



Transnational Standards of Social Protection

**Contrasting European
and International Governance**

Christian Joerges and Poul F. Kjaer (eds)

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Transnational Standards of Social Protection Contrasting European and International Governance

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Cover picture: Karl Polanyi, 1886-1964

Preface

Reconstituting Democracy in Europe (RECON) is an Integrated Project supported by the European Commission's Sixth Framework Programme for Research, Priority 7 'Citizens and Governance in a Knowledge-based Society'. The five-year project has 21 partners in 13 European countries and New Zealand, and is coordinated by ARENA - Centre for European Studies at the University of Oslo.

RECON takes heed of the challenges to democracy in Europe. It seeks to clarify whether democracy is possible under conditions of pluralism, diversity and complex multilevel governance. See more on the project at www.reconproject.eu.

The present report is part of RECON's work package 9 'Global Transnationalisation and Democratisation Compared', and contains the proceedings of a workshop held at the University of Bremen on 23-24 November 2007. The inter-disciplinary workshop 'Transnational Standards of Social Protection: Contrasting European and International Governance' was jointly organised by RECON and CRS 597, the Collaborative Research Centre on 'Transformations of the State' at the University of Bremen, which is financed by the *Deutsche Forschungsgemeinschaft*.¹

Erik Oddvar Eriksen
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¹ See more on the CRC 597 at www.sfb597.uni-bremen.de.

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Abbreviations

AB	Appellate Body
ATS	Alien Tort Statute
BEUC	The European Consumers' Organisation
CAC	Codex Alimentarius Commission
CRS	Collaborative Research Centre
CSR	Corporate social responsibility
DSB	Dispute Settlement Body
ECJ	European Court of Justice
ECOSOC	Economic and Social Security Council
ECT	European Community Treaty
EFSA	European Food Safety Authority
EPZs	Export Processing Zones
FAO	Food and Agricultural Organisation of the United Nations
GATS	General Agreement of Trade in Services
GDP	Gross Domestic Product
GM	Genetically Modified
GMO	Genetically Modified Organism
GSP	General Systems of Preferences
ICFTU	International Confederation of Free Trade Unions
ILO	International Labour Organisation
IMF	International Monetary Fund
MNEs	Multi-national Enterprises
MPs	Members of Parliament
MSR	Monitored self-regulation
NGO	Non-Government Organisation
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
OMC	Open Method of Co-ordination
RLS	Ratcheting Labour Standards
RR	Responsive regulation
SCFAH	Standing Committee on the Food Chain and Animal Health
SPS	Agreement on Sanitary and Phytosanitary Measures
TNC	Trans-national Corporations
TPRM	Trade Policy Review Mechanism
TRIPS	Trade-Related Intellectual Property Rights
UNEP	United Nations Environment Programme
UNHCR	United Nations High Commissioner for Refugees
UNIDO	United Nations Industrial Development Organisation
UNODC	United Nations Office on Drugs and Crime
WCSDG	World Commission on the Social Dimension of Globalisation
WHO	World Health Organisation

Introduction

Christian Joerges and Poul F. Kjaer

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The present report contains the proceedings of the inter-disciplinary workshop ‘Transnational Standards of Social Protection: Contrasting European and International Governance’, which was jointly organised by RECON Work Package 9 and the CRS 597 A 1. Within the framework of the RECON project, Work Package 9 is devoted to the exploration and comparison of social regulation both within the EU, and within global structures such as the WTO. Within CRS 597, Project A 1 focuses on the tensions between international free trade and concerns for social regulation. The research agenda of WP 9 and A 1 have much in common and strong co-operative links have been established between both projects.

I.

The background for the common agenda of both research initiatives and the November workshop, in particular, is the intertwinement of European regulatory policies with global governance arrangements. The mutual impact of the two layers of governance is steadily increasing, and this development poses a dilemma for the EU. On the one hand, an “ideological convergence” can be observed, in the sense that stronger global governance can be understood as a way through which the EU can project its own *raison d’être* of increased integration to the wider world in order to realise the objective perpetual peace which Kant outlined more than two centuries ago, on a global, rather than on a European, scale. Traditionally, the EU has been

strongly in favour of strengthening both the scope and the impact of global governance structures. On the other hand, the design of the European project is being increasingly challenged by ever more assertive global structures. This is particularly the case in relation to the WTO regime, which is increasingly constraining the decisional autonomy of the EU with regard to both the appropriateness of its content and its external effects. Against this background, the project seeks to pin down the exact nature of the interaction between the two levels, and to clarify the differences and similarities in relation to the legal and regulatory philosophy which materialises within the two settings.

Regulation should be understood here in both a “narrow” and a “broad” sense. The narrow understanding refers to the impact of EU and WTO economic regulation on classical labour market and social policies. The broader understanding comprises policies which seek to minimise the negative externalities of economic reproduction in a more general manner, for example, in the form of consumer, environmental and food safety policies.

The first section of this report deals with the regulation of services in the EU and the WTO. Section Two focuses on labour standards, which are analysed from different angles in order to clarify the functions of the WTO and the ILO, multinational companies as well as other private actors within this specific field. In the final section, the perspectives of our discussion are widened. We are addressing here the legitimacy problématique of transnational governance, i.e. the theoretical core issue of our project, which will remain on our agenda in the years ahead. Since we seek to link theoretical deliberations to exemplary practical problems, we have included an analysis of the regulatory problems of GMOs in that section. Nowhere is the need for theoretical orientation more obvious than in these debates. Equally important for our research agenda, the GMO case demonstrates that even the EU cannot act fully autonomously but must take the next transnational level of governance into account.

II.

The workshop documented here represents, for the research agendas of both the RECON and the Transformations of the State projects, work in progress that is bound to lead towards a deeper understanding of the phenomena under scrutiny, and, in the long run, to a solid conceptualisation of transnational governance, which should reflect the state of the disciplinary art in both law and political science. It seems evident to us, after the experience

with this workshop and our collaboration in the editing of the workshop proceedings, that the next step should again become a joint enterprise. The profile of this event emerged in this process and is visualised by the photo of the young Károly (Karl) Polányi on the cover of our report. We became ever more aware of the renaissance of the author of “*The Great Transformation*”, which is accompanied by new intense research activities by sociologists, political economists and, occasionally, even by lawyers, who all underline the “embeddedness” of markets. Markets, this is the common core of these research activities, which are to be analysed as social institutions. This reference point lends itself to interdisciplinary efforts. Polanyi’s seminal book seems to have captured a crossroads of two seemingly contradictory developments. On the one hand, we observe an erosion of the nation state’s power, its regulatory capabilities and its role as the guarantor of social justice, in particular, through the increased mobility of capital and other “disembedding” processes. On the other hand, we also become increasingly aware of the interdependencies in the international system and the dependence of globalising markets on non-economic conditions. Polanyi taught us to pay particular attention to what he termed “fictitious commodity goods”, namely, Land (the environment), Labour and (*sic!*) Money. There are co-ordination problems, he asserted, that cannot be solved by markets operating on their own. This is why we are witnessing the emergence of a set of institutional arrangements which seek to manage these fictitious commodities. Polanyi did not analyse what we, today, call globalisation, and the selection of our key research fields was not inspired by his work. And yet, we believe that it is worthwhile to try to conceptualise the processes that we observe as (counter-)moves towards a re-embedding of globalising markets. This is the guiding question of the conference on “*The Social Embeddedness of Transnational Markets and their Juridification*” which we have started to prepare.

III.

Back to the present report! We would like to thank the contributors to this volume as well as all the other participants in the workshop. This report is the result of intense debates and mutual learning which we will seek to continue. We would like to thank Chris Engert for his patience with our use of his language and for his editorial assistance.

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Section One

Freedom of Services

Chapter I

The Multiple Understandings of Conflict between Trade in Services and Labour Protection

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I. Introduction

The freedom to trade services is often perceived as putting pressure on the social protection of workers through three partly-related factors, namely, replacement, de-localisation and races to the bottom.¹ EC internal market law on freedom of establishment and freedom to trade services and the WTO's General Agreement on Trade in Services (GATS) are faced with the difficult task of balancing the trade liberalisation objectives with the policies underlying labour law. This chapter shows that the conflict between trade in services and labour protection can be understood in multiple ways, depending on the function that is ascribed to trade liberalisation and labour law, respectively. Because of legitimate differences in understanding the conflict between trade and labour law, this contribution submits that trade liberalisation law must limit itself to giving some space to each of these understandings. In the EC, there has primarily been respect for regulatory rights and functions and, to a certain extent, for distributive functions, but less for the "autonomy-function" of labour law. In the GATS, the regulatory and rights-based function of labour law are respected, but neither the trade

^{*} I would like to thank Markus Krajewski, Susanne Schmidt and the participants of the RECON workshop for their useful comments on an earlier version of this contribution.

¹ F. Hendrickx, 'The Services Directive and Social Dumping: National Labour Law under Strain?', at 5 *et seq.* Draft paper on file.

liberalisation nor the autonomy- and distributive function of labour law are sufficiently respected.

2. Conflicts between trade in services and the social protection of workers

2.1. The empirical effects of trade in services on labour protection

According to one scenario, the freedom to trade services leads to *replacement* of high-wage national service providers with service providers from low-wage countries that post their workforce to the high-wage country. Here, competition occurs between national service providers and their workforce on the one hand, and foreign service providers and their workforce on the other. In terms of trade theory, competition between service providers is perceived as being beneficial, while, in terms of social protection, there can be high costs if such competition leads to widespread unemployment, to national service providers who are employers being squeezed out of the market, and to a breakdown of international solidarity between workers. The latter concern could be seen to be reflected in the *Laval* case, in which Swedish workers organised a strike against a Latvian service provider who had won a tender to build schools in Sweden in order to compel it to sign a collective agreement for the protection of the posted workers.²

A further consequence of this scenario could be the *de-localisation* of national service providers to low-wage countries, in order to allow the providers to remain competitive, even though they continue to provide services in their former home countries. Here, competition occurs between the domestic workforce on the one hand and the foreign workforce and service providers on the other. This scenario corresponds to the facts of the *Viking* case.³ A Finnish ferry operator sought to re-flag his vessels in Estonia in order to benefit from the lower wages there while continuing to operate routes from the Baltic states to Finland. The operator was running at a loss because of the competition from the Baltic ferry operators and therefore needed to re-register his vessels to survive. The Finnish union threatened collective action

² Judgment of the Court Case-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet avd. 1, Byggettan, Svenska Elektrikerförbundet*, Opinion of Advocate General Mengozzi, Case-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others*.

³ Judgment of the Court Case-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, Opinion of Advocate General Maduro, Case-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*.

in order to prevent the Finnish operator from re-registering and sought the support of other unionised workers through the London-based International Transport Workers Federation.

In response to low-wage competition, national service providers may seek to reduce wages or weaken collective bargaining and the right to strike in their home countries. Here, the conflict is mainly an internal one between employees on the one hand, and workers on the other. The social costs associated with the race to the bottom in the home country relates to social cohesion and distributive justice in the sense that the lowering of wage levels and labour protection increases income gaps and alters the relative powers of both employers and workers. Whenever a country artificially lowers its labour standards in order to remain competitive or to attract foreign investment, it could also be considered to be engaging in unfair trade practices, although it is not clear what the appropriate standards for determining the existence of social dumping should be.

The scenario described so far could equally pertain to the case of trade in goods. What makes the provision of trade in services so unique is that domestic employers sometimes do not need to re-locate at all in order to lower their labour costs and remain competitive. Sometimes, there is the possibility of replacing the local employed workforce with self-employed service providers from abroad. Here, the local workforce and self-employed service providers are in direct competition. Employers become consumers or recipients of services.⁴ They no longer face the other potential difficulties associated with re-location if they wish to reduce labour costs, and this may make the replacement of employed workers with self-employed service providers particularly attractive. The decision of a firm to re-locate its business abroad will generally be conditioned by a variety of factors, amongst which the cost of labour is just one. On balance, the lower labour costs abroad may not make re-location worthwhile if the legal and political environment is less stable, the energy supply is unreliable, the transport costs are higher, *etc.* However, where firms can turn to less expensive, foreign service providers in order to purchase services hitherto provided by salaried workers, they no longer need to re-locate abroad and may therefore replace local labour with foreign service providers more willingly.

Naturally, the extent to which competition from foreign service providers exerts pressure on employment and on the social protection of workers differs between service sectors. Not all firms will equally be able to take advantage of

⁴ R. Nielsen, 'The Services Directive, Rights of Recipients of Services and the Welfare State(s)', draft paper on file.

lower labour costs by re-locating. SMEs, for instance, might face more hurdles in terms of language barriers, ignorance of applicable business regulations, *etc.*, than large corporations. Furthermore, the extent to which employed labour can be replaced with self-employed service providers varies between sectors. Some sectors may combine the manufacture of goods with the provision of services (for example, after-sale services), while other sectors may not be sufficiently labour-intensive to make sub-contracting worthwhile.

2.2. Interpreting the conflict between trade in services and labour protection

Conflicts between the objectives of trade liberalisation in services and labour law can be understood through different interpretative lenses, which ultimately reflect different understandings regarding the very functions of trade in services and labour law, respectively. The regulatory, fundamental rights-based, distributive and “autonomy-function” of labour law may simultaneously be present in national labour laws and national labour constitutions may also differ with regard to the functional model of labour law they endorse. While many developing countries grapple with how to ensure the regulatory function of labour law, countries like Sweden place a particular emphasis on the “autonomy-function” of labour law.

