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Conflict of Laws as Constitutional Form

Reflections on International Trade Law
and the *Biotech* Panel Report

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Abstract

Hardly anywhere is the trend towards a perfection of transnational governance arrangements and their “legalization” more visible than in international trade. Governance arrangements established through and alongside WTO law are both practically important and theoretically challenging. They do not just organise international trade relations. They also affect national and regional (European) regulatory policies partly directly, partly more indirectly. How can we explain and how should we evaluate their emergence?

The WTO system of 1994, which replaced the GATT of 1947, responded to the ever increasing importance of non-tariff barriers to trade. These barriers reflect regulatory concerns especially in the fields of health and safety, consumer and environmental protection. The importance for WTO members is such that they cannot simply be abandoned for the sake of free trade. This is why the responses the new international trade system institutionalised by special agreements concerning non-tariff barriers to free trade such as the *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS) and the *Agreement on Technical Barriers to Trade* (TBT) reflect a politicisation of international trade. Can we conclude that international markets have been re-regulated and that international trade law ensures their “social embeddedness”?

The paper seeks yardsticks for an answer to these questions in the debates on transnational constitutionalism. It submits that constitutionalisation can and should be based on a conflict-of approach. For its elaboration of this suggestion, the paper first contrasts the juridification of transnational governance at the European and the international level. It then discusses the WTO panel report on the *Biotech* dispute. It concludes that the legalisation and judicialisation in that case have remained “thin”. What can be observed is a political rather than a social and legal embeddedness of markets.

Keywords

Constitutionalisation - European Governance - International Trade - Legalization - Legitimacy - Multilevel Governance - National Autonomy - Risk Regulation - Transnational Governance - WTO

Introduction

International law has become a discipline which fascinates jurists working in other fields, among them even some who study such mundane things as markets and market economies. One of the reasons for this new attractiveness is certainly the intrusion of international law into new spheres, its exposure to new societal demands and its search for new theoretical and methodological orientations. Such mutations nurture hopes among at least some of their observers. Students of private and economic law who understand markets not as more or less automatically and more or less perfectly functioning mechanisms adjusting supply and demand, but as quite fragile, morally, socially and politically embedded institutions. Those who share such premises will assign to law the function of fostering the social responsibility of markets. And for precisely that reason they have to move beyond the borders of their own discipline to overcome its “methodological nationalism” which ties all core analytical and normative categories to the nation state. This framework clearly has become insufficient. It is less clear, however, whether equivalents to the instruments at the disposal of the nation state can be developed at a transnational level. International Law, even the New International Law, seems quite distant from the ways and means by which national law and regulatory policies have accomplished the “social embeddedness” of our formerly national economies.

But exactly that distance may be problematic. The example of the European Union may be instructive here. Over a good number of years we have been witnessing an enormously intensive scholarly, pragmatic and political debate over the constitutionalisation of Europe. That debate touched upon the “European social model” rather tangentially.¹ Precisely this not so benign neglect of the market and its social embeddedness has contributed to the rejection of the Constitutional Treaty in the French referendum.² Europe may have failed to correct what Fritz W. Scharpf has characterised as a decoupling of economic and social integration.³ But the potential of the EU to address its social deficit still seems relatively strong if contrasted with the means available to internationally supervise the international economy. Is the vision of socially embedded transnational markets, then, purely utopian? Markets are “always socially embedded”, Karl Polanyi taught us.⁴ I will try to take his message seriously. How shall I proceed?

I. First, I shall undertake an excursion into a largely forgotten discipline, i.e. conflict of laws scholarship, pointing to the work and theses of one important but in Europe hardly appreciated American scholar, Brainerd Currie.

¹ See C. Joerges and F. Rödl (2005) ‘The ‘Social Market Economy’ as Europe’s Social Model?’, in L. Magnusson and B. Stråth (eds) *A European Social Citizenship? Preconditions for Future Policies in Historical Light*, Brussels: Lang, pp. 125-58.

² D. della Porta and M. Caiani (2006) ‘Quale Europa? Europeizzazione, identità e conflitti’ (typescript EUI Florence 2005, on file with the author); J. Schild (2006) ‘Ein Sieg der Angst – das gescheiterte französische Verfassungsreferendum’, *Integration* 28:3, pp. 187-200.

³ See F. W. Scharpf (2002) ‘The European Social Model: Coping with Diversity’, *Journal of Common Market Studies* 40, pp. 645-70; F. W. Scharpf (2006) ‘The Joint Decision Trap Revisited’ *Journal of Common Market Studies* 44, pp. 845-64.

⁴ K. Polanyi ([1944] 1992) *The Great Transformation: The Political and Economic Origins of Our Time*, Boston: Bacon Press, esp. pp. 45-58, 71-80.

II. On this basis, as second step I shall present my theoretical concerns: these deal with the notion of constitutionalisation, at all levels of governance.

III. The third step of the argument is a strictly juridical one. I will retranslate and rephrase in legal terms my theoretical premises and positions. Here I take up the conflict of laws tradition once more, but adapt it to European multi-level system of governance.

IV. In a fourth and final step, I address a much discussed sector of transnational governance, WTO law, my specific focus being the recent GMO dispute. Can what we observe in this dispute be called a “legalisation” of international trade and can we expect that conflict resolution will be “judicialised” further? Or are we rather observing a return to politics?

An Idiosyncratic Preliminary: The Brainerd Currie-led American Conflict of Law’s Revolution of the 1960s

Conflict of laws, *Kollisionsrecht*, is not an idiosyncratic term, but the field associated with it is much better known as Private International Law (PIL) in all of Continental Europe. PIL determines the applicable law in cases with foreign elements, *i.e.*, with “links” to, or relationships with, different legal systems. If a Romanian drives with his car to Italy and has an accident somewhere in Austria in which a driver from France is involved, what law do we apply? PIL provides us with rules of rule-selection. Its rules are, in principle, indifferent as to the content of the potentially applicable laws. PIL-justice is categorically different from substantive justice: what it seeks to determine is not which law is better or more just, but rather which legal system should govern the matter at hand. It is exactly this indifference towards content that enables national courts to accept and apply foreign law and permits acceptance of PIL rules across all jurisdictions, furthering the uniformity of decision-making in legal controversies all over the world - the famous “*Entscheidungseinklang*”.

