gremien am

(1) Where and to what degree can we assume that non-governmental organisations are committed to fair, politically and socially sensitive procedures?

(2) Where and to what degree are these organisations operating in the shadow of laws, in particular tort and antitrust law?

(3) Can we assume that standardisation procedures take conflicting policy concerns into account?

(4) Are review mechanisms in place, which expose standardisation practices to public concerns?

These criteria should help us to answer the question of whether the outcome of standardisation procedures can be accepted as a fair compromise between the affected jurisdictions and their interests. Such results are much more unlikely at international level than within the EU. The main obstacle is socio-economic diversity and the lack of means to compensate for distributional implications of an imposition of standards. This is why the law has to provide for specific exit options or to limit their prescriptive power.[75]

III.3 The Third Dimension

For the time being I content myself with references back to the assessment of para-legal phenomena in national law, European law and WTO law in the preceding sections. As underlined there, the analogy between the recognition of foreign judgments, administrative decisions, arbitration awards and the supervision of "new modes" of governance is rarely drawn.[76] Its sustainability is nevertheless quite obvious. Suffice it here to point to the American literature cited in Lars Viellechner's contribution:[77]

> Either transnational conflicts are resolved by comparable mechanisms in national private law which preserve the integrity of the national legal tradition. Or national constitutional law evolves in reaction to the emergence of the transnational regulatory networks. Accordingly, even in U.S. American constitutional theory, "a broader view of the Constitution's scope" is envisaged that "would reach the

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Beispiel von Handel und Gesundheitsschutz: der SPS-Ausschuss", TranState Working Paper No. 68. Bremen: Sfb "Staatlichkeit im Wandel" 2007.

[75] The Report of the Appellate Body in *Hormones I* documents this sensitivity: "To read Article 3.1 [of the SPS Agreement] as requiring Members to harmonize their SPS measures by conforming those measures with international standards, guidelines and recommendations, in the here and now, is in effect, to vest such international standards, guidelines and recommendations (which are by the terms of the Codex recommendatory in form and nature) with obligatory force and effect. …[Such an] interpretation of Article 3.1 would, in other words, transform those standards, guidelines and recommendations into binding norms. But … the SPS Agreement itself sets out no indication of any intent on the part of the Members to do so.": Appellate Body Report, note 62, para. 165.

[76] But see E. Schanze, "International Standards - Functions and Links to Law", in P. Nobel (ed.), *International Standards and the Law*, Berne: Stämpfli, 2005, at 84-103, esp. at 90-91.

[77] Note 50; text following note 78 (footnotes omitted).

> private standard-setting bodies – which now function so powerfully (yet so invisibly) to establish the code that regulates cyberspace – and subject them to constitutional norms of fair process and judicial review."

Further insightful analyses are available.[78] Admittedly, the imposition of such supervision on transnational governance arrangements may expose their organisers to competing and partly irreconcilable yardsticks. It can hardly be otherwise. Pluralist dissolution may then continue to haunt transnational governance regime. That, however, is not necessarily an unappealing prospect. Non-governmental actors are experienced players in multi-jurisdictional arenas and will manage to comply with not so coherent exigencies.

[78] R.Wai, "Conflicts and Comity in Transnational Governance: Private International Law as Mechanism and Metaphor for Transnational Social Regulation through Plural Legal Regimes", in Ch. Joerges & E.-U. Petersmann (*op.cit*, note 75), 229-262.