The conflict between trade liberalisation and labour law can be understood as a conflict between economic freedom and social regulation, as performed by labour law. From this point of view, the justification of labour law is functionalist – it corrects market failures that arise because the market, left to its own devices, will exploit the workforce and eventually erode an adequate supply of labour.⁵ It is, of course, difficult to draw the line between the necessary social regulation and economic freedom – what may, to one country, appear to be the necessary protection of workers, may appear to be unnecessary trade protectionism to another! Nevertheless, it is submitted that there are certain elements of labour protection, which are not only politically desirable but are also functionally indispensable in order to ensure an adequate supply of labour: definitions of maximum work hours, minimum rates of pay, minimum holiday entitlements, health and safety at work, payment in case of illness or maternity, *etc.*

Certain aspects of labour law can also be perceived as basic rights, similar to other liberal rights, such as the freedom of religion and of speech. Labour law rights that typically fall into this category are the right to join trade unions

⁵ K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, (Boston: Beacon Press, 2nd edition, 2001), at 71*et seq.*

and the right to take collective action. Here, the conflict between trade liberalisation and labour law becomes a clash of conflicting rights, *i.e.*, the fundamental labour rights and the rights to free movement guaranteed by the EC Treaty. The judicial approach to such a conflict of rights requires that we first establish which right enjoys priority and then carry out a proportionality analysis.

A different function than providing for basic rights is labour law's distributive function. Here, labour law is mainly outcome-oriented, as in the functionalist-regulatory model. The protection objectives pursued by labour law here reflect notions of distributive justice, *i.e.*, of what should be due to workers in exchange for their selling of their labour. What should be due to workers can go considerably beyond what is necessary for their subsistence and physical well-being. Collective agreements setting a wage-level for a particular service sector are a prominent way of affecting the gains of both business and workers, respectively. Profit-sharing schemes benefiting workers are another means. When the function of labour law is primarily defined in this way, the conflict between trade in services and labour law can be understood as one between economic freedom and distributive justice. However, it is also possible to view trade liberalisation as a means of effecting distributive justice between trading countries.⁶ Trade liberalisation would be the means whereby poorer, less developed countries could share in the wealth of more developed countries by being more competitive, particularly with regard to labour costs. According to this understanding, the conflict between the liberalisation of trade services and labour law is really about conflicting claims of distributive justice, *i.e.*, about what should be due to the members of poorer countries and domestic workers, respectively.

Finally, another function of labour law can be labelled the "autonomy-function". Its emphasis is on the respective powers of business and workers, and on the process through which decisions concerning the social protection of workers are reached, without necessarily being focused on the outcomes. The right to join trade unions, to take collective action, to form labour representations in firms and negotiate collective agreements, *etc.*, can all be seen as expressions of the "autonomy-function" of labour law because they increase the bargaining power of workers *vis-à-vis* their employers.

How are EC internal market law and the GATS to react to these different interpretations of the conflict between trade in services and labour law? Is there one interpretation which would help us to decide how trade

⁶ For such an argument in the context of the WTO, see E.B. Kapstein, *Economic Justice in an Unfair World: Toward a Level Playing Field*, (Princeton: Princeton University Press, 2006).

liberalisation and labour law should be balanced? It is submitted that interpreting trade liberalisation law as a means to effect distributive justice is not very plausible. After all, EC internal market law and the GATS are neither concerned with the internal distribution of wealth in one state, nor with relative differences in wealth between citizens of different countries. It is more plausible to view competition between high- and low-wage jurisdictions as a *quid-pro-quo* that allows the latter, generally poorer countries, to share in the benefits of free trade without having to bear any adjustment costs. As a result, it will also be important for trade liberalisation to allow competition based upon labour costs in, at least, some instances.

An EC-wide or global definition of the function of labour law is also absent. While the GATS does not recognise any labour rights explicitly, the Community at least recognised certain labour rights as fundamental rights.⁷ However, nothing is said about how those rights should be exercised, and with good reason, since structural conditions such as the extent of unionisation and size of the transitory workforce differ between EC Member States and make the adoption of any one function of labour as a Community-wide definition unsuitable. It therefore follows that EC internal market law must restrict itself to ensuring that the freedom to trade services and the various functional models of labour law can co-exist without any one being undermined.

3. The interface between trade in services and labour law in EC law, the GATS and judicial decisions

3.1. Balancing economic freedoms and rights against various functional definitions of labour law under EC law

In EC law, the key provisions governing trade in services and the freedom of establishment and labour protection are Articles 43 and 49 of the EC Treaty. According to Article 43, “restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited”. Article 49 provides that “restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended”. To the extent that the application of labour law can be considered as a restriction, Member States need to be able to justify them. The ECJ has recognised overriding

⁷ Charter of Fundamental Rights of the European Union, Official Journal C 303, 14 December 2007. See, also, Judgment of the Court in *Laval un Partneri*, cited note 2 above, at paras. 90-91.

reasons of public interest as justifying indistinctly applicable measures. The justificatory grounds of essential interests seem wide enough to accommodate diverse views about the function(s) of labour law. Moreover, the Charter of Fundamental Rights of the EU⁸ recognises certain labour rights as fundamental. These include the right to conclude collective agreements, to take collective action, rights to protection against unfair dismissal, rights to limitations of maximum working hours, rights regarding rest periods and holidays and protection from dismissal in cases of maternity as well as rights to paid maternity leave and parental leave.⁹ Member States that already recognise these rights as fundamental can therefore now be sure that their view about the function of labour law will be protected by Community law.

Another important instrument which governs the liberalisation of trade in services and establishment is the Services Directive. It contains references to fundamental rights and the right to negotiate collective agreements and to take collective action, which can be seen as a reflection of the “autonomy-function” of labour law. It also contains references to employment and working conditions and the relationship between employers and workers, which can be interpreted as reflecting the regulatory function of labour law as well as the distributive and “autonomy-function” of labour law. As will become clear in the following paragraphs, there is some uncertainty as to how much the Services Directive respects these different functions of labour law, but it can, nevertheless, be concluded that it does not define *a priori* one appropriate function of labour law.

The relationship of the Services Directive to matters of social protection and labour law more specifically is complex. The Directive provides - in Article 1(6) - that it “does not affect labour law, that is any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, which Member States apply in accordance with national law which respects Community law”.¹⁰ Article 1(7) goes on to provide that “[t]his Directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law”.¹¹

⁸ Official Journal C 303 of 14 December 2007.

⁹ Articles 28, 30, 31(2), 32(2).

¹⁰ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, O.J. L 376/36, 27.12.2006, Art. 1(6).

¹¹ Services Directive, Art. 1(7).

It has been pointed out that the Directive's use of the terms "shall not affect" is not tantamount to the wholesale exclusion of labour law from the Directive.¹² The language differs notably from that used in Article 2, entitled "Scope", which states that the Directive "does not apply" to a range of activities. This latter term clearly excludes certain activities from the scope of application of the Services Directive. It is also significant that Article 1 is entitled "Subject matter", which could be considered as an operative specification of the recitals.

In light of this, the weaker "does not affect" language can be interpreted as affirming that the Directive does not regulate labour law matters directly, but that they may well fall into the scope of the Directive, in as much as they pertain to services supplied by providers established in a Member State¹³ and are relevant to the establishment of general provisions facilitating the exercise of the freedom of establishment and the free movement of services, while maintaining a high quality of services.¹⁴

The term "does not affect" is even amenable to an interpretation that includes the application of a proportionality test in the sense that Member States retain the right to apply their labour laws and continue their industrial relations practices as overriding reasons relating to the public interest as long as they do not burden the freedom of establishment and service provision in an overbroad or unnecessary manner by going beyond what is necessary to achieve their objectives. It could be argued that such a proportionality test leaves the Member States' rights to apply labour laws and collective action and bargaining practices both intact and unaffected because it merely verifies whether the interest in the application of local laws and practices is validly present.

It also has to be noted that, according to Articles 1(6) and 1(7), Member States must continue to respect Community law in their application of labour laws and collective bargaining practices, and that these matters are not directly regulated by the Services Directive only to the extent that they conform with Community law. Articles 43 and 49 of the EC Treaty are therefore fully applicable to labour law and collective bargaining practices which may constitute barriers to establishment and to trade in services, and it could be argued that proportionality tests are incorporated into the said Articles.

¹² F. Hendrickx, cited above n. 1, at 12.

¹³ Art. 2(1)

¹⁴ Art. 1(1)

It next has to be considered whether Article 16(3) modifies the above argument in any way. Article 16 is entitled “Freedom to provide services” and Article 16(3) reads:

The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1 [requires non-discrimination, justification for reasons of public policy, security, health or the protection of the environment and proportionality]. Nor shall that Member State be prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements.

The concept of “employment conditions” in Article 16(3) is only one part of labour law, as specified in Article 1(6). In addition to “employment conditions” it mentions “working conditions [...] and the relationship between employers and workers”. Article 16(3) also omits any reference to overriding reasons related to the public interest. Article 4 of the Service Directive defines these as: “reasons recognised as such in the case law of the Court of Justice, including the following grounds: [...] the protection of consumers, recipients of services and workers...[and] social policy objectives”.

The question thus becomes whether Article 16(3) in effect narrows down the subject matter exclusion of Article 1(6) to employment conditions and restricts the ability of Member States to regulate to the narrow grounds of Article 16 to the exclusion of grounds such as worker protection and social policy. Two additional considerations suggest that Article 16 might restrict the ability of Member States to introduce overriding requirements relating to the public interest: Article 18 makes it clear that the right of Member States to go beyond what it laid down in Article 16 applies only in exceptional circumstances and only in relation to the safety of services. Furthermore, the chapter of the Services Directive relating to establishment mentions overriding requirements related to the public interest.

On the other hand, such an interpretation of Article 16(3) would deprive the references to working conditions and the relationship between employers and workers in Article 1(6) of legal effect, and contradict the text of Article 1(6), according to which the Services Directive does not affect these aspects of labour law. Furthermore, several pieces of Community legislation, including

the Posted Workers Directive take precedence over the Services Directive if there is a conflict, provided that the provisions of the Posted Workers Directive can be considered as governing specific aspects of access to, or exercise of, a service activity in specific sectors or for specific professions.¹⁵ There may be an issue as to whether the Posted Workers Directive has the necessary specificity regarding service sectors or professions since it is in effect, a horizontal directive. As will be seen below, the Posted Workers Directive allows Member States to apply public policy provisions concerning the protection of workers where they do not conflict with equal treatment. Since this permission is in conflict with the omission of overriding requirements relating to the public interest from the Services Directive, it could be argued that the provisions of the Services Directive should take precedence.

A further issue to consider is whether the Services Directive leaves it to Member States to define when their labour laws apply to an economic activity. If this were the case, they could still for the most part manage the conflict between the liberalisation of trade in services and establishment by defining an economic activity as one to which labour law, rather than the Services Directive, should be applicable. Clearly, this would give them considerable leeway to safeguard their appropriate functional definitions of the purpose of labour law.

The Directive states that a service “means any self-employed economic activity, normally provided for remuneration, as referred to in Article 50 of the Treaty”. Article 50 states that “services shall be considered to be ‘services’ within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons”. Nielsen argues that Member States probably retain the right to determine when their labour laws should apply, as the subject matter provisions of the Services Directive state that the Directive does not affect labour law.¹⁶ However, she also points out that there is a Community definition of a worker in the Allonby case, which draws a line between self-employment and the status of a worker depending on whether independence is merely notional.¹⁷

Upon close examination of Article 1(6) it has to be concluded that it does not confer the right on Member States to decide autonomously when their labour laws apply. The further specification in Article 1(6) provides a finite

¹⁵ Services Directive, Art. 3(1).

¹⁶ R. Nielsen, cited n. 4, p. 12.

¹⁷ *Ibid.* at p. 13.

definition of what labour laws comprises since it is preceded by the words "that is" and the following enumeration does not include the decision of when an economic relationship can be considered as employment. Coupled with the analysis above, which suggests that the exclusion of labour law matters from the scope of the Services Directive is rather limited, it has to be concluded that the Member State definition of what constitutes employment is not automatically controlling, and that Member States will therefore need to persuade the ECJ to accept their definition into a Community concept of what constitutes a worker, with the potential that the Community concept may not entirely reflect national definitions.

3.2. Balancing economic freedoms and rights against various functional definitions of labour law under the GATS

The GATS covers four distinct modes of supplying services. These include commercial presence, the cross-border provision of services, consumption abroad, and the presence of natural persons. The GATS provides a framework for the liberalisation of trade in services, but it also involves labour mobility through its 'Mode 4' of services provision.¹⁸ Mode 4 covers the supply of a service by a service supplier of one member of GATS, through the presence of natural persons of a member in the territory of any other member.¹⁹ The Annex on Movement of Natural Persons Supplying Services under the Agreement forms an integral part of the GATS and makes it clear that the GATS does not apply to measures affecting natural persons seeking access to the employment market of a member or employment on a permanent basis.²⁰ In other words, labour laws – in as much as they pertain to permanent employment or to those seeking access to the employment market – are excluded from the scope of the GATS. The Annex further states that it applies to "measures affecting natural persons who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service".²¹ This leads to the conclusion that the GATS' Mode 4 covers the provision of services by the self-employed as well as the posting of workers in the context of service provision.

¹⁸ T. Broude, 'The WTO/GATS Mode 4, International Labour Migration Regimes and Global Justice', International Law Forum of the Hebrew University of Jerusalem Law Faculty Research Paper No. 7-07, May 2007, *passim*.

¹⁹ GATS, Art. I:2(d)

²⁰ GATS, Annex on Movement of Natural Persons Supplying Services under the Agreement, para. 2., GATS Article XXIX.

²¹ GATS, Annex on Movement of Natural Persons Supplying Services under the Agreement, para. 1.

In the GATS, conflicts between the objectives related to the liberalisation of trade in services and labour laws are most likely to arise in the context of the cross-border provision of services, the establishment of a commercial presence, and the movement of natural persons. A country “importing” a service across its borders could, for instance, seek to apply its labour laws extra-territorially to the foreign service provider. Another example would be a country that allows the movement of natural persons in the context of service provision applying its labour laws to the persons temporarily present on its territory.