In 1958, the American Law Professor Brainerd Currie published the first of a series of articles in which he explained his “misgivings concerning our inherited method of handling problems in the conflict of laws”.⁵ Currie started what was to become heralded and criticised as the American conflicts revolution, a break with older (esp. Bealian) American traditions and their European (esp. Savignian) counterparts.

The strength of Currie’s influence, and stories about whether the revolution failed or succeeded, need not concern us here in any detail.⁶ However, two elements of Currie’s approach are of crucial importance to my argument. The first is quite simple: Modern law, even our private law, has become “politicised”; it expresses and pursues “policies”. This is why we can attribute an “interest” to a polity’s jurisdiction in the application of its policies. The second element follows from this insight with great

⁵ For a brief summary cf. B. Currie (1959) ‘Notes on Methods and Objectives in Conflicts of Laws’, in B. Currie (1963) *Selected Essays on the Conflict of Laws*, Durham, NC: Duke University Press, pp. 177-87.

⁶ The most constructive recent contributions to this “revolutionary” tradition of which I am aware are L. Kramer (1991) ‘More Notes on Methods and Objectives in Conflict of Laws’, *Cornell International Law Journal* 24, pp. 245-78, and L. Kramer (1990) ‘Rethinking Choice of Law’, *Columbia Law Journal* 90, pp. 277-345.

stringency. Courts are bound to follow the policies of their own jurisdiction. They have no mandate to evaluate the policies of a foreign jurisdiction. Let me cite from Currie's summary:

1. Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.
4. ["False problems"] If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply the foreign law.
5. ["True conflicts"] If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy...⁷

All of these directives, which amounted to an assault on the most precious values and achievements of PIL, namely, its tolerance of foreign law, provoked heated debates. They brought a political dimension into the citadel of private law without indicating how the law could cope with the resulting unruliness. Though Currie to an extent moderated his position in later writings,⁸ his concerns about the epistemic and constitutional limits of the judiciary always remained in place:

[C]hoice between the competing interests of co-ordinate states is a political function of a high order, which ought not, in a democracy, to be committed to the judiciary: ... the court is not equipped to perform such a function; and the Constitution specifically confers that function upon Congress.⁹

Brainerd Currie was writing for a federal system. Even in such a system, he asserted, the "politicisation" of modern law, in other words, its application in pursuit of policy goals, has transformed the choice-of-law problem into a delicate task, for which courts are ill-equipped, and for performance of which, where the "governmental interests" of the states concerned are in conflict, they lack legitimacy. I will not defend this position. But I do believe that we should take Currie's queries seriously: Is transnational governance a proper task for a judicial, let alone quasi-judicial, body? Is judicialisation of transnational governance at all conceivable?

Constitutionalisation

Governance must not be equated with government. It is nevertheless a response to functional needs which arise by necessity even where no government capable of taking directive action is in place. This is what James Rosenau, to whom we owe the idea of "governance without government" in the international system, has famously

⁷ B. Currie (1963) *Selected Essays, supra*, note 5. See, also, B. Currie (1963) 'Comment on *Babcock v. Jackson*', *Columbia Law Review* 63, 1233, 1242 ff.

⁸ B. Currie (1963) 'The Disinterested Third State', *Law & Contemporary Problems* 28, pp. 754, 763.

⁹ B. Currie (1958) 'The Constitution and the Choice of Law: Governmental Interests and the Judicial Function', in B. Currie (1963) *Selected Essays on the Conflict of Laws*, Durham, NC: Duke University Press, pp. 188-282, at 272.

observed and explained.¹⁰ If governance is functionally similar to government, then it is an exercise of public power, which demands supervision. Bodies allotted that supervisory role must be duly authorised; in other words, a constitutional framework must be established to guide and control their operation.

Democratic Constitutionalism and Globalising Markets

Constitutionalisation has become the most prominent of all buzzwords in legal discourses. For a decade or so, we have read of the constitutionalisation of what, formerly, was purely legal - all branches of national law, including private law. Libraries could be filled with the proposals that have been advanced for curing Europe's democracy deficit via constitutionalisation. In the wake of that debate, international law is developing its own constitutionalisation agenda, which is extending into its sub-disciplines, most notably WTO law. And let me mention also societal constitutionalism, a theoretical vision to which I will return.

Clearly, it is impossible to summarise all these debates briefly in any meaningful way. Let me therefore start with my own very strong normative notion of constitutionalism and constitutionalisation. I reserve this term for law that seeks to justify law-making processes, a "law of law production", to use Frank Michelman's formula.¹¹ This is what we expect the constitutions of democratic states to accomplish. It is this normative promise to which I refer in my understanding of constitutionalisation. This premise implies that the citizens of a democratic polity have a claim to determine the economic and social conditions under which they live. This is not a social right to social justice. It is a right to participate in democratic processes which form and shape these conditions. To put it slightly differently: constitutionalism must reach down into the economic system and the social fabric of society. If it fails to do so, it loses its democratic credentials.¹²

This is a strong statement, to be sure. It rests upon an understanding of the project of political modernity as collective self-determination, and is at odds with the economic definition of modernity as the "autonomous determination of the ways in which human needs are satisfied".¹³ But it is this statement which helps us to understand the difficulties of the protagonists of the project of political modernity with the post-national constellation, with Europeanisation and even more so with globalisation. To

¹⁰ J. N. Rosenau (1992) 'Governance, order, and change in world politics', in J. N. Rosenau and E.-O. Czempiel (eds) *Governance without government in world politics*, Cambridge/New York: Cambridge UP, pp. 1-3.