The extent to which labour law, collective bargaining and other, related social protection issues come into conflict with the trade liberalisation objectives of the GATS depends first and foremost on the commitments that members actually make in respect of the cross-border provision of services, the establishment of a commercial presence, and the movement of natural persons. They retain the right to exclude liberalisation altogether, to establish quotas, or to restrict movement to certain types of workers. A member that either does not liberalise the service sector or grants market access only to those service providers applying its labour laws is therefore able to safeguard the regulatory capacity of its labour law and to protect its specific definition of its function. In addition to defining rights of market access, members also have the right not to grant any national treatment to foreign service providers or to limit the extent to which they grant them national treatment. Again, if a member does not grant national treatment or explicitly reserves a right to discriminate against foreign service providers by requiring them to apply domestic labour laws, it can safeguard its regulatory autonomy of the appropriate functions of labour law.

However, where members have granted rights of market access and national treatment, but have not reserved a right to apply their labour law, the application of labour law may well be inconsistent with their commitments. The application of labour law will be inconsistent with market access commitments if it amounts to a quantitative restriction and is inconsistent with the national treatment obligation if it treats similar foreign services or service providers less favourably than domestic ones by modifying the competitive relationship between the two. Article XVII on national treatment provides that “[i]n sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers”.²² The Article goes on

²² GATS, Art. XVII:1.

to state that the national treatment obligation may be met by either according formally identical or by formally different treatment, provided that such treatment does not modify the conditions of competition in favour of the services or service suppliers of the member.²³ Since labour costs are an important source of competitive advantage, the application of minimum wage laws, maximum work hours and minimum holidays may therefore be inconsistent with national treatment obligation since they raise the costs for foreign service providers. Similarly, requiring foreign service providers to negotiate a collective agreement with their workforce could raise their costs and be inconsistent with the national treatment obligation.

Broude has queried whether the GATS national treatment provision would not, in fact, mandate extending the host member's labour law, minimum wages and collective bargaining practices to the workers moving under Mode 4 since not doing so could be considered discriminatory *vis-à-vis* the workers.²⁴

It is submitted that the national treatment obligation cannot be interpreted so as to require host states to apply their labour laws to workers moving under Mode 4. The first issue to consider is whether the workers themselves might be considered as service providers. The GATS defines a service supplier as "any person that supplies a service".²⁵ The definition of a service supplier could, therefore, potentially encompass workers employed in a home state and supplying services in a host state. However, WTO adjudication might also consider the definition of Mode 4 in an interpretative context, which distinguishes between the service supplier of the home member and the presence of natural persons in order to establish that the term "service supplier" cannot be extended to the workers who move to the host state in order to provide services.

Regardless of whether the term "service supplier" is to be applied to salaried workers moving as natural persons, a national treatment violation would hinge on a modification of conditions of competition that adversely affects the foreign service supplier or service. Since lesser labour protection is more likely to confer a competitive advantage than a disadvantage, it can be concluded that the GATS does not require members to extend their labour law protection to foreign workers moving in the context of service provision.

²³ GATS, Art. XVII:2, 3.

²⁴ T. Broude, 'The WTO/GATS Mode 4, International Labour Migration Regimes and Global Justice', International Law Forum of the Hebrew University of Jerusalem Law Faculty Research Paper No. 7-07, May 2007.

²⁵ GATS, Art. XXVIII (g).

By the same token, however, a national treatment violation exists, for instance, if the member applies different standards of labour protection to its own nationals employed as temporary workers than to foreign nationals using Mode 4, and this difference in treatment could somehow be shown to modify the conditions of competition to the detriment of the foreign employer supplying services because it makes translocation of the provision of services too unattractive.

Once the application of the labour laws of the host state is provisionally found to be inconsistent with the market access and/or the national treatment obligation, the issue then becomes one of justification in terms of the general exceptions in Article XIV of the GATS and its chapeau. According to Article XIV(a) and (b), WTO members have the right to take measures that are necessary for the protection of public morals and human health, and to maintain public order. The public order exception requires a genuine and sufficiently serious threat to a fundamental interest of society. The public morals exception has been interpreted as referring to standards of right or wrong conduct. Since maximum work hours, annual holidays and maternity leave contribute to the health of the workforce, they might be capable of justification under Article XIV(b) GATS and the GATS thus recognises some of the social regulatory functions of labour law. The public morals and order exception could also be used to justify the application of certain, particularly fundamental, labour protection rights. While denial of constitutionally guaranteed rights to strike or unionise would probably constitute a sufficiently serious threat to public order, the application of more favourable paid holiday legislation or of union wages of the host state might not, particularly if there is no real tradition of collective bargaining. It is thus questionable as to whether the GATS recognises the distributive and “autonomy-function” of labour law, if they are not constitutionally enshrined as a fundamental interest of society.

A final issue to consider is whether members retain the autonomy to define whether an activity constitutes a service provision or employment, and hence falls outside the scope of the GATS. The more freedom of definition that WTO members enjoy in this respect, the greater their ability to safeguard their various functional understandings of labour law. A member could, for instance, argue that a natural person providing services in the capacity of a self-employed person has only nominal independence from the recipient of the service and that his or her status is that of a person seeking access to the employment market and/or of being, in effect, although not formally employed on a permanent basis in the host country.

Nowhere does the GATS define services. Panels or the Appellate Body would therefore be likely to rely on dictionary definitions, which stress the fact that services do not produce tangible commodities, in order to interpret the term 'services'. The GATS also does not define when members seek access to the labour market or employment on a permanent basis in the host member, nor when workers can be considered to be employed in respect of the provision of a service. With regard to both definitions, panels and the Appellate Body will, again, have to seek guidance from dictionary definitions. It is submitted that the GATS definition of natural employed persons involved in the provision of services is likely to be a broad one which also covers ancillary and technical personnel. This question is not dealt with in the definitions and scope of the GATS, although Article XVI on market access prohibits non-listed "limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirements of an economic needs test".²⁶ The exclusion of members' labour laws from the scope of Article XVI could, therefore, hinge on vague standards of whether employees are necessary for and directly related to service provision and on the difficult delineation between trading/manufacturing goods and supplying services.

In respect of the Annex on the Movement of Natural Persons, a similar issue is whether its scope of application is limited *rationae materiae* or *rationae personae*. A member could argue that Paragraph 1 restricts the scope of application to workers who are involved in the supply of the service to the exclusion of personnel partly or entirely involved in manufacturing or trade, and to where the firm manufactures or trades goods and provides services at the same time. A close reading of Paragraph 1 of the Annex on the Movement of Natural Persons suggests that it contains no limitation on the scope *rationae personae* since the term "in respect of the supply of a service" is separated by a comma from the preceding part, and thus does not refer to natural persons employed by a service supplier, but instead to "measures affecting natural persons" with the effect of further qualifying these measures *rationae materiae*.

In the final analysis, WTO members that have made no commitments or have made appropriately limited commitments are able to pursue the functions of labour law as they see fit. The flipside of members' autonomy concerning the inclusion of labour law matters is that the GATS may not be granting members that are interested in liberalising the movement of natural

²⁶ GATS, Art. XVI: 2(d).

persons or the exploitation of the competitive advantage linked to lower costs in the context of cross-border service provision sufficient market access. Few members have allowed the cross-border movement of natural persons at all, and the few that have done so have restricted it to the category of intra-corporate transfers at executive level and/or to the short-term entry of self-employed service providers for the purpose of forming business relationships. When labour law carve-outs have been omitted from schedules of commitments, it has been shown that the GATS restricts members to labour law policies that pursue regulatory functions relating to the health of the workforce and to fundamental labour rights. Lastly, it can be concluded that the exemption of labour law matters from the scope of the GATS Mode 4 is limited.

3.3. Limits on the functions of labour law arising from the interpretation of EC secondary legislation

The ECJ has long recognised that “Community law does not preclude Member States from extending their legislation, or collective labour agreements, entered into by both sides of industry to any person who is employed even temporarily, within their territory, no matter in which country the employer is established”.²⁷ By doing so, it has given considerable protection to national labour constitutions and to the different approaches to the function(s) of labour law. However, the problem with the *Rush Portuguesa* decision was both its over- and under-inclusiveness. On the one hand, member states could apply their legislation or collective agreements to posted workers and deprive service provision of much of its competitive advantage. It also enabled host member states not to take advantage of sufficient or similar protection offered by the home member state under functionally different models of labour law. On the other hand, the judgment in *Rush Portuguesa* failed to ensure the regulatory function of labour law since Member States could also choose not to apply their legislation to posted workers, thereby accepting the provision of services under lower or no standards of social protection.

Indeed, the ECJ seems to have increasingly moved away from its broad statement in *Rush Portuguesa* to a closer examination of whether formally identical treatment in respect of labour protection requirements is, in effect, equal treatment, and towards a more qualified acceptance of worker protection as an overriding requirement relating to the public interest by

²⁷ Case C-113/89, *Rush Portuguesa v Office National d'Immigration*, [1990] ECR I-1321, para 18.; see, also, Cases-62/81 and 63/81 *Seco* [1982] ECR-223.

examining whether the measure confers a genuine benefit and significantly adds to the social protection of workers and whether it is proportionate.²⁸

The standard of a genuine and significant contribution to the social protection of the worker constitutes a promising attempt to manage the conflicts between the freedom to trade services and the protection of posted workers if one uses a regulatory paradigm of labour law. If the Court finds that a measure does not add much to the protection of posted workers, it can promote the freedom to trade services without being seen as accepting differences in social protection between posted and regularly employed foreign workers. However, this may work less well when it comes to reconciling the differences between trade in services and the autonomy- or distributive function of labour law, as these are not focused on correcting market failures. They are instead focused on the process of collective decision-making about work related matters and relative deserts, i.e. what should be due to workers in exchange for their labour, respectively.

The Posted Worker's Directive attempts to solve the choice of law problems in the context of the posting of workers by requiring the host Member State to apply certain core employment protection measures to workers posted to their territory, where these are specifically laid down in law.²⁹ For the building sector, these core protection measures may be contained in collective agreements, which have been declared to be universally applicable.³⁰ The core protection measures include maximum work periods, minimum rest periods, minimum paid holidays, minimum rates of pay, including overtime rates, conditions for hiring-out workers, health, safety and hygiene at work, protection for pregnant workers, children and young people, and equality of treatment between men and women, as well as other provisions on non-discrimination.³¹

The Directive also regulates the case where a Member State does not have a system for making collective agreements universally applicable.³² Where a Member State applies these other collective agreements in respect of workers posted to its territory, it must ensure equality of treatment between the undertaking making the posting as well as undertakings in a similar position,

²⁸ B. Hepple, *Labour Laws and Global Trade*, (Oxford: Hart Publishing, 2005), at 171 [with further references].

²⁹ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, O.J. L-18, 21.1.1997, 1, Art. 3(1).

³⁰ *Ibid.*

³¹ Art. 3(1).

³² Art. 3(8).

notably by requiring the latter to fulfil the same obligations and with the same effects.³³

Finally, the Directive affirms that it does not preclude Member States from applying non-core protection measures if these constitute public policy, nor from applying terms and conditions laid down in collective agreements outside the building sector, provided that the Member State affords equality of treatment in both cases.³⁴

By requiring host Member States to apply defined core labour protection measures to the extent that they are contained in the Member State's labour law, the Directive clearly recognises the regulatory function of labour law as the enumerated core protection can plausibly be considered as being necessary for a functioning labour market. In this sense, then, competition between service providers bound by core protection measures and those not bound by such measures would also be unacceptable from a trade perspective.³⁵ The effect of the Directive is also to exempt core labour protection measures from the need for justification as public policy or from an overriding requirement relating to the public interest. In addition, it contains an important element of subsidiarity and respect for national labour constitutions because it leaves the choice regarding what core protection measures are necessary to the host Member State. Despite being focused on the regulatory function of labour law, the Posted Workers Directive does not preclude the possibility that other functions and notably the "autonomy-function" of labour law exist since it enables the Member States to make collective agreements in the building sector universally applicable, and conditionally allows them also to apply collective agreements outside the building sector and non-core protection measures that constitute public policy.

The Posted Workers Directive has recently been the subject of a preliminary ruling by the ECJ in the *Laval* case. The case concerned strike action and a blockade by Swedish trade unions against a Latvian construction company in order to compel it to sign a collective agreement in Sweden with provisions which went beyond the core protection in the Posted Workers Directive and to compel it to pay a certain hourly wage.³⁶ Sweden does not have a system for declaring collective agreements to be universally applicable, nor does it a

³³ Art. 3(8).

³⁴ Art. 3(10).

³⁵ The ECJ speaks of unfair competition and the need to ensure minimum protections of workers. See *Laval un Partneri*, paras. 74-76.

³⁶ *Laval un Partneri*, paras. 30, 34-38.

minimum wage, and remuneration is generally negotiated between employers and employees in collective agreements.³⁷ In one question, the referring court inquired as to whether the Posted Workers Directive precluded the trade union action with a view to persuading Laval to sign a collective agreement with more favourable terms and conditions and to enter into negotiations on pay.³⁸

The ECJ first noted that Sweden had not used the means provided by the Posted Workers Directive for setting a minimum wage, making collective agreements universally applicable or deciding to use collective agreements which are generally applicable to all similar undertakings in the sector or have been concluded by the most representative employers' and labour organisations.³⁹ The ECJ concluded that the trade union action could not be justified on the basis of Articles 3(1), (8) of the Posted Workers Directive because Sweden had not used the means provided for in these articles and because the collective negotiations went beyond minimum rates of pay.⁴⁰ Thus, in essence, the court held that Sweden's labour law system, which recognises the autonomous right to negotiate of each trade union, was incompatible with the Posted Workers Directive.