¹¹ F. I. Michelman (1999) *Brennan and Democracy*, Princeton, NJ: Princeton UP, p. 48; as a close equivalent in German jurisprudence, there is the term "Rechtfertigungs-Recht" or "Rechtsverfassungsrecht" coined by R. Wiethölter; see R. Wiethölter (2005) 'Justifications of a Law of Society', in O. Perez and G. Teubner (eds) *Paradoxes and Inconsistencies in the Law*, Oxford: Hart, pp. 65-77, also available at <http://www.jura.uni-frankfurt.de/ifawz1/teubner/RW.html>. See also C. Joerges (2006) 'Constitutionalism in Postnational Constellations: Contrasting Social Regulation in the EU and in the WTO', in C. Joerges and E.-U. Petersmann (eds) *Constitutionalism, Multilevel Trade Governance and Social Regulation*, Oxford: Hart, pp. 491-527, (493).

¹² P. Wagner (2005) 'Introduction. The Political Construction of Contemporary Capitalism', in C. Joerges et al (eds) *The Economy as a Polity*, London: UCL Press, pp. x-xvi; A. Somek (2004) 'Dogmatischer Pragmatismus. Über die Normativitätskrise der Europäischen Union', in S. Hammer et al (eds) *Demokratie und sozialer Rechtsstaat in Europa. Festschrift Theo Öhlinger*, Wien: Springer, pp. 41-67; C. Joerges (2005) 'What is left of the European economic constitution? A melancholic eulogy', *European Law Review* 30, pp. 461-89.

¹³ F. Block (2005) 'Towards a New Understanding of Economic Modernity' in C. Joerges et al., *The Economy as a Polity*, London: UCL Press, pp. 3-16.

take just one, albeit, at least in Germany, particularly prominent example, Jürgen Habermas argues that Europe needs a constitution if it is to preserve the European “social model”.¹⁴ Yet this claim is by no means as naïve as it has been portrayed to be by certain critics. Habermas introduced, at an early stage, the further condition that “any assessment of the chances for a European-wide democracy depends in the first place upon empirically grounded arguments”.¹⁵

Democratic Constitutionalism and Transnational Governance

Applied at the global level, constitutionalism, in the sense I set out above, appears at best a utopian project. Those advocating such use of the term need to re-define it. One famous suggestion is to proclaim an “international community” as the basis and object of constitutionalisation.¹⁶ I will not engage in discussion of such suggestions,¹⁷ because my concern here is to understand the sociological basis of law, the linking of validity to facticity. And as a private lawyer I do not shy away from exploring a possibility which Habermas himself categorically rejects: “markets, unlike polities, cannot be democratized”.¹⁸

My starting point here is the phenomenon of an intensifying “embedding” of markets at international level via governance arrangements established through and alongside WTO law.

The background to the strong development of international trade law is well known. Under the 1947 General Agreement on Tariffs and Trade (GATT) regime, objections to free trade were essentially economic, and tariffs were a nation state’s primary means of protecting its interests. However, by the early 1970s, tariffs had been substantially reduced and, subsequently, the imposition and removal of non-tariff barriers (NTBs) that reflected a wide range of domestic concerns about the protection of health, safety, and the environment have come to dominate trade agreements and their implementation. The growing impact of NTBs on international trade is hence indicative of the latter’s politicisation. WTO 1994 stands for a juridification/legalisation and judicialisation of this new reality.¹⁹

¹⁴ J. Habermas (2001) ‘Warum braucht Europa eine Verfassung?’, in J. Habermas *Zeit der Übergänge*, Frankfurt a.M.: Suhrkamp, pp. 104-29 (English version: *So, Why Does Europe Need a Constitution?* available at <http://www.iue.it/RSCAS/e-texts/CR200102UK.pdf>)

¹⁵ J. Habermas (1998) *The Inclusion of the Other: Studies in Political Theory*, C. Cronin and P. de Greiff (ed.), Cambridge, MA: MIT Press, p. 158; see also J. P. McCormick’s (2006) precise analysis, ‘Habermas, Supranational Democracy and the European Constitution’, *European Constitutional Law Review* 2:3, pp. 398-423.

¹⁶ For a review of pertinent contributions, see B. Fassbender (1998) ‘The United Nations Charter as Constitution of the International Community’, *Columbia Journal of Transnational Law* 36, 529 ff; on C. Tomuschat in particular cf. A. von Bogdandy (2006) ‘Constitutionalism in International Law: Comment on a Proposal from Germany’, *Harvard International Law Journal* 47: 1, pp. 223-42.

¹⁷ A. Fischer-Lescano (2005) *Globalverfassung. Die Geltungsbegründung der Menschenrechte*, Weilerswist: Velbrück, 253 ff.

¹⁸ J. Habermas, (1999) ‘The European Nation-State and the Pressures of Globalization’, *New Left Review* 235, 46 ff.; see J. P. McCormick (2006) ‘Habermas, Supranational Democracy and the European Constitution’, *European Constitutional Law Review* 2:3, at 402 f.

¹⁹ There is simply no space here for an analysis of the state of the art. An outstanding contribution to the very rich debate is J. Pauwelyn (2005) ‘The Transformation of World Trade’, *Michigan Law Review* 104:1, pp. 1-66.

Do these developments, to take up another Habermasian formula,²⁰ “deserve recognition”? Or, more specifically, by which criteria should we assess their normative quality? This second dimension of the discussion is, in my understanding, the agenda driving recent controversies concerning the constitutionalisation of international trade law.