The ECJ then turned to Article 3(7) of the Directive, according to which Member States are not precluded from applying terms and conditions of employment to posted workers which are more favourable than the core protections. It found that Article 3(7) only allows the Member State and the undertaking that is posting workers to reach a voluntary accord on more favourable terms and conditions, but does not allow Member States to require conformity with such terms.⁴¹ Lastly, the ECJ considered whether the trade union action could be justified in the light of the provision in the Posted Workers Directive which allows Member States to apply non-core protection measures if they constitute public policy. The ECJ reasoned that trade unions could not avail themselves of the public policy provision since they were not public bodies.⁴² Thus, what the ECJ did in this part of the decision was to restrict the Posted Workers Directive to a functionalist-regulatory model of labour law, thereby excluding the distributive model of labour law, which would, for instance, require higher levels of pay and a model based upon the "autonomy-function" of labour law, in which workers

³⁷ *Laval un Partneri*, paras. 7, 24, 52

³⁸ *Laval un Partneri*, para. 53.

³⁹ *Laval un Partneri*, paras. 64, 66, 71.

⁴⁰ *Laval un Partneri*, paras. 70-71.

⁴¹ *Laval un Partneri*, paras. 80-81.

⁴² *Laval un Partneri*, para. 84.

and employers decide together on all the terms and conditions governing employment. It should also be noted that the Court's decision represented a departure from the more generous approach in *Rush Portuguesa* and *Seco*.⁴³

4. Limits to the functions of labour law arising from the interpretation of the EC treaty

The *Laval* case also concerned an examination of the Swedish trade union action in the light of Article 49 of the EC Treaty. The ECJ first decided that Article 49 applied to trade union actions because trade unions are engaged in the collective regulation of the provision of services and then found that strike actions and blockades and the requirement to negotiate with trade unions constituted restrictions within the meaning of Article 49.⁴⁴ As the right both to strike and to take collective action are fundamental rights, the ECJ then engaged in a balancing exercise with the freedom to provide services in order to determine whether the trade union action could be justified as a proportionate pursuit of a fundamental right. In respect of the strike action to compel Laval to sign the collective agreement on more favourable terms and conditions, the ECJ decided that it did not contribute to the protection of workers since the Posted Workers Directive already laid down the conditions for the protection of workers.⁴⁵

Here, the ECJ re-affirmed the restrictive reading of the Posted Workers Directive as providing only for minimal functionalist-regulatory protection. It also, in effect, turned the rights-based function of labour law on its head by requiring the exercise of the right to strike to lead to certain outcomes and thus conditioning that right. The analysis of the ECJ, it is suggested, has subtly shifted from an analysis of fundamental rights to a functionalist-regulatory one in which labour law is accepted because it leads to certain outcomes.

In respect of trade union action aimed at negotiations on pay, the ECJ found that they could not be justified as an overriding reason of public interest since the Swedish context was too intransparent and made it impossible for a service provider to ascertain the obligations with which it had to comply regarding minimum pay.⁴⁶ One may wonder whether a certain degree of intransparency and lack of prior notice is not an inherent feature of a national labour law system that relies primarily on the "autonomy-function" of labour

⁴³ See n. 27 and the accompanying text.

⁴⁴ *Laval un Partneri*, paras. 89, 99-100.

⁴⁵ *Laval un Partneri*, para. 108.

⁴⁶ *Laval un Partneri*, para. 110.

law, and whether the ECJ has not thereby implicitly restricted the "autonomy-function" of labour law still further.

The *Viking* case turned on the conflict between freedom of establishment and the right to collective action. It concerned actions by the Finnish Seamen's Union (FSU) and the International Transport Workers Federation (ITF) to prevent the Finnish ferry operator from establishing itself in Estonia by re-registering a vessel in Estonia in order to use low wage labour there. At the behest of the FSU, the ITF had issued a circular that prohibited affiliated Estonian unions from negotiating with Viking with a view to concluding a collective agreement, or else face sanctions and loss of membership of the ITF. What was at issue was, therefore, the collective action of the Finnish union and the policy of the ITF.

The referring court referred four main questions to the ECJ, namely, whether collective action fell outside the scope of Article 43, whether Article 43 had horizontal direct effect, whether the collective action by the FSU and the policy of the ITF constituted a restriction on the freedom of establishment, and whether such restrictions could, nevertheless, be justified as pursuing a legitimate aim and be justified by overriding reasons of public interest.⁴⁷

The ECJ decided that collective action fell within the scope of Article 43 in as much as it regulates employment and the provision of services collectively by aiming at the conclusion of a collective agreement.⁴⁸ The ECJ decided that the lack of Community competence on these matters, the status of fundamental rights or the reasoning in *Albany* did not modify this conclusion.⁴⁹ Since the actions of the FSU and ITF were aimed at the conclusion of a collective agreement and thus at regulating the work of Viking's employees collectively, the ECJ reasoned that Article 43 could apply horizontally in the present situation.⁵⁰ The ECJ also affirmed that the collective action by the FSU and the policy of the ITF constituted restrictions on the freedom of establishment.⁵¹

Concerning the justification of FSU's collective action and the ITF's policy, the ECJ differentiated between strike action with the purpose of persuading the undertaking to maintain jobs or cushion the effects of members of the

⁴⁷ *Viking*, para. 27.

⁴⁸ *Viking*, paras. 33, 36-37.

⁴⁹ *Viking*, paras. 38-55.

⁵⁰ *Viking*, paras. 58-61.

⁵¹ *Viking*, paras. 72-74.

workforce being laid off, and strike action and the ITF policy whose purpose was to prevent the ferry operator from re-registering by requiring it to sign a collective agreement at the place of beneficial ownership. In respect of the former, the ECJ affirmed that collective action for the protection of workers was a legitimate interest and the protection of workers an overriding reason of public interest.⁵² However, strike action could only be justified if jobs and working conditions were actually endangered by the re-registering, given that no other, less restrictive, course of action was available to the FSU under national law, and the other available means had not been exhausted before commencing collective action.⁵³ With regard to the ITF's anti-flag-of-convenience policy, the ECJ decided that it could not be objectively justified to the extent that the policy results in ship-owners being prevented from establishing themselves in another Member State.⁵⁴ The ECJ also doubted whether the purpose of the ITF's policy was really to protect the terms and conditions of employment for seafarers since the ITF was required to initiate solidarity action regardless of whether the work or employment conditions were adversely affected by the establishment in another Member State.⁵⁵

What can be concluded from the *Viking* decision with regard to the functions of labour law? The ECJ seems to be prepared to accept the distributive function of labour law because it decided that unions could engage in strike action in order to preserve their existing employment rights, regardless of whether these afforded minimal protection or further protection measures. At the same time, the decision reveals a certain suspicion about the "autonomy-function" of labour law because the ECJ sees strike action as an *ultima ratio* to be resorted to if other means of persuading employers have failed. Finally, the decision denies that there can be a Community-wide "autonomy-function" of labour law in which trade unions *collectively* seek to prevent employers from relocating to another Member State and wield so much power that they can effectively make this impossible. In a sense, then, the ITF became the victim of its own success.

⁵² *Viking*, para. 77.

⁵³ *Viking*, paras. 81, 84, 86-87.

⁵⁴ *Viking*, para. 88.

⁵⁵ *Viking*, para. 89.

5. Conclusion

The extent to which EC law and the GATS recognise different functions of labour law differs. The GATS list approach enables WTO members to exempt labour law matters from the scope of the market access and national treatment commitments, and thus leaves their various functional models of labour law intact. However, members that have not made use of this possibility need to be able to justify their application of labour law which constitutes barriers to market access or less favourable treatment either in terms of making a contribution to health protection, and thus the regulatory function, or in terms of public morals and order, and thus the rights-based function of labour law. Whether labour laws based upon the distributive or “autonomy-function” of labour law can also be justified remains doubtful. In contrast, in the EC, the primary legal texts are open towards various models of labour law but recent interpretations of these texts and of secondary legislation show a more restrictive approach notably towards the autonomy- and, to a certain extent, also the distributive function of labour law.

The fact that it is particularly the functionalist-regulatory model of labour law that has found acceptance in the EC legal context is not surprising. As Polanyi would teach us labour is a commodity whose sufficient production would be undermined if markets were left to their own devices. To this extent, the Posted Workers Directive could actually be said to strengthen the internal market for trade in services, where such services are provided across borders with employed labour. However, if labour markets are more politically embedded than the functionalist-regulatory model of labour law suggests, the Community’s apparent unease with the distributive and “autonomy-function” of labour law might lead to further conflicts over the liberalisation of services in the long run.

Chapter 2

Competing in Markets, not Rules: The Conflict over the Single Services Market¹

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I. Introduction

The discussion of the Services Directive from 2004 onwards was evidence of an unprecedented extent of the politicisation of a single-market issue. Whereas single-market policies until then had mainly passed unnoticed, this time, protest soared. In the course of this protest, the French and the Dutch even rejected the Constitutional Treaty.² With the Services Directive, politicisation hit the single market. No longer can it be said that the left-right dimension does not play a role in the European Union.³

With its proposal, the Commission wanted to strengthen the single market for services, which does not reflect the importance of services in national GDP. While services had already been part of the drive to complete the internal market by 1992, only sector-specific directives had been agreed upon (such as insurance services), which proved to be a very long and cumbersome process. As a horizontal directive, the draft Services Directive targeted all

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² See D. Howarth, “Internal Policies: Re-enforcing the New Lisbon Message of Competitiveness and Innovation”. (2007) 45 *Journal of Common Market Studies*, pp. 89-106, at. 94; S. Maatsch, “The Struggle to Control Meanings: The French Debate on the European Constitution in the Mass Media”. (2007) 8 *Perspectives on European Politics and Society*, pp. 261-80.

³ See P. Genschel, “Markt und Staat in Europa”, (1998) 39 *Politische Vierteljahresschrift*, pp. 55-79.

services, realising the single market by following the home-country responsibility for regulation. While home-country regulation, which implied the mutual recognition of the regulation of the other Member States, never roused significant fears for the markets in goods, for services, the Commission was advised differently.

By integrating segmented national markets, single-market legislation significantly enhances efficiency. Companies no longer need to adapt their goods or services to the different domestic regulations of the Member States. Instead, there are either common, harmonized rules, or there is mutual recognition. This lifting of market segmentation allows companies to exploit economies of scale while customers enjoy greater product variety. As Majone very early pointed out, increased markets are the reason why multi-national companies, in particular, seek regulation at European level.⁴ Single-market policies are thus classic examples of measures which increase Pareto-efficiency.

In this paper, I analyse why the realisation of the internal market for services was perceived not as a Pareto-efficient solution, but as a highly distributional exercise. My explanation builds on the difference between trade in services and trade in goods, the specifics of governance through mutual recognition, and the increased heterogeneity among Member States after the Eastern enlargement. For mutual recognition to work in this context, it is crucial that Member States perceive themselves as co-operating entities, and not as competing entities. Integration becomes acceptable only if competition can be focused on markets instead of rules, if it is the different competitiveness of companies, rather than merely the strictness of national rules, which determine market performance. Should the integration of markets via mutual recognition result in competition regarding the rules, distributional issues come to the forefront. For distributional issues, the European Union has insufficient input-legitimation.⁵ Even if general welfare would be strengthened by liberalising the markets for services, if liberalisation has highly distributional effects, this is unlikely to be perceived as legitimate, due to the lack of a common *demos* to show sufficient solidarity for significant redistribution.

⁴ See G. Majone, "Regulating Europe: Problems and Prospects", in: *Jahrbuch zur Staats- und Verwaltungswissenschaft Band 3*, T. Ellwein, (ed.), (Baden-Baden: Nomos Verlag, 1989), pp. 159-77, at 166-68; G. Majone, "Regulatory Federalism in the European Community", (1992) *10 Government and Policy*, pp. 299-316.

⁵ See F.W. Scharpf, *Legitimationskonzepte jenseits des Nationalstaats*, (Cologne: Max-Planck-Institut für Gesellschaftsforschung, 2004).

In the following, I start by analysing governance through mutual recognition,⁶ which allows ‘unity in diversity’ to be achieved.⁷ After pointing to the specifics of trade in services and the way in which the European Court of Justice has analysed the freedom of services, I analyse the original proposal of the directive, and the distributional issues which it raised. It is contrasted with the final compromise, and an inquiry into how the distributional issues in it were lowered. Mutual recognition can only achieve ‘unity in diversity’ for trade in services if Member States can assure that others do not exploit their regulatory situation. This is achieved by strengthening administrative co-operation through the harmonisation of administrative procedures. Paradoxically, in services the lack of harmonisation of rules in favour of mutual recognition seems to imply that Member States are much more likely to follow common administrative procedures in the implementation of the directive, as this is the only way to contain its distributive consequences. Thus, the case of the Services Directive is an example in which the conflict of interest in policy-making is absorbed by shifting it to another venue – that of implementation.⁸

2. The governance of mutual recognition⁹

To understand why the Services Directive was able to rouse such fears of re-distribution, it is necessary to explain how mutual recognition functions, and what its pre-conditions to solve governance problems are. The European Community had originally relied on the harmonisation of rules in order to build the internal market. As harmonisation transfers the competence for rule formulation and enforcement to the supranational level, it is a very demanding way to integrate markets. Harmonisation can be equalled to hierarchy, and to governing, as opposed to governance. Member States negotiate common rules, and these are then binding upon all of them, thus overcoming the different national regulations which separate the markets of Member States. The high decision-making costs associated with it were responsible for the sluggish completion of the internal market in the 1960s and 1970s. Moreover, once markets are harmonised at European level, the

⁶ See S.K. Schmidt, “Mutual recognition as a new mode of governance”, (2007) 14 *Journal of European Public Policy*, pp. 667-681.

⁷ See Ch. Joerges, “Conflict of Laws as Constitutional Form: Reflections on the International Trade Law and the Panel Report on the EC Biotechnical Products Case”. Paper for the New International Law Conference. Oslo, 2007.

⁸ See A. Héritier, *Policy-Making and Diversity in Europe*, (Cambridge: Cambridge University Press, 1999), p. 23; N. Zahariadis, “Europeanization as program implementation: Effective and democratic?”, (2008) 14 *Journal of Comparative Policy Analysis*, forthcoming.

⁹ The following draws on S.K. Schmidt, “Mutual recognition as a new mode of governance”, (2007) 14 *Journal of European Public Policy*, pp. 667-681.

Member States are no longer free to change the existing regulation, in order to adapt it to new requirements, and, instead, have to wait for the appropriate decisions at EU level.¹⁰

Mutual recognition is an alternative way of integrating markets. Here, it is assumed that Member States regulate markets in different ways, but in ways which are functionally equivalent. Instead of engaging in complex decision-making processes in order to harmonise these rules, Member States mutually recognise each others' rules. Mutual recognition has advantages for building markets, as there are no longer complicated pre-conditions. However, some of these complications re-appear in the implementation phase. As Member States remain politically responsible for the regulation of their markets, they only accept mutual recognition if the rules are equivalent. If the rules are not equivalent, Member States retain the right to demand adherence to their own rules – thus host-country rules would apply rather than home-country rules, and the market would remain fragmented. Compared to harmonised rules, mutual recognition is therefore more difficult to implement. Although companies may believe that their goods and services are regulated in an equivalent way and that they therefore qualify for mutual recognition, it may always be that local authorities are of a different opinion.¹¹ As the local authorities responsible for the control of market regulations have to decide whether the rules of the 26 other Member States are equivalent or not, mutual recognition entails significant transaction costs. Kalypso Nicolaïdis thus argues that mutual recognition relies on a transfer of transaction costs from the decision-making to the implementation phase.¹² One could also say that the solution of conflicts is shifted from the decision-making to the implementation stage.¹³

Similar to harmonisation, mutual recognition can provide governance functions. In doing so, it entails benefits and costs, just as harmonisation does. While Member States maintain the competence to regulate their markets and to adapt regulations to changed circumstances with mutual recognition, they transfer this competence to the supranational level through harmonisation. However, integrating markets via mutual recognition is more complicated

¹⁰ This is likely to prove increasingly problematical after enlargement, given the large *acquis communautaire* and the changed conditions of policy-making.

¹¹ See J. Pelkmans, "Mutual recognition in goods. On promises and disillusion", (2007) 14 *Journal of European Public Policy*, pp. 699-716.

¹² See K. Nicolaïdis, *Mutual Recognition Among Nations: The European Community and Trade in Services*. PhD, (1993), Cambridge, Massachusetts: Harvard., at 352.

¹³ See A. Héritier, *Policy-Making and Diversity in Europe*, (Cambridge: Cambridge University Press, 1999), p. 23.

compared to following harmonised rules. Typically, therefore, mutual recognition is combined with minimum harmonisation, in order to prevent Member States from finding reasons to object to mutual recognition because of the lack of the equivalence of rules. Moreover, there is the fear that mutual recognition puts pressure on regulatory levels, in the sense of a race to the bottom. If rules are mutually recognised, companies can pick their home country according to the regulatory regime; and those companies operating from countries with low levels of regulation enjoy competitive benefits.¹⁴ We come back to the specific relevance of this point for services.

While mutual recognition was already considered by the Commission in the 1960s as a way of integrating tax policy,¹⁵ it only entered the scene noticeably in 1979, when the European Court of Justice gave its ruling in the *Cassis* case.¹⁶ Drawing on the previous *Dassonville* case,¹⁷ the ECJ gave a broad meaning to the freedom of goods on the basis of Article 28, implying that goods legally marketed in one Member State can also be marketed in all other Member States. This is the obligation to *recognise* goods from the other Member States *mutually*, if they conform to the rules of the home country. However, by broadening the reach of the market freedoms under the *Cassis-de-Dijon* case law, the ECJ simultaneously enhanced the possibilities for Member States to make exceptions, beyond those already foreseen in the Treaty by Article 30. Member States remain free to regulate their domestic markets in sensitive areas, by invoking mandatory requirements goods have to adhere to (“rule of reason”).¹⁸

As is well-known, the Commission readily took up the idea of mutual recognition and launched the single-market initiative around it.¹⁹ At the late 1990s, the European Council in Tampere decided to transfer it to the area of justice and home affairs (JHA), with the first application being the European arrest warrant. In JHA, there was also a perceived need for co-operation, but

¹⁴ See G. Davies, “Services, Citizenship and the Country of Origin Principle”, *Mitchell Working Paper Series 2*, 2007: Edinburgh Europa Institute, p. 4.

¹⁵ See P. Genschel, “Why no mutual recognition of VAT? Regulation, taxation and the integration of the EU’s internal market for goods”, (2007) 14 *Journal of European Public Policy*, pp. 743-761.

¹⁶ Case 120/78 *Cassis de Dijon*, ECJ, [1979] *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*.

¹⁷ Case 8/74 *Procureur du Roi v Dassonville*, [1974] ECR 837.

¹⁸ See V. Hatzopoulos & T.U. Do, “The Case Law of the ECJ concerning the free Provision of Services”, (2006) 43 *Common Market Law Review*, pp. 923-991, at 956 et seq.

¹⁹ See K.J. Alter & S. Meunier-Aitsahalia, “Judicial Politics in the European Community. *European Integration and the Pathbreaking Cassis de Dijon Decision*”, (1994) 26 *Comparative Political Studies*, pp. 535-561.

an inability to achieve the necessary agreement on common rules. Just as in the single market, mutual recognition was taken up as an alternative mode of governance.²⁰

It is surprising that political science has largely neglected mutual recognition in the broad debate on new modes of governance in the EU. “The most important of Europe’s institutional innovations is hardly mentioned any longer in the debates on the so-called ‘new modes of governance’.”²¹ In the aftermath of the Lisbon Agenda of 2000 and the Commission’s White Paper of Governance in 2001, the discussion of new modes of governance has soared in European integration studies. But there has been little on mutual recognition until recently,²² despite the fact that most political scientists would probably agree that the impact of mutual recognition on European integration has been much larger than that of the Open Method of Co-ordination (OMC).

To sum up, mutual recognition can act as an alternative to harmonisation if Member States differ in their – equivalent – regulations. They can then simply accept each others’ rules instead of bothering to agree on common ones. But in the case of the Services Directive, the prospect of such an acceptance raised significant fears. To understand this conflict further, it is necessary to proceed by looking at the specifics of trade in services, regulation, and the legal provisions for the freedom of services.

3. The regulation of trade in services in the EU

In contrast with services, goods can travel borders independent of their production. For services, the delivery most often coincides with consumption, making it questionable how mutual recognition actually applies. Several forms of trade in services can be distinguished: 1) With the *active* freedom of services, the provider of services renders himself in the other Member State. 2) With the *passive* freedom of services, the consumer of services locates himself or herself in another Member State. 3) *Correspondence services* are those that can be delivered across borders without requiring either the recipient or the provider to move. Examples include financial services,

²⁰ See S. Lavenex, “Mutual recognition and the monopoly of force: limits of the single market analogy”, (2007) 14 *Journal of European Public Policy*, pp. 762-779.

²¹ See Ch. Joerges & C. Godt, “Free trade: the erosion of national, and the birth of transnational governance”, (2005) 13 *European Review*, pp. 93-117, at 95.

²² See S. K. Schmidt, “Mutual recognition as a new mode of governance”, (2007) 14 *Journal of European Public Policy*, pp. 667-681.

telecommunications and broadcasting.²³ The trade of correspondence services resembles the trade of goods most closely.

Services are, in a certain sense, invisible, which is why it is often difficult to separate their production from their consumption. Nevertheless, it is useful to draw this distinction artificially and to differentiate the service product from its delivery,²⁴ because this allows us to consider how the regulation of services differs from that of goods. The regulation of services can concern market access (for example, certain training requirements), mode of operation (for example, certain solvency requirements, speed-limits), the products themselves, and their distribution.²⁵ Two important points follow. For services, regulation is much more constitutive than for goods. And in contrast with goods, the regulation of services relies heavily on what one can compare to process standards.²⁶

In trade in goods, product and process standards are subject to different kinds of competitive pressures.²⁷ While consumer demand for high-quality products may keep product standards up, process standards are much more subject to competition, as costly versus cheap production processes determine competitiveness, often without having an impact upon product quality (for example, environmental standards in steel production). In as far as process standards need to be harmonised for trade in services, there is thus *much less* scope to use different process standards as a basis for competitive advantages for services than there is for goods. However, if services have to be delivered in the country of consumption (namely, the host country) and the latter cannot determine which rules apply, there maybe *much more* scope for competitive pressure through different regulations. Given the constitutive role of regulation for services, competition in rules – rather than markets –

²³ See K. Hailbronner & A. Nachbaur, „Die Dienstleistungsfreiheit in der Rechtsprechung des EuGH“, (1992) 6 Europäische Zeitschrift für Wirtschaftsrecht, pp. 105-113, at 108.

²⁴ See W-H. Roth, „The European Economic Community’s Law on Services: Harmonisation“, (1988) 25 Common Market Law Review, pp. 35-94, at 44.

²⁵ See W-H. Roth, „The European Economic Community’s Law on Services: Harmonisation“, (1988) 25 Common Market Law Review, pp. 35-94, at 16.

²⁶ See P. Troberg, „Dienstleistungen“, in: H.v.d. Groeben, J. Thiesing & C-D. Ehlermann (eds), Kommentar zum EU-/EG-Vertrag, (Baden-Baden: Nomos, 1997), pp. 1441-1523, at. 1472 et seq.

²⁷ See F. W. Scharpf, *Governing in Europe: effective and democratic?* Oxford: Oxford University Press, 1999.

thus becomes more likely. “[...] there is a closer connection between services regulation and labour market regulation than in the case of goods”.²⁸

Having regarded the specifics of the trade and regulation of services, the question becomes one of how the EEC Treaty supports mutual recognition for services. Traditionally the freedom of services serves a residual function. Whenever none of the other freedoms applies, the freedom of services becomes relevant. Thus, in contrast to the WTO approach to services, the freedom of services covers not the tertiary sector as such, but only trade of services across borders. In addition, the remuneration and the temporary nature of the delivery of services are important distinctions.²⁹ The residual nature makes it necessary to distinguish the freedom of services from the freedom of labour and of establishment. If someone occasionally works in another country, he or she will probably profit from the freedom of services. If an EU-foreigner is part of the national labour market, it will be the freedom of labour. If a cabinet-maker offers particularly tailored products across borders, he or she profits from the freedom of services; if he or she does it on a continuous basis with some sort of establishment, it is the freedom of establishment that matters. What is important is the difference in regulation: With the freedom of establishment, companies are regulated in the country where the services are being provided on a par with nationals. But if the freedom of services is being evoked, the regulations of the country of establishment (*i.e.*, the home country), and not so much of those of the service provision (*i.e.*, the host country) are applicable. However, host countries can apply rules that are covered by the general interest, similar to the mandatory requirements restricting the freedom of goods – if such rules have not already been observed in the home country.³⁰

²⁸ J. Pelkmans & S. v. Kessel, “Encapsulating Services in the ‘Polder’. The Bolkestein Directive in Dutch Politics”. WRR-Webpublicatie, 31, (The Hague: Wetenschappelijke Raad Voor Regeringsbeleid, 2007), p. 7.

²⁹ See W-H. Roth, “The European Economic Community's Law on Services: Harmonisation”, (1988) 25 Common Market Law Review, pp. 35-94, at 41.

³⁰ See K. Hailbronner & A. Nachbaur, “Die Dienstleistungsfreiheit in der Rechtsprechung des EuGH”, (1992) 6 Europäische Zeitschrift für Wirtschaftsrecht, pp. 105-113; see, also, V. Hatzopoulos, “Recent developments of the case law of the ECJ in the field of services”, (2000) 37 Common Market Law Review, pp. 43-82, at 112.

In contrast to the freedom of goods, the ECJ, for a long time, interpreted the *freedom of services* in a fairly restrictive way, not covering *continuous, regular activities*.³¹ A good example of this is the case law on the posting of workers, in which the ECJ allowed France – in the *Rush Portuguesa Case*³² – to apply its minimum wages also to workers temporarily posted from Portugal. Based upon this ruling, the Member States agreed on the Posted Workers Directive. More recently, however, the ECJ has seemed to pursue a more liberal approach with regard to services, emphasising the need to eliminate hindrances to trade in services trade. At the same time, the number of Court cases concerning the freedom of services increased from 40 cases between 1995 and 1999, to 140 cases between 2000 and 2005.³³ Thus, in 2003, the ECJ did not stress the temporary nature of services in the *Schnitzer case*,³⁴ which loosened the relationship with the freedom of establishment. In a later case, the ECJ went so far as to state that “*all services that are not offered on a stable and continuous basis from an established professional base in the Member State of destination constitute provision of services within the meaning of Article 49 EC*”,³⁵ thus bringing the interpretation of the freedom of services more into line with the WTO concept of trade in services.

The broadening of the case law on services which the ECJ has been developing since the early 2000s increasingly implies that Member States are forced to recognise the rules of the home country of service providers mutually. As we will see, the proposal for a Services Directive took up this incipient change of the case law, seeking to codify it in a radical way.³⁶

³¹ See A. Randelzhofer & E. Forsthoﬀ, “Art. 43 EGV: Das Niederlassungsrecht”, in: E. Grabitz & M. Hilf (eds), *Das Recht der EU. Kommentar*, (Munich: C.H. Beck, 2001), No. 35; see, also, V. Hatzopoulos, “Recent developments of the case law of the ECJ in the field of services”, (2000) 37 *Common Market Law Review*, pp. 43-82, at 63 et seq.; W-H. Roth, “The European Court of Justice’s Case Law on Freedom to Provide Services: Is Keck Relevant?” in: M. Andenas & W-H. Roth (eds), *Services and Free Movement in EU Law*, (Oxford: Oxford University Press, 2002), pp. 1-24, at 20; see, also, G. Davies, “Services, Citizenship and the Country of Origin Principle”, (2007) 2 *Mitchell Working Paper Series: Edinburgh Europa Institute*, p. 14.

³² Case-C113/89 *Rush Portuguesa* [1990] ECR I-1417.

³³ V. Hatzopoulos & /T.U. Do, “The Case Law of the ECJ concerning the free Provision of Services”, (2006) 43 *Common Market Law Review*, pp. 923-991, at 923.

³⁴ Case C-215/01, *Schnitzer*, [2003] ECR.

³⁵ See V. Hatzopoulos & T.U. Do: “The Case Law of the ECJ concerning the free Provision of Services”, (2006) 43 *Common Market Law Review*, pp. 923-991, original emphasis, at 929.

³⁶ See B. de Witte, “Setting the scene: How did services get to Bolkestein and why?” (2007) 3 *Mitchell Working Paper Series: Edinburgh Europa Institute*, p. 9 et seq.

4. The Bolkestein Directive

Launched in early 2004, the draft directive aimed to achieve the single market for services in all those areas where specific legislative measures had not yet been taken (as happened for financial services, for instance). Due to the importance of services, the Commission targeted about 50% of all the economic activities of the Member States with this single directive.³⁷ The directive aimed to accomplish both the freedom of establishment and the freedom of services, *exempting* only lotteries and all genuinely public services with no profit interest (for example, education, cultural activities, *etc.*). Health and social services were included. In order to achieve its ambitious goal, the draft directive relied on the principle of home-country control. Member States were required to recognise mutually services regulated in other Member States as equivalent to their domestically regulated services. Excessive regulatory requirements were to be abolished. Given the highly regulated nature of most services, the de-regulatory potential of the directive was considerable, as was aptly described by the then Commissioner Bolkestein:

We cannot expect European businesses to set the global competitiveness standard or to give their customers the quality and choice they deserve while they still have their hands tied behind their backs by national red tape, eleven years after the 1993 deadline for creating a real Internal Market. Some of the national restrictions are archaic, overly burdensome and break EU law. Those have simply got to go. A much longer list of differing national rules needs sweeping regulatory reform.³⁸

Given that sector-specific attempts at building the single market for services had already proven to be very cumbersome, the directive was bound to be controversial. To facilitate both the *freedom of establishment and of services*, Member States were called upon to establish a single contact point in their administrations (Article 6) for service providers. For the *freedom of services*, the draft prescribed the *rules of the home country*. Service providers would be able to offer their services in the host country, by simply following their home rules regarding access to services markets and the practice of service delivery. The host country was only to be able to enforce rules justified by the general

³⁷ See the report of the European industrial relations observatory on-line under: <http://www.eurofound.europa.eu/eiro/2004/07/feature/eu0407206f.html> [accessed September 24th, 2008].

³⁸ Rapid press release IP/04/37, 13.1.2004: Services: Commission proposes Directive to cut red tape that stifles Europe's competitiveness.

interest. Thereby, the increased legal certainty for services providers to operate simply under home-country rules resulted in significant legal uncertainty for the host countries. For them, mutual recognition would mean that they would no longer be aware under which rules services would be temporarily provided in their country. Related to this were fears of downward pressures on domestic regulations as well as insecurity for end-consumers who were uncertain of which rules service providers would have to abide by, and which rights they would themselves have as consumers.³⁹ However, the directive obliged *national authorities to co-operate* with each other. Thus, the possibilities for host-country authorities to obtain information from home-country authorities regarding the legality of companies posting workers would be greatly improved.

Given its broad scope, it was hardly possible to assess all the implications of the directive. In addition, further uncertainty was added by other provisions of the draft. Thus, the Services Directive explicitly was said to complement existing services law. However, it was not clear what implications would arise from the interaction of the new basis with the existing legal basis, such as the specialised directives for services, for utilities and services of general economic interest. In particular, this overlap concerned the *Posted-Workers Directive*⁴⁰ of 1996, for which the services draft foresaw the easing of some restrictions, such as the need to carry identity papers for local controls in the host country, and the obligation to appoint a national representative, making the controls of the host country more difficult.

Looking at the draft Services Directive, it is surprising that the Commission could agree to propose it,⁴¹ thereby placing the “permissive consensus” supporting European integration under such strain.⁴² The internal market DG had engaged in intensive consultations with the Member States before publishing the proposal, without getting to know the extent of the opposition within the Member States.⁴³ Moreover, it could point to the evolving case law of the ECJ on the freedom of services for support. It was argued that the directive simply codified much of what was already there, thus making the existing *acquis communautaire* more accessible for companies,

³⁹ See K. Nicolaidis & S.K. Schmidt, “Mutual Recognition on ‘Trial’: The Long Road to Services Liberalization”, (2007) 14 *Journal of European Public Policy*, pp. 717-734.

⁴⁰ Posted-Workers Directive (96/71/EC) of 1996.

⁴¹ I thank Ivo Maes for raising this question.

⁴² See A. Schäfer, “Nach dem permissiven Konsens. Das Demokratiedefizit der Europäischen Union”, (2006) 34 *Leviathan*, pp. 350-376.

⁴³ See K. Nicolaidis & S.K. Schmidt, “Mutual Recognition on ‘Trial’: The Long Road to Services Liberalisation”, (2007) 14 *Journal of European Public Policy*, pp. 717-734, at 722.

thereby enhancing legal certainty. While the Commission tried to advertise the services proposal as a measure which simply enhanced efficiency in a Pareto-optimising sense, the reactions to the draft emphasised its distributive consequences. It is to these consequences that I will now turn.

5. Re-distributive concerns: the contention about the Draft Directive

Given that the single-market initiative of the late 1980s had already targeted services next to goods, the Services Directive was long overdue. With the growing relevance of services, the failure to establish the single market implied significant losses of efficiency.⁴⁴ So why did distributive worries largely manage to overshadow the concerns for efficiency? An important factor here was the particular timing of the draft directive. Within a few months of the proposal, the Eastern enlargement took place, which significantly increased the heterogeneity among the European Union's members. This fundamentally altered the basis upon which the foreseen regime of a home-country rule had to build. Governance based upon mutual recognition needs to build upon the equivalence of rules and a functioning administrative co-operation. While this was already bound to cause problems in the EU-15, in the EU-25 (27 to be) it could not be any easier.

In the following, I take the German case in order to illustrate the distributive issues stemming from the single services market. On this basis, I analyse how Germany attempted to reduce the distributive consequences of the freedom of services by on its own, while negotiating the Services Directive.

6. Exemplifying re-distributive consequences: the German case

Given its central position in the European Union and the possible competitive pressure resulting from the wages gap of the new Member States, Germany joined most other Member States (with the exception of the UK, Ireland and Sweden) in using the transitory arrangement (2+3+2) in order to restrict the free movement of labour for the new East European Member States (not including Cyprus and Malta). In addition, Germany negotiated a

⁴⁴ Several economic studies make the point, see the webpage of the Commission under: http://ec.europa.eu/internal_market/services/services-dir/studies_en.htm (accessed 14.9.07). However, see C. Hay, "Keynote Article: What Doesn't Kill You Can Only Make You Stronger: The Doha Development Round, the Services Directive and the EU's Conception of Competitiveness", (2007) 45 *Journal of Common Market Studies*, pp. 25-43, who argues that the analogy of services markets with cheap consumer goods is faulty.

transitory regime for the freedom of services, exempting construction services, cleaning, and interior decoration in parallel to the freedom of labour. The German public was therefore surprised when, some months after the Eastern enlargement, it appeared that East Europeans were, nevertheless, exerting significant pressure on the national job market – simply by exploiting the freedom of services. Arguably, the exemptions that Germany had negotiated were precisely in those areas where East Europeans could profit least from the wage differential. When using free movement of labour, the same conditions apply to EU foreigners as to nationals. As construction is the main economic sector covered by the German Posted-Workers Law, similarly, a minimum wage has to be respected. In all other sectors, workers can come in temporarily under the freedom of services – which is interpreted as up to one year with the possibility of an extension for further twelve months – and replace German workers for the wages of their home country. As Germany does not have a minimum wage with the exception of the construction industry and sea transport, it cannot demand it for posted-workers.⁴⁵

Most noted in the press was the case of the slaughterhouses, where Germans were laid off on a large scale. In their stead, the slaughterhouses commissioned East European service providers with the slaughtering, which brought in East European personnel working for little money under deplorable working conditions. In some cases, wages were only 2-3 euro per hour with a daily working-time of up to 16 euro per hour. Already in early 2005, the unions spoke of 26,000 jobs lost; one third of all employees in the sector had been replaced by East Europeans. On the basis of this experience, it was feared that the Services Directive would bring similar pressure to other sectors.⁴⁶

The situation was complicated as East Europeans could come into Germany under different legal provisions, either relying on the freedom of establishment or of services, added to which there were also illegal activities.⁴⁷ Under the *freedom of establishment*, East Europeans face no restrictions, but

⁴⁵ See T.G. Christen, “Der Zugang zum deutschen Arbeitsmarkt nach der EU-Erweiterung”, (2004) 3 Bundesarbeitsblatt, pp. 4-16; see, also, F. Temming, “EU-Osterweiterung: Wie beschränkt ist die Dienstleistungsfreiheit?“, (2005) 3 Recht der Arbeit, pp. 186-192. For construction services in West Germany, the minimum wage is currently 10.40 EUR to 12.50 EUR (see Handwerkskammer Dresden <http://www.hwk-dresden.de/Serviceangebot/Beratung/Recht/RatgeberRecht/tabid/276/Default.aspx> [accessed 24 September 2008]).

⁴⁶ FTD 9.2.2005, p.27. Der Spiegel 7/2005, “Der Osten kommt“, p. 32-35; Hamburger Abendblatt 26.2.2005, p. 23.

⁴⁷ I omit the free movement of labour being less relevant for reasons of simplicity.

they do have to comply with German laws. Due to the coincidence that Germany had liberalised its crafts law right before the Eastern enlargement in early 2004, the loosened rules were exploited by many East Europeans. No specific wage and social security obligations exist for establishments, thus inviting social security fraud, for instance, through mock self-employment.⁴⁸

Under the *freedom of services*, East Europeans can be posted from an Eastern European company for temporary service deliveries in Germany, except in the exempted sectors (construction, cleaning, and interior decoration).⁴⁹ The Posted-Workers Directive prescribes German labour conditions for all sectors. However, with no general minimum wage, there are no restrictions with regard to what posted-workers have to be paid. The posting company has to discharge social security expenses in the home country. In addition, posting has to be a temporary activity and the company has to be active in its home country – mere mailbox companies established exclusively for posting workers are illegal, as are posted workers who are fully integrated into the German company's work process.⁵⁰ A host of different possibilities result for illegal activities: the temporariness, the exclusion of certain sectors, the working conditions of the host country, and the need to pay social security expenses in the home country may all be violated as well as the restrictions of the Posted-Workers Directive. Moreover, many companies are expressly established for posting workers, with no regular economic activity in their home country. But violations are difficult for the host country to detect. Authorities in the host country have to rely on the controls of the home country, and have to trust these accordingly. Moreover, it is not clear when a company legally posts workers abroad: it is probably insufficient for a company to employ one person for recruitment and control purposes in, say, Poland, and posts 99 workers into Germany. But how many persons have to be employed in Poland? Which part of the annual turnover has to be achieved in the home country in order for it to be seen as a company that is active in its home country?⁵¹ With high unemployment rates in many new Member States, the older Member States distrust whether the new Member States are playing by the rules.

⁴⁸ Stuttgarter Zeitung, 12.4.2005, p. 1; General-Anzeiger 14.5.2005, p. 3.

⁴⁹ See F. Temming, "EU-Osterweiterung: Wie beschränkt ist die Dienstleistungsfreiheit?", (2005) 3 Recht der Arbeit, pp. 186-192, at 188; see, also, T.G. Christen, "Der Zugang zum deutschen Arbeitsmarkt nach der EU-Erweiterung", (2004) 3 Bundesarbeitsblatt, pp. 4-16.

⁵⁰ Fleischwirtschaft 12.5.2005, p. 10.

⁵¹ FR 23.7.2005, p. 12.

The German situation was worsened by the mixture of not having a minimum wage, of being required to respect the services freedom, and of having little chance of reacting towards illegal activities. Only few other Member States (Denmark, Finland, Italy and Sweden) share the problem of not having a minimum wage. Nevertheless, the lesson told by the German case is a more general one. This is due to the problems created when the principle of home-country control is applied to services, of which the overriding incentives to use the opportunities for illegal activities are only one part. With the significant wage differentials in the EU after the Eastern enlargement, a greater emphasis on home-country regulations for services has a significant de-regulatory potential – which, after all, was partly desired, as is evident in the citation from Commission Bolkestein, noted above.

Moreover, it seems likely that the conflict about home-country control in services goes beyond a mere conflict about the extent of the liberalisation of services – as grave as the distributive issues may be. Instead, the fact that services are often traded with their providers present means that home-country control raises important issues of equality.⁵² Davies puts the problems succinctly:

The presumption is that service providers are exempt, above the law of the territory where they operate, and the rebuttal of that presumption is hard. The situation where competing service providers on a territory are subject to different legal regimes – that they essentially bring their own legal regime with them – becomes the usual one, with all the associated challenges to equality and competition norms [...].

Davies therefore argues that an interpretation of the services freedom as pertaining to home-country control violates the prohibition of nationality discrimination of Article 12 of the Treaty. The nationals of the host state are being discriminated against. Given the implication of home-country rule in trade in services, host-country control would often lead to less inequality.⁵³

An individual who is present in the jurisdiction but not subject to its regulation, and operating under a more beneficial regime, is a direct challenge to the content of citizenship – national or European – and its associated guarantees of equality and privilege. His domestic competitor sees his most privileged position as a national citizen

⁵² See G. Davies, “*Services, Citizenship and the Country of Origin Principle*”, (2007) 2 Mitchell Working Paper Series: *Edinburgh Europa Institute*, p. 8.