To rephrase: The fundamental dilemma of WTO law lie in its relationship with national law. Can national regulatory policies survive WTO law? Does WTO law overrule and thereby erode the regulatory politics of WTO members? Or, to turn the question around: Will WTO law survive the steady growth of regulatory law in national or regional legal systems? This is a question of clear constitutional dimensions. The constitutionalisation debate is so-to-speak a logical consequence of the emergence of transnational governance structures, and an indispensable one – at least if one continues to believe that the type of power which is administered through these arrangements should be legitimated, and that we should at least try to defend the idea of law-based legitimacy.

But what promise is there of fulfilling such ambitions? Not a great deal, in my view, if we continue to seek the type of legitimacy constitutional democracies can claim, while refusing to be content with the type of “constitutional talk”²¹ which decouples normativity from facticity. My thesis is that we can avoid both Scylla and Charybdis, through adoption of an alternative approach I call “conflict of laws as constitutional form”.

Conflict of Laws as Constitutional Form: The Case of the EU

This second step will be demanding. I will again operate with that not so well-known legal discipline to which I referred at the start. But this time, I will also seek to revise it in order to overcome Currie’s destructive normative nihilism. What I aim to achieve might be approximated to a Hegelian manoeuvre, a synthesis of the theses of traditional PIL on the one hand, and the antitheses of the American conflict revolution on the other. The synthesis is one neither tradition could imagine: conflict of laws of supranational validity. This revised understanding of conflict of laws supplies us with a new perspective on transnational constitutionalism. Last but not least, I will argue that my legal conceptualisation is not only normatively attractive but also compatible with the structures and function of transnational governance at both European and international levels – and even has potential to reflect their specifics.²²

²⁰ J. Habermas (2001) ‘Remarks on Legitimation through Human Rights’, in J. Habermas, *The Postnational Constellation. Political Essays*, Cambridge, MA: MIT Press, pp. 113-29.

²¹ N. Walker (manuscript, 2007) ‘Globalization and transnational constitutionalism’, Florence (on file with author).

²² I refrain from a discussion of similarities and differences with the work of G. Teubner and A. Fischer-Lescano; cf. most recently ‘Fragmentierung des Weltrechts: Vernetzung globaler Regimes statt etatistischer Rechtseinheit’, in M. Albert and R. Stichweh (forthcoming) (eds) *Weltstaat – Weltstaatlichkeit: Politische Strukturbildung nach der Globalisierung*, Wiesbaden: VS Verlag. – As is plainly visible, my theoretical framework is indebted to the discourse theory of law of Habermas. But just as I have to depart from the efforts he made to adapt this framework to Europeanisation and globalisation, G. Teubner and A. Fischer-Lescano have to make a very creative use of systems theory in general and Luhmann’s theory of the world society in particular. Constitutions, Luhmann has explained, bridge the legal and the political system (‘Verfassungen’, in *Recht der Gesellschaft*). That formula is simply inapplicable at international level. The *Ersatz* there is “the search for a structural coupling of global law and global governance”, explains A. Fischer-Lescano (*supra*, note 17). That is not so far away from my

Let me start with Europe, and my thesis that we can, and indeed should, understand European law as a new species of supranational conflict of laws. I start with this bold thesis because I hope thereby to underline that the conflict-of-laws approach to European constitutionalism is not a matter simply of selecting the law of one particular jurisdiction. Rather, its objective is to turn the debate on the democracy deficit in European governance upside down: it does not start with the much-deplored democracy deficits of the Union, but focuses on those of constitutional nation states. The kernel of the argument may date back to Rousseau²³ and is not as idiosyncratic as my terminology: “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”.²⁴ 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. As I have recently put it: “We must conceptualise supranational constitutionalism as an alternative to the model of the constitutional nation-state which respects that state’s constitutional legitimacy but, at the same time, clarifies and sanctions the commitments arising from its interdependence with equally democratically legitimised states and with the supranational prerogatives that an institutionalisation of this interdependence requires”.²⁵

What should that postulated design have to do with conflict of laws? That discipline is concerned with differences between legal systems. Its vocation is – in my understanding – the disciplining, through law, of conflicts arising out of these differences. This law is to transform international anarchy into what Kant, however tentatively, envisaged as a cosmopolitan ‘*Rechtszustand*’. Conflict of laws “juridifies” the Union through rules and principles which resolve the paradoxical task of creating “unity in diversity”. This is its constitutional function. It does what conflict of laws, and in particular international administrative (public) law in the continental tradition, historically refused to do. In the continental tradition, the application of foreign public law seemed irreconcilable with the sovereignty of the forum state. “Kein Staat macht sich zum Büttel eines anderen Staates”, we still read in Germany’s leading treatise.²⁶ But this is precisely what my supranational conflict of laws asks them to do. This

conceptualisation of the constitutionalisation of transnational governance through a second order conflict of laws (see C. Joerges and M. Everson (2006) ‘Re-conceptualising Europeanisation as a public law of collisions: comitology, agencies and an interactive public adjudication’, in H. C. H. Hofmann and A. H. Türk (eds) *EU Administrative Governance*, Cheltenham, UK: Edward Elgar, pp. 512-40; C. Joerges (2007) ‘Europarecht als ein Kollisionsrecht neuen Typs: Wie eine europäische *unitas in pluralitate* verfasst werden kann’, in M. Führ *et al* (eds) *Umweltrecht und Umweltwissenschaft. Festschrift für Eckard Rehlinger*, Berlin: Erich Schmidt Verlag, pp. 719-47).

²³ Thus R. Grant and R. A. Keohane (2005) ‘Accountability and abuses of Power in World Politics’, *American Political Science Review* 99:1, pp. 29-43.

²⁴ C. Joerges and J. Neyer (1997) ‘From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology’, *European Law Journal* 3, pp. 273-99, at 293.

²⁵ See C. Joerges (2006) ‘Deliberative Political Processes’ Revisited: What Have we Learnt About the Legitimacy of Supranational Decision-Making’, *Journal of Common Market Studies* 44:4, pp. 779-802, at 791-95.

²⁶ G. Kegel and K. Schurig (2000) *Internationales Privatrecht*, 8th ed., Munich: Beck, p. 1094: „Jeder Staat... ist frei... duldet keine Richter über sich“.

authority has its positive basis in the “Bund” which the European Treaty has established.²⁷

Why use the notion of conflicts in the first place, rather than a more pleasant term, such as “horizontal constitutionalism”? What is specific about the EU is the need to deal continuously with a variety of conflict patterns, namely vertical conflicts (the realm of supremacy), horizontal conflicts (the realm of mutual recognition) and diagonal conflicts.²⁸ In all of these constellations, European conflict-of-laws can build upon legal commitments and principles which further co-operative problem-solving, which are quite firmly enshrined in the Treaty, and which have been further developed in Europe’s *praxis*.

I refrain from further elaboration here, but would underline two potentialities of the EU which are either not present or considerably weaker at international level. The first: Europe can turn to secondary legislation as a means of ensuring stable and long-term co-ordinated problem-solving.²⁹ The second: Europe has the means to organise a cognitive opening of the legal system for scientific and other expertise without subjecting itself to technocratic governance.

Juridification and its Limits at International Level

Beyond the EU, issues are more complex. And yet, the conflict-of-laws approach can be brought to WTO law and adapted to the specifics of WTO-governance. Let me explain this thesis with the help of two cases, the hormones case and the GMO dispute.

²⁷ On that notion see C. Schönberger (2004) ‘Die Europäische Union als Bund. Zugleich ein Beitrag zur Verabschiedung des Staatenbund-Bundesstaat-Schemas’, *Archiv des öffentlichen Rechts* 129, 81-120 (88 ff.). The term was previously used by C. Schmitt ([1928] 1993) *Verfassungslehre*, Berlin: Duncker und Humblot, 363 ff.: „Der *Bund* ist eine auf freier Vereinbarung beruhende, dem gemeinsam Zweck der politischen Selbsterhaltung aller Bundesmitglieder dienende, dauernde Vereinigung, durch welche der politische Gesamtstatus jedes einzelnen Bundesmitgliedes im Blick auf den gemeinsamen Zweck verändert wird“ (p. 366). Schmitt’s *Bund* presupposed a kind of homogeneity (“...jeder Bund [beruht] auf einer wesentlichen Voraussetzung, nämlich der *Homogenität aller Bundesmitglieder*, d.h. auf einer substantiellen Gleichartigkeit, welche eine konkrete, seismäßige Übereinstimmung der Gliedstaaten begründet und es bewirkt, dass der extreme Konfliktfall innerhalb des Bundes nicht eintritt“, 375 f.) which the conflict-of-laws approach rejects. The „unity“ which that approach seeks to ensure can content itself with a Habermasian constitutional patriotism; see most recently J. Habermas (2005) *Zwischen Naturalismus und Religion*, Frankfurt a.M.: Suhrkamp, p. 111: “Entgegen einem weit verbreiteten Missverständnis heißt ‚Verfassungspatriotismus‘, dass sich Bürger die Prinzipien der Verfassung nicht allein in ihrem abstraktem Gehalt, sondern konkret aus dem geschichtlichen Kontext ihrer jeweils eigenen nationalen Geschichte zu Eigen machen. Wenn die moralischen Gehalte von Grundrechten in Gesinnungen Fuß fassen sollen, genügt der kognitive Vorgang nicht. Moralische Einsichten und die weltweite Übereinstimmung in der moralischen Empörung über massive Menschenrechtsverletzungen allein würden nur für die hauchdünne Integration der Bürger einer politisch verfassten Weltgesellschaft genügen (wenn es sie denn eines Tages geben sollte). Unter Staatsbürgern entsteht eine wie immer auch abstrakte und rechtlich vermittelte Solidarität erst dann, wenn die Gerechtigkeitsprinzipien in das dichtere Geflecht kultureller Wertorientierungen Eingang finden“.

²⁸ To explain the third category at least briefly: since the Member States have delegated legislative competences only in limited fields, responses to functionally interdependent problem constellations often require a co-ordination of different, semi-autonomous levels of governance.

²⁹ This possibility and functional necessity do not compromise the conflict-of-laws approach. Suffice it here to recall the insights of E. Steindorff’s amazingly modern *habilitation* thesis: E. Steindorff (1958) *Sachnormen im internationalen Privatrecht*, Frankfurt a.M.: Klostermann.

Hormones in Beef: A Case of Manageable Proportions and Prudently Managed

The central issue in the hormones case³⁰ was similar to that of the GMO dispute but of less troubling proportions. In *hormones*, the subject matter was the administration of growth hormones to cattle – illegal in the EU, but a common practice in the US. Which law applies? This is the question traditional conflict of laws would pose. But this is not the question the Appellate Body had to answer. Rather, the Appellate Body had to look for guidance in the SPS 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 organisations (Article 5): These provisions can be interpreted as a search for a transnationally acceptable meta-norm institutionalising “science” as peacemaker. All WTO lawyers know about the indeterminacy of scientific authority. Science typically provides no clear answers to questions posed by politicians and lawyers; secondly, it cannot resolve ethical and normative controversies about numerous technologies; third, consumer *Angst* might be so significant that neither policy-makers nor the economy can ignore it.

None of these difficulties, however, stands in the way of applying a conflict-of-laws approach to transnational trade governance. The Appellate Body wisely refrained from referring to science as the ultimate authority by reference to which it would be legitimate to resolve the conflict. It nevertheless channelled the ongoing controversy, hence promoting the conflict’s civilised conduct.³¹

The Example of the GMO Dispute: Are International Markets “Socially Embedded”?