⁵³ *Ibid.*, at 8.

undermined, while the two competitors, working side by side, operate under different legal regimes with different rights, despite a shared EU citizenship.⁵⁴

To sum up, services are particularly rule-dependent. Moreover, they normally cannot be traded without their providers. To allow people in the same situation to be subject to different rules raises questions of equality which do not appear if goods are subject to different regulations. As service traders are controlled, moreover, by a different jurisdiction than the one where they operate, incentives for illegal activities are of great importance. The risk is that the liberalisation of services does not lead to (fair) competition in markets, but to (unfair) competition in rules – as difficult as it is to separate the two, given the rule-dependence of services.⁵⁵

7. Reacting to the new situation: lessening re-distributive effects

Given the problems resulting from trade in services, Germany was forced to react politically. Parallel with the multi-lateral negotiations, it could, and did, react both unilaterally and bi-laterally. One notable result of the freedom of services has been the intensified discussion on minimum wages in Germany, which started under the red-green coalition when it agreed, in May 2005, upon the aim to extend the German Posted-Workers law to all sectors of the economy.⁵⁶ This discussion has been continuing ever since. Since the state traditionally leaves wage agreement to the unions and employers' associations, a state-set minimum wage would be a significant institutional rupture. At the same time, it would be the easiest way to tackle the re-distributive issues arising from the freedom of services. The discussion on minimum wages, which is ongoing, is therefore a highly interesting example of an Europeanization effect, exemplifying the shortcomings of Europeanisation studies that normally focus only upon the implementation of directives.⁵⁷

⁵⁴ Ibid., at 7.

⁵⁵ The fact that there are grey areas in distinguishing the two does not imply that rule manipulation or violation in order to gain competitive advantage are not being noticed as such.

⁵⁶ 'Für Fairness am Arbeitsmarkt – Kabinett beschließt Änderung des Arbeitnehmer-Entsendegesetzes', *Bundesministerium für Wirtschaft und Arbeit*, 11-05-2005.

<http://www.bmwi.de/BMWi/Navigation/Presse/pressemitteilungen,did=63816,render=renderPrint.html>

⁵⁷ See S.K. Schmidt, M. Blauburger & W. van den Nouland, "Jenseits von Implementierung und Compliance – Die Europäisierung der Mitgliedstaaten", in: I. Toemmel (ed.): "Die Europäische Union: Governance und Policy-Making", (2008) *Politische Vierteljahresschrift, Sonderheft 40*, pp. 275-296.

In the following, I will not engage any further in this kind of purely domestic institutional adaptation to reduce the distributional consequences of European regulation. Instead, I discuss two other kinds of domestic reaction: the German attempt to fight illegal activities, and the bilateral talks with its neighbours about the freedom of services.⁵⁸ Both reactions have been part of the mandate of the ‘*Task Force zur Bekämpfung des Missbrauchs der Dienstleistungs- und Niederlassungsfreiheit*’,⁵⁹ which Germany created in March 2005 to combat the adverse effects of the freedom of services and establishment after the Eastern enlargement.⁶⁰

To tackle illegal activities Germany requires a postal address for the posting company as well as a translation of all the relevant documents concerning the working contract, working times and pay into German.⁶¹ The facilitations on the Posted-Workers Directive of the draft Services Directive clearly ran counter to these control efforts. In its attempt to ease the posting of workers, the Commission started an infringement procedure in late 2004 against Germany for restricting the freedom of services disproportionately. In its recent judgment of July 2007, the ECJ, however, assessed the German interest in workable controls as not interfering with the freedom of services.⁶² It remains to be seen whether this will lead the European Commission to back down from its criticism on how Germany, and other Member States, have implemented the Posted-Workers Directive. Only in June 2007 did the Commission publish a communication on the directive, criticising Member States for overly controlling the use of the freedom of services.⁶³

⁵⁸ In the following, I partly draw on unpublished work by Wendelmoet van den Nouland in the context of the NewGov project “The Domestic Impact of European Law”.

⁵⁹ Task Force to fight the abuse of the freedom of services and of establishment.

⁶⁰ See BMF/BMAS Bericht zu den Aktivitäten der Task Force zur Bekämpfung des Missbrauchs der Dienstleistungs- und Niederlassungsfreiheit, Oktober 2006, under: http://www.bundesfinanzministerium.de/nm_54338/DE/BMF__Startseite/Service/Downloads/Abt__I/Monatsbericht/Downloads/0609121a1001,templateId=raw,property=publicationFile.pdf#search=%22task%20force%22 [accessed 24. September 2008].

⁶¹ TAZ, 14.06.2007.

⁶² Case C-490/04, [2007] *Commission of the European Communities v Federal Republic of Germany*.

⁶³ Communication from the Commission: Posting of workers in the framework of the provision of services – maximising its benefits and potential while guaranteeing the protection of workers. Under: http://ec.europa.eu/employment_social/news/2007/jun/communication_en.pdf [24.09.2008]

Since April 2006, Germany has compelled the other Member States to send a copy of all E 101-forms of workers posted to Germany to the *Deutsche Rentenversicherung in Würzburg*.⁶⁴ Previously, Germany suffered a serious setback in its activities to combat fraud when the ECJ ruled in early 2006 that Member States have to accept existing E 101 forms, even when they are obviously fake.⁶⁵ In cases of suspicion, the Member States have to contact the issuing authority of the Member State concerned or have to start an infringement procedure⁶⁶ against the issuing Member State. National courts are not allowed to decide by themselves whether the forms have been forged. Consequently, Germany could not do anything in a case in which Germans had employed Portuguese workers on a permanent basis, pretending that they were being posted from Portugal, thus evading social security in Germany.⁶⁷

As Member States have to accept each others' administrative acts according to the ECJ, Germany conducted bilateral talks with other Member States, both old (for example Denmark, the Netherlands, Austria) and new. Talks are being held regularly with Poland and Hungary once every three months.⁶⁸ With these meetings, Germany wants to reach a 'common understanding' of the freedom of services, in order to establish the criteria for defining the status of 'posted workers' and for issuing E 101 certificates, including the precondition of the economic activity in the country of origin (in order to combat mailbox companies), and the distinction between real and mock self-employment.⁶⁹ Moreover, the bilateral talks allow specific problems, such as the situation in German slaughterhouses, to be investigated.⁷⁰ An underlying

⁶⁴ Deutscher Bundestag, Drucksache 16/5098, 25.4.2007; Deutscher Bundestag, 27 May 2005, "Dienstleistungsfreiheit nach der EU-Osterweiterung", p. 18. <http://dip.bundestag.de/btd/15/055/1505546.pdf> (accessed 24.09.2008).

⁶⁵ Case C-2/05 *Rijksdienst voor Sociale Zekerheid v Herbosch Kiere NV* [2006].

⁶⁶ Article 227 EC Treaty.

⁶⁷ Bundesgerichtshof, Pressestelle, N. 143/2006; "Keine Strafbarkeit wegen Nichtabführung von Sozialversicherungsbeiträgen bei Vorlage einer durch einen Mitgliedstaat ausgestellten 'E 101-Bescheinigung'". Urteil vom 24.10.2006, 1 StR 44/06.

⁶⁸ Information on these bilateral contacts can be found in: BMF/BMAS Bericht zu den Aktivitäten der Task Force zur Bekämpfung des Missbrauchs der Dienstleistungs- und Niederlassungsfreiheit, Oktober 2006, under: http://www.bundesfinanzministerium.de/nn_54338/DE/BMF__Startseite/Service/Downloads/Abt_I/Monatsbericht/Downloads/0609121a1001,templateId=raw,property=publicationFile.pdf#search=%22task%20force%22 [24.9.2008], pp.4-6.

⁶⁹ Interview 11: Bundesministerium für Arbeit und Soziales; Interview 12: Bundesministeriums für Wirtschaft und Technologie; Die Welt, 12 April 2005, "Lohndumping: Regierung verhandelt mit Polen"; Financial Times Deutschland, 26 April 2005, "Rüge aus Polen; Dienstleistungen".

⁷⁰ Interview 12: Bundesministeriums für Wirtschaft und Technologie.

goal of the talks is the strengthening of mutual trust.⁷¹ A more formal goal is the signing of administrative co-operation agreements between Germany and the new Member States (which already exist between Germany and France, between France and Belgium, and between Britain and the Netherlands) in order to improve cross-border controls and co-operation between the respective authorities.⁷²

8. The fate of the Bolkestein Directive

The German experience clearly illustrates the distributive consequences when the principle of home-country control is applied to the provision of services. The contradictory discussions surrounding the proposal of a Services Directive took off from here; arguments about Pareto-efficiency met those of distributional effects. This discussion shall not be resumed here.⁷³ Instead, I wish address how the final compromise managed to lessen the distributive effects of the freedom of services.

The compromise which was reached in the European Parliament between the Social Democrats and the Christian Democrats abolished the contentious home-country principle, thus only leaving the obligation to enable the freedom of services.⁷⁴ Officially, the directive does not speak of mutual recognition,⁷⁵ but of enabling the freedom of services. However, a list is included of the measures Member States may not require, which include special duties to register in the host country or to acquire *ex-ante* certification as well as prescriptions regarding the materials and tools to be used. So, in all these cases, home-country rules apply, even though the directive refrained from saying so openly. Importantly, the list of justifications for host-country

⁷¹ Ministry of Finance/Ministry of Labour and Social Affairs, October 2006, "Bericht zu den Aktivitäten der Task Force zur Bekämpfung des Missbrauchs der Dienstleistungs- und Niederlassungsfreiheit", p. 4.

http://www.bundesfinanzministerium.de/nr_54338/DE/BMF__Startseite/Service/Download_s/Abt__I/Monatsbericht/Downloads/0609121a1001,templateId=raw,property=publicationFile.pdf#search=%22task%20force%22 [accessed 24.9.2008].

⁷² See Bundesministerium der Finanzen 2005: 161; Interview 7: ZOLL - Finanzkontrolle Schwarzarbeit; 'Gemeinsam für Deutschland. Mit Mut und Menschlichkeit'. Koalitionsvertrag von CDU, CSU und SPD, 11 November 2005, p. 39.

http://www.bundesregierung.de/nsc_true/Content/DE/___Anlagen/koalitionsvertrag,templateId=raw,property=publicationFile.pdf/koalitionsvertrag.

⁷³ See K. Nicolaidis & S.K. Schmidt, "Mutual Recognition on 'Trial': The Long Road to Services Liberalization", (2007) 14 *Journal of European Public Policy*, pp. 717-734.

⁷⁴ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, under: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0123:EN:NOT>.

⁷⁵ See K. Nicolaidis & S.K. Schmidt, "Mutual Recognition on 'Trial': The Long Road to Services Liberalisation", (2007) 14 *Journal of European Public Policy*, pp. 717-734.

requirements in Art. 16 III is much more narrow than the ones the ECJ has accepted in its case law, implying a “deregulatory shift”.⁷⁶

The final directive is more restricted in scope than the draft, exempting health services, utilities, public transport, social, and security services, temporary workers, gambling and lotteries, waste, audiovisual services, electronic communication, financial and legal services. In addition, the facilitations foreseen for the Posted-Workers Directive were deleted, much to the chagrin of the East European Member States. Here, the Commission promised a separate follow-up on the workings of the posted-workers directive. It remains to be seen whether the recent ECJ judgment concerning the German control inhibits the Commission’s attempts to remove controls of posted workers by the Member States.

Other provisions survived more or less untouched. Thus, Member States have to establish points of single contact for service providers in their administration. They also have to review their regulations and abolish disproportionate burdens. Moreover, they have to ensure that service providers can fulfil all formalities electronically. Importantly, the directive includes a far-reaching provision on administrative co-operation,⁷⁷ detailing the responsibilities of the administrations in the home and the host country. In contrast to the original version, the host-country authorities will now be responsible for controlling those rules which they themselves impose. But generally, the home-country authorities are the ones legally responsible for oversight. Both authorities co-operate closely, since the home-country authorities cannot become active in the host country, but have to request the host authorities to take action. Notably, the directive establishes a duty to co-operate among the administrations of the Member States. This had not existed before.⁷⁸ Thus, Article 28 (8) provides that the Commission will start an infringement procedure if the Member States fail to comply with their duties:

Member States shall communicate to the Commission information on cases where other Member States do not fulfil their obligations of mutual assistance. Where necessary, the Commission shall take

⁷⁶ See B. de Witte: “Setting the scene: How did services get to Bolkestein and why?”, (2007) 3 Mitchell Working Paper Series, : *Edinburgh Europa Institute*, p. 12; see, also, G. Davies: “Services, Citizenship and the Country of Origin Principle”, (2007) 2 Mitchell Working Paper Series: *Edinburgh Europa Institute*. p. 12 & 18.

⁷⁷ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market Chapter VI; Articles 28-36.

⁷⁸ Interview European Commission, DG Internal Market 27.9.05.

appropriate steps, including proceedings provided for in Article 226 of the Treaty, in order to ensure that the Member States concerned comply with their obligations of mutual assistance. The Commission shall periodically inform Member States about the functioning of the mutual assistance provisions.

In order to facilitate co-operation across the language barriers, the Commission is promoting an information system that provides for the automatic translation of specific standardised paragraphs.

Thus, the Services Directive lays the foundations for transnationally operating administrations. Instead of simply following the instructions given in their national hierarchy of command, with the Minister on top being ultimately responsible politically,⁷⁹ administrations now also have to comply with horizontal demands which originate in the administrations of other Member States.

In the negotiations on the directive, the administrative changes required by the directive received relatively little attention. The political conflict about the extent of the liberalisation overshadowed everything else. However, they do impose major institutional changes. Already the requirement to provide for points of single contact implies a “paradigmatic” change for administrations, as they now have to be thought of from the point of the citizen accessing the administration, rather than from the point of state organisation and along the lines of inner-administrative accountability and responsibility.⁸⁰ The obligation of administrative assistance among Member States intensifies these changes, and prompts questions regarding *which* administration acts under *what* kind of law. Thus, if the host-country administration takes action, upon the request of the home-country administration, it would have to do so upon the legal basis of the home country. But how would legal protection against these acts be organised, and to which court the administration would be subject and under what kind of law? Would the home-country court, say in Estonia, order the administration, say in the UK, to postpone or alter its acts? How would different data protection laws be handled? It is likely, that the duty to co-operate will lead to further harmonisation of administrative laws of Member

⁷⁹ See M. Döhler, “Institutional Choice and Bureaucratic Autonomy in Germany”, (2001) 25 West European Politics, pp. 101-124.