Foodstuffs are in general highly politicised products. No legal system has ever ceased to subject them to a degree of regulatory supervision. GMOs are, at least in that sense, nothing new. But they are the most technologically advanced and most controversial of all foodstuffs, if not of all consumer products. GMO production is led by the US, but has also been mastered by countries such as Brazil and India, to ambivalent socio-economic consequences, as development imperatives clash with agrarian employment concerns not only at the level of international trade but also within these countries.³² The most intense debate, however, focuses on risks posed by GMOs. Both GMO sceptics and GMO adherents agree that there is little evidence that GMO food poses

³⁰ Appellate Body Report (1998) *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R and WT/DS48/AB/R, 16 January 1998.

³¹ This type of restraint was wise for an additional reason. The standards to which the TBT and 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 authorised 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 recognition of foreign law and foreign judgments seems obvious, but is rarely drawn. But see E. Schanze (2005) ‘International Standards - Functions and Links to Law’, in P. Nobel (ed.) *International Standards and the Law*, Bern: Stämpfli, at pp. 84-103, esp. at 90-1; and J. Scott (2004) ‘International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO’, *European Journal of International Law* 15, pp. 307-54.

³² See, S. Zarrilli (2006) ‘International trade in GMOs: Legal frameworks and Developing Country Concerns’, in Italian in F. Francioni and T. Scovazzi (eds) *Biotechnology and International Law*, Oxford: Hart, pp. 231-54.

an appreciable risk to human health.³³ Nonetheless, a major concern remains that non-GMO-crops will be contaminated by GMOs released into the environment. Likewise, conflict rages over the meaning of consumer anxiety and choice: Do we have a 'right to know' what we are eating;³⁴ ought governments be allowed to demand GMO labelling, since the majority of their citizens refuse to accept GMO products;³⁵ is the EU correct to have 'perfected' its authorisation procedures by means of the establishment of an ethical advisory body?³⁶

For all these reasons the GMO case is a touchstone for competing views on the constitutional status of WTO law and it is this aspect on which my analysis focuses.³⁷ However, neither this intense debate nor the socio-economic dimensions of the GMO controversy are explicitly addressed in the more than 1000 pages of the report which the panel finally delivered in September 2006.³⁸ To the contrary, the panel took great pains to underline that it did not decide a series of issues of obvious importance.³⁹ However, the intended (quasi-)judicial self-restraint was not achieved in practice. The panel adopted partisan positions, albeit partly indirectly and implicitly. This is to not what a conflict-of-laws approach would have recommended.

The Authority and Austerity of Science

The US and the EU, the main actors in the dispute, differ in their regulatory approaches to GMOs in two significant respects: whereas the US focuses on health risks posed by food, the EU follows a more comprehensive approach, placing an additional and greater emphasis upon environmental risks.⁴⁰ US authorities will

³³ See, W. van den Daele (forthcoming 2007) 'Legal framework and political strategy in dealing with the risks of new technology – the two faces of the precautionary principle', in J. Somsen (ed.) *Regulating Biotechnology*, Cheltenham: Edward Elgar.

³⁴ See, on this controversy P. H. Sand (2006) 'Labelling Genetically Modified Food: The Right to Know', *Review of European Community & International Environmental Law* 15:2, pp. 185-92.

³⁵ See, 'Europeans and Biotechnology in 2005: Patterns and trends', *Eurobarometer* 64.3, (2006).

³⁶ See, P. Dabrowska (2006) 'Hybrid Solution for Hybrid Products? EU Governance of GMOs', Ph.D Thesis EUI Florence, 200 ff.

³⁷ I am aware of just three analyses: O. Perez 'Anomalies at the Precautionary Kingdom: Reflections on the GMO Panel's Decision', available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=940907; C. Conrad (2006) 'Im Spannungsfeld von WTO-Recht und nationaler Sozialregulierung: Kritische Erörterung der Anwendbarkeit des SPS-Abkommens auf die Regulierung gentechnisch veränderter Produkte anhand des EC-Biotech-Streits', Ms. Bremen (on file with author); D. Prevost (2007) 'Opening Pandora's Box: The Panel's Findings in the EC-Biotech Products Dispute', *Legal Issues of Economic Integration* 34:1, pp. 67-101.

³⁸ "European Communities – Measures affecting the approval and marketing of biotech products", (DS291, DS292 and DS293). Findings and conclusions available at: http://www.wto.org/english/tratop_e/dispu_e/291r_conc_e.pdf. The full panel report is available at: http://www.wto.org/english/news_e/news06_e/291r_e.htm.

³⁹ "[T]he Panel did *not* examine: whether biotech products in general are safe or not; whether the biotech products at issue in this dispute are "like" their conventional counterparts. Although this claim was made by the Complaining Parties (*i.e.*, the United States, Canada and Argentina) in relation to some aspects of their complaints, the Panel did not find it necessary to address those aspects of the complaints; whether the European Communities has a right to require the pre-marketing approval of biotech products...; whether the European Communities' approval procedures as established by Directive 90/220, Directive 2001/18 and Regulation 258/97, which provide for a product-by-product assessment requiring scientific consideration of various potential risks, are consistent with the European Communities' obligations under the WTO agreements...; the conclusions of the relevant EC scientific committees regarding the safety evaluation of specific biotech products. ..." (Panel-Report 8.3).

⁴⁰ G. C. Shaffer and M. A. Pollack (2005) 'Reconciling (or Failing to Reconcile) Regulatory Differences: The Ongoing Transatlantic Dispute over the Regulation of Biotechnology', in D. Andrews *et al* (eds) *The*

approve products *unless* evidence exists confirming a risk. By contrast, the 1992 Treaty on the European Union constitutionalised the “precautionary principle”, so that all legislative, administrative and judicial decision-making within Europe must respect the notion that *any* indistinct hazard must be guarded against (Article 174(2) EC Treaty).

Can this type of conflict be resolved by “science”? Science has been portrayed and invoked as an objective and non-partisan authority by the ECJ in conflicts over the limits of national regulatory autonomy and the EU commitment to free intra-community trade.⁴¹ The ECJ certainly knew that risk assessment and management also entail political and ethical issues.⁴² While nobody questions these dimensions seriously, this does not affect the readiness to assign trans-legal and meta-political authority to scientific discourses. Science itself and science-led techniques of risk assessments derive this from the fact that, even where scientists fail to agree, disagreements are conducted within a shared and constantly re-assessed scientific logic.

Why should this not be possible at international level? Why should WTO members who refuse free access to their markets not be expected to justify such restrictions on the basis of scientific evidence? This is exactly what the SPS agreement, which the panel held applicable after very lengthy deliberations,⁴³ provides.⁴⁴ This, however, is not all we need to know. We must also decide what these provisions mean in cases when science “runs out” and scientists agree that general hazard cannot be transformed into specific risk, since they cannot hope to gather sufficient data with which to conduct a scientific risk assessment.

Within the EU the precautionary principle governs such dilemmas, without, however, providing much guidance.⁴⁵ In the Hormones Case,⁴⁶ the WTO Appellate Body found that the “[precautionary] principle has not been written into the SPS Agreement as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement”. The panel, in the GMO case, goes one important step further. Recalling “that, according to

New Transatlantic Agenda and the Future of Transatlantic Economic Governance, Florence: European University Institute, pp. 167–229.

⁴¹ See, C. Joerges (1997) ‘Scientific Expertise in Social Regulation and the European Court of Justice: Legal Frameworks for Denationalized Governance Structures’, in C. Joerges *et al* (eds) *Integrating Scientific Expertise into Regulatory Decision-Making. National Traditions and European Innovations*, Baden-Baden: Nomos, pp. 295-324.

⁴² See, A. W. Gouldner (1957) ‘Cosmopolitans and Locals: Towards an Analysis of Latent Social Roles I’, *Administrative Science Quarterly*, p. 281-306 and A. W. Gouldner (1958) ‘Cosmopolitans and Locals: Towards an Analysis of Latent Social Roles II’, *Administrative Science Quarterly*, pp. 444-80.

⁴³ See the critical comments of C. Conrad, *supra*, note 37.

⁴⁴ “Members shall ensure that any sanitary or phytosanitary measure ... is based on scientific principles and is not maintained without sufficient scientific evidence ... (Art. 2 (2))”. “In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time (Art. 5 (7))”.

⁴⁵ Cf., most prominently, ECJ, Case C-236/01, *Monsanto v. Italy*, [2003] ECR I-8105.

⁴⁶ WTO Appellate Body Report (1998), *European Communities - Measures Concerning Meat and Meat Products (Hormones)* (“EC - Hormones”), WT/DS26/AB/R and WT/DS48/AB/R, adopted 13 February 1998.

the Appellate Body, the precautionary principle has not been written into the *SPS Agreement* as a legitimate ground for justifying SPS measures”, the panel proceeds to explain that “even if a member follows a precautionary approach, its SPS measures need to be ‘based on’ a (‘sufficiently warranted’ or ‘reasonably supported’) risk assessment”.⁴⁷ This is a constitutionalising move. It seems readily apparent that the WTO panel is not prepared to recognise the constitutional commitment of any of its members to precaution. “Supremacy” of WTO standards over European constitutional commitments – this is the implication and the message.

The Distortion of Political Authority

It is instructive to contrast the European and WTO constellations at this point. Both the European and the international system share free trade commitments. Within a system so clearly predicated on establishment of a *common* market, diversity seems hard to accept. Accordingly, the ECJ has imposed significant burdens on Member States while invoking their autonomy in risk assessments. It has underlined that safeguards based on the precautionary principle may justify a temporary derogation, but *only* where “it proves impossible to carry out as full a risk assessment as possible ... because of the inadequate nature of the available scientific data”.⁴⁸ There are limits to the political autonomy of Member States. However, with respect to such limits, the ECJ has prudently declined to introduce any rigid boundaries.

Why do the two systems react differently, and what difference does it make? This seems to lead us to the core problematic. Europe has been struggling over GMOs for many years. Even though the EU claims that intense political debate has led to a definitive settlement,⁴⁹ it is far from clear whether this new regime will be easy to administer, or will instead serve as a framework within which competing positions are continuously discussed and negotiated. In my view the most problematic aspect of the panel report is that it seeks de-legitimise even that type of indeterminate response to scientific controversies and political contestation. Exercising prudence of a different kind, the panel decided that the SPS Agreement was applicable to the authorisation of GMOs, and could then point to Article 8 SPS Agreement, whose provisions require that applications must be processed without “undue delay”. This, again, is a constitutionalising manoeuvre, albeit one less plainly visible. The private right of applicants seeking authorisation for their products trumps political sensitivities; it is irrelevant that time may be needed to debate domestic political and ethical issues. Constitutions confer on political systems the right to take binding decisions, Niklas Luhmann has explained.⁵⁰ Is that a valid diagnosis for a Union of political systems? Should such a Union have the right *not* to decide? Subtle questions, to be sure. The panel found that completion of the approval process had been “unduly delayed” in 24 cases. Accordingly, it requested that the EU brings its measures “into conformity with its obligations under the SPS Agreement”, in effect asking the EU to complete approval procedures for outstanding applications.

The panel’s critique of EU member state autonomy in relation to safeguard measures was equally indirect but effective. French, German, Austrian, Italian, Luxembourg

⁴⁷ GMO Panel, *supra*, note 38, Para. 7.3065, and note 1905.

⁴⁸ Case C-236/01, *Monsanto v. Italy*, [2003] ECR I-8105, para. 109.

⁴⁹ See the detailed analysis by P. Dabrowska, *supra*, note 36.

⁵⁰ N. Luhmann (1990) ‘Verfassung als evolutionäre Errungenschaft’, *Rechtshistorisches Journal* 9, 176 ff. Cf. A. Fischer-Lescano, *supra*, note 17, 208 ff.

and Greek bans on the marketing and import of EU-approved biotech products were held incompatible with WTO law. Again the panel arrived at this result in an indirect way. It did not question the validity of the European regulatory framework and its institutional balancing. It nonetheless opined that, since the EU's scientific committee had judged relevant biotech products to be safe, the named states had failed to undertake risk assessments that would "reasonably support [their] prohibitions" under the SPS Agreement. SPS standards overrule Europe's precarious institutional settlement.