⁸⁰ See U. Schliesky, “Von der Realisierung des Binnenmarktes über die Verwaltungsreform zu einem gemeineuropäischen Verwaltungsrecht? Die Auswirkungen der geplanten EU-Dienstleistungsrichtlinie auf das deutsche Verwaltungsrecht”, *Deutsches Verwaltungsblatt*, 2005, July, pp. 887-895, at 891.

States. Thus, the directive presents a significant break from the past principle that Member States are free to implement European directives with the European Union not interfering with administrative organisation of the Member States.⁸¹

To sum up, distributive concerns were contained by reducing the scope of the directive and by abolishing the home-country principle, at least officially. At the same time, the strengthened co-operation appears crucial for Member States to accept the further integration of service markets by a combination of applying home-country and host-country rules, which now results. Given the way the ECJ is interpreting the need for administrative collaboration and reliance, totally rejecting the right of one Member State to control the administrative acts of another, it is only through further administrative co-operation that the distributive effects of fraud in the trade of services can be contained. The centrality of administrative co-operation also becomes apparent in the bilateral attempts of the German government.

9. Conclusions

Mutual recognition is an alternative to integrating markets via harmonisation. For it to function, Member States have to trust that different rules will not be taken as a basis of competition; that difference will not be exploited to gain “unfair” advantages, relating not to different competitive strength but simply to rules and their enforcement. I have argued that mutual recognition is acceptable if competition is about markets not rules. Given the rule-dependent nature of services, there is controversy among the Member States as to whether it is rule manipulation, and not efficiency and specialisation, that strengthens their competitiveness. Distributive effects arise, on the one hand, due to the labour-intensive nature of most services. With the liberalisation of services coinciding with the Eastern enlargement, the lower wages of these countries immediately exert pressure – most of all in those countries which rely on collective wage agreements, instead of minimum wages, as the host states cannot make these binding. In addition, there are, on the other hand, the many control problems that the principle of home-country rule implies, when it is put to use with services. Several points are at issue here, and they are best illustrated by taking the case of goods as a starting point. Goods are being produced in the home country, under its rules, being controlled by local authorities and then traded. For services, with the exception of correspondence services, the situation is entirely different. Under the principle of home-country rule, service providers, regulated under

⁸¹ *Ibid.*, at 893 et seq.

27 different regimes, work side-by-side. This raises issues of basic equality, particularly if nationals feel discriminated against by their own domestic rules. Host-state authorities, moreover, have to trust in the adequacy of the rules and the administrative controls of 26 different home countries. They cannot exert on-site controls, but have to ask the home-country authorities for such controls. It seems evident that integrating services markets via mutual recognition requires much more trust and institutional support structures than is the case for goods markets. For the latter, Member States have to trust each other to control the home market sufficiently to protect their own population as well as customers from abroad. For services, Member States have to trust each other to control their service providers sufficiently exclusively for the sake of customers abroad. In contrast to goods, it is possible, in the control of services, to distinguish whether the beneficiaries of controls are domestic customers or those of another Member State. In view of high unemployment figures in new Member States, the old Member States are sceptical as to whether the administrations of new Member States will take decisions that favour the old Member States at the expense of their own populations. By setting incentives in this way, mutual recognition in services favours illegal activities.

In order to ameliorate such concerns as not playing by the rules, and thereby raising distributive issues, administrative co-operation is being strengthened. As we have seen, this is what Germany has, on its own, initiated by means of bilateral talks, but this is also the way that the Services Directive proceeds. Interestingly, mutual recognition thus leads to a harmonisation of state organisation. Traditionally, it is up to the Member States to decide how they implement the law of the European Union. While mutual recognition allows 'unity in diversity' when it comes to regulation, paradoxically, in implementation, it leads to a new and significant form of harmonisation in the case of services. By instituting a new line of duties, administrations are released from their exclusive national obligations, and start to be similarly dedicated to the needs of other Member States in the context of the Community cause. In terms of institution-building, this is a very significant development. Possibly, it lays the foundation for a network of nationally-based administrations pursuing European aims, rather than segmented national authorities pursuing domestic goals.

The services single market is an interesting example of changes of institutional venues in view of conflicts of interest. First, the mutual recognition of rules is pursued instead of harmonisation, shifting the conflict of interest from the decision-making to the implementation stage. However, in the case of services, where regulation matters so much for competitive performance, the

incentives to engage in regulatory arbitrage are high and conflicting interests cannot be mediated via mutual recognition. The harmonisation of administrative procedures to contain the distributive issues is the next step in this development. In the course of implementing the Services Directive, it remains to be seen whether distributional conflicts can be mediated successfully at this level.

Chapter 3

Competitiveness and Labour Protection: A Comment

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1. Introduction

The GATS and the EC internal market on services, in particular the Services Directive, have been at the centre of a vigorous public debate about the effects of the liberalisation of services on domestic political, economic and social systems in recent years. This debate was part of the general discourse about the establishment and maintenance of social and economic justice under the conditions of globalisation. One of the aspects of this debate concerns the conflict-laden relationship between labour protection or social policy in general and competitiveness in the markets for services, which raises legal, political, economic and social concerns. The stimulating chapters by Alexia Herwig and Susanne Schmidt address two aspects of this multi-dimensional relationship and approach them from different disciplinary backgrounds.

2. The impact of GATS and EC law

From the legal perspective, Alexia Herwig is interested in how the law reacts to the potential conflicts between the labour law regime and the services liberalisation regime. She approaches this question on a comparative basis, discussing the Services Directive and the GATS. She develops her arguments in two steps: first, she discusses whether the legal regimes can apply simultaneously, or, more precisely, whether the Services Directive or the GATS contain a carve-out for labour laws. She concludes – correctly, to my mind – that neither Article 1.6 of the Services Directive nor the GATS

Annex on Movement of Natural Persons preclude the applicability of the two liberalisation of services regimes to labour law.

Having determined that an overlap between trade liberalisation and labour protection is possible, Herwig then analyses a potential area of conflict, *i.e.*, the application of domestic labour laws and collective wage agreements to posted-workers from abroad. She points to the approach taken by the Posted-Workers Directive in the EC context, which aims at a balance between the competitiveness of service providers and the protection of the (domestic and foreign) labour force. As Herwig rightly points out, the Posted-Workers Directive can be seen as an attempt to manage the underlying conflicts by means of the free movement of services and labour protection. However, the Posted-Workers Directive can also limit additional instruments used by the Member States in order to protect the labour force, as the *Rüffert* case aptly demonstrated.¹ This case concerned the public procurement law of the German Land Niedersachsen which required a declaration from the bidders in a public tender to pay at least the remuneration prescribed by the collective agreement in force at the place where these services were to be performed. The ECJ held that this requirement is incompatible with the Posted-Workers Directive and Article 49 EC.²

Lastly, Herwig turns to the GATS and assesses the potential impact of the national treatment obligation (Article XVII GATS) on domestic labour law. She identifies the modification of the competitive relationship as the determining factor of the application of Article XVII GATS, which contains the national treatment obligation. She concludes that the GATS national treatment obligation does not require the extension of labour standards to the foreign service supplier. This conclusion can be supported in full. However, the question answered by this conclusion is not the only relevant question in this context. Asking whether the GATS national treatment obligation prohibits WTO members from applying their own domestic system may be equally – if not more – important. Herwig briefly mentions this question but does not pursue it further.

¹ Case C-346/06, *Dirk Rüffert v Land Niedersachsen*, Judgment of 3 April 2008, nyr.

² *Rüffert*, above note 2, para. 49.

3. Revisiting *Laval*, *Viking* and *Rüffert* in light of the GATS

In order to ascertain the potential impact of the GATS national treatment obligation on social policy and labour protection, it may be helpful to assess the three recent ECJ cases, which concerned the conflict between labour protection and the markets for services in the EC context, from the GATS perspective. How would the *Viking*,³ *Laval*,⁴ and *Rüffert* cases have been decided on the basis of the GATS national treatment obligation, assuming, in each case, that the countries concerned made full national treatment commitments?

The answer to this question is relatively straight-forward in the *Viking* and the *Rüffert* cases: *Viking* is – as Herwig reminds us – a typical re-location scenario which concerns the re-establishment of a service provider in a country other than its (former) home country. From a GATS perspective, this involves trade in services through Mode 3 (commercial presence). However, the measure in question (preventing a company from re-locating) is a measure attributed to the home and not the host country,⁵ and affects the exportation of services, but not their importation. Yet, Mode 3 (unlike Modes 1 and 2) concerns the importation of services. Hence, only the measures of the host state are covered. Thus, the GATS national treatment obligation does not prohibit governments from preventing the re-location of a company.

Rüffert concerned a condition placed on a call for tenders. According to Article XIII:1 GATS the national treatment obligation (as well as the most favoured nation and the market access obligations) does not apply to requirements governing government procurement. The GATS mandates negotiations on government procurement, but, so far, these have not produced any results. Thus, a *Rüffert*-type regulation would not be affected by Article XVII GATS.

As Herwig points out, *Laval* is a typical replacement scenario: A service provider employing high-wage workers loses a competitive bid to a service

³ C-438/05, *International Transport Workers' Federation a. o. v Viking Line a.o.*, Judgment of 11 December 2007, nyr.

⁴ C-341/05, *Laval un Partneri v Svenska Byggnadsarbetareförbundet a. o.*, Judgment of 18 December 2007, nyr.

⁵ In fact, the measure in question was a measure by trade unions. Whether these are covered by GATS will be discussed in the context of the *Laval* case.

provider employing low-wage workers. This amounts to a *de facto* replacement of high-wage workers with low-wage workers. Addressing this case from a GATS perspective, one would first have to ask whether the activities of the labour unions (calling for a strike and blocking the construction site of Laval) would fall under the scope of the GATS as a measure by a WTO member affecting trade in services according to Article I:1 GATS. It can be argued that the collective action of the labour union affects trade in services, because Laval is supplying a service under Mode 4 of the GATS by posting workers to a construction site abroad, and was therefore engaging in “trade in services” according to Article I:2 GATS. However, it is questionable whether the collective action is a “measure by a Member”. The term “measure” is defined in Article XXVIII(a) GATS as suggesting that only governmental activities are covered by the GATS. However, GATT and WTO dispute settlement practice has extended the notion of a measure to include private actions encouraged or supported by a government, and not merely tolerated by it.⁶ Whether collective action would be covered by this, depends on the circumstances of the case. In any event, the institutional scope of the GATS seems much narrower than the scope of Article 49 EC which extends to rules “which are not public in nature but which are designed to regulate, collectively, the provision of services” and to “associations or organisations not governed by public law” including collective actions of trade unions.⁷

If the collective action was covered by the GATS, one would have to determine whether the measure violates a specific commitment. There is no market access violation involved because measures against a service supplier who has already been granted market access are not mentioned in the list of prohibited measures in Article XVI:2 GATS. It is, however, possible that the collective action would violate the national treatment obligation in Article XVII GATS. While the requirement to join a collective labour agreement can be construed as a formally non-discriminatory requirement, it could, nevertheless, be discriminatory on a *de facto* basis. According to Article XVII:3 GATS, a measure is considered discriminatory if it modifies the conditions of competition in favour of the domestic service supplier. Hence, the central question is: What determines the competitive basis of the domestic and the foreign service supplier? On the one hand, it could be

⁶ W. Zdouc, “WTO Dispute Settlement Practice Relating to the GATS”, in: F. Ortino & E-U. Petersmann (eds), *The WTO Dispute Settlement System 1995-2003*, (The Hague: Kluwer Law International, 2004), pp. 387-389.

⁷ *Laval*, above note 5, para. 98. This conclusion deserves a very critical analysis, which is, however, beyond the scope of this comment.

argued that the lower wages that Laval was paying determined the basis of its competitiveness. Viewed from this perspective, a requirement to join the Swedish collective wage agreement would modify the competitive basis to the detriment of Laval, because it would be required to pay wages above/superior to the level of its regular wages. On the other hand, it could be argued that competitiveness is determined by other factors such as the technology used by the service supplier. In this perspective, the requirement to join the collective agreements would establish a level playing-field between the domestic and foreign service supplier. A related question is at the heart of Susanne Schmidt's paper. It is hence useful to turn to her arguments now.

4. Solving the conflict through mutual recognition?

Susanne Schmidt approaches the conflict between labour protection or social policy and the internal market from a political economy perspective. She is interested in the underlying reasons for the opposition to the single market for services in general, and the Services Directive in particular. She claims that the liberalisation of services was perceived by many as implying high distributive costs, because of the complexities of "governance through mutual recognition" in the context of services. While mutual recognition or the country of origin principle has long been accepted in the context of goods, it proved to be more contentious and complicated in the context of services. In fact, the critics of the Services Directive were particularly opposed to the inclusion of this principle in the directive. Why, one may ask, is there such a categorical difference between the free movement of goods and the free movement of services? Schmidt argues that there are, at least, two reasons: first, services are much more "rule-dependent" than goods. The application of different legal regimes therefore makes a greater difference than in the regulation of goods. Rules often shape and influence both the nature and the supply of a service as such. Second, the first draft of the Services Directive was published shortly before the Eastern enlargement took place, which increased the fears about liberalisation of services and produced a conflict between the new and the old Member States. In fact, all three controversial cases regarding labour protection and the free movement of services, the *Viking*, the *Laval*, and the *Rüffert* case, involved a competitive relationship between services suppliers from both "old" and "new" Member States.⁸

However, there is more than just the rules-based nature of services and the increased competition from Eastern Europe. Mutual recognition in services

⁸ Ch. Joerges & F. Rödl, Von der Entformalisierung