Where the law ends

What would a conflict of laws approach have to offer as an alternative? The answer has become visible in the settlement of the hormones dispute. There the Appellate Body ruled against the EU without, however, depriving it of the right to develop new arguments and to refine its positions. In an analysis written prior to publication of the panel report, Nico Krisch argued that the GMO controversy shows that global governance must live with "a constant potential for mutual challenge: of decisions with limited authority that may be contested through diverse channels until some (perhaps provisional) closure might be achieved".⁵¹ Is this a conflict of laws solution? It is a response which reflects and respects the limits of transnational governance. No authority, and certainly not a WTO panel, is entitled to rewrite European law of constitutional dimensions in the name of sound science.

Is it adequate to suggest that there is a legal duty not to decide? Could that kind of precaution be the correct response to the constitutional deficits of transnational governance?⁵² A positive answer is not incorrect but incomplete. The answer is "hard" law, in that it acknowledges that, especially at international level, one must acknowledge that there are both factual and normative limitations to "legalisation" and "judicialisation". It is incomplete in that it fails to characterise that non-legalised sphere in any constructive way. The proper characterisation of that sphere may be diplomacy⁵³ or, closer to the traditions of conflict of laws, *comitas*. As Jona Israël recently put it,⁵⁴ the *comitas* of the European Member States has mutated into a legal duty of co-operative problem-solving. At the WTO level, the wide-ranging general conversion of *comitas* into mandatory commitments is not conceivable.⁵⁵

⁵¹ N. Krisch (2006) 'The Pluralism of Global Administrative Law', *European Journal of International Law* 17, pp. 247-78, at 266.

⁵² Proponents of precaution hesitate to substantiate the precautionary principle in this way. But some do this at least implicitly, e.g. D. Bevilaqua (2006) 'The Precautionary Principle in GMO Regulations: a vertical and horizontal comparison', Ms. Rome: Università La Sapienza (on file with author).

⁵³ J. H. H. Weiler (2001) 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', *Journal of World Trade* 35:2, pp. 191-207.

⁵⁴ J. Israël (2005) *European Cross-Border Insolvency Regulation*, Intersentia: Antwerp-Oxford, pp. 123, 150-52, 325-34.

⁵⁵ There are striking parallels between my suggestions and the version of global administrative law recently presented by N. Krisch (*supra*, note 51): the difficulties of regulation and its juridification in international arenas result "from fundamental and durable contestation over the tight constituency of global governance ... [A]ttempts at 'constituting' the political order by forcing it into a coherent, unified framework are problematic as they tend to downplay the extent of legitimate diversity in the global polity..." (at 248). Nowhere does Krisch mention "conflict of laws". However, his insight that global governance is confronted with "competing constituencies" insisting on their competence to define legitimacy autonomously (at 253) rephrases the core problem of conflict of laws. Neither does Krisch refer to the *comitas* tradition in international law. And yet, his insight that global governance has to live with "a constant potential for mutual challenge: of decisions with limited authority that may be contested through diverse channels until some (perhaps provisional) closure) might be achieved" portrays precisely the space between law and the state of nature which the notion of *comitas* designates.

Concluding Remark

To come full circle: Markets, Karl Polanyi assured us,⁵⁶ will always be “socially embedded”. Do WTO law, in general, and the GMO controversy, in particular, confirm that assertion? The panel report, it may be noted, favours law over politics, opting for juridification in a very specific sense: restrictions on free trade, on the freedom of producers, exporters and traders can be imposed only where they are supported by “sound science”. Sound science, rather than politically accountable regulation, has become the guardian of the common good and of the consumer. In a series of lectures on the “*naissance de la biopolitique*” delivered to the Collège de France in 1979, Michel Foucault warned that neo-liberalism would replace the supervision of markets by the state with the supervision of states by the market – and by sound science, we may now add.⁵⁷ Would this gloomy conclusion take the panel report too seriously? The differences between panel reports and the Reports of the Appellate Body are often significant – and were probably of importance in this case. The EU, however, has decided not to appeal the panel report.⁵⁸ As a recent, highly detailed comment underlines, the report is “not too difficult for the EC to accept, since the Commission has been trying, and failing, to get the Member States to remove their safeguard measures for some time now”.⁵⁹ Does this indicate that the EU, or at least its officials, are ready to comply, and will use the report to discipline recalcitrant Member States? Perhaps both Polanyi and Foucault captured a grain of the truth: The GMO market is at any rate “politically embedded”. Can one call this constitutionalisation? The law of constitutional democracies provides a structuring framework for political processes and decision-making which ensures their legitimacy. WTO law, in our example, cannot make such claims.

⁵⁶ K. Polanyi ([1944] 1992) *The Great Transformation: The Political and Economic Origins of Our Time*, Boston: Bacon Press, esp. at pp. 45-58, 71-80.

⁵⁷ “... [A]u lieu d’accepter une liberté du marché, définie par l’État et maintenue en quelque sorte sur surveillance étatique... eh bien, disent les ordolibéraux, il faut entièrement retourner la formule et se donner la liberté du marché comme principe organisateur et régulateur de l’État...Autrement dit, un État sous surveillance du marché plutôt qu’un marché sous surveillance de l’État” (thus, M. Foucault (2004) *Naissance de la biopolitique*. Cours au Collège de France: Seuil/Gallimard, Leçon 5, p. 120).

⁵⁸ See, <http://www.euractiv.com/en/trade/eu-accepts-trade-ruling-gmos/article-159918>.

⁵⁹ Prevost, D. *supra*, note 37, p. 84.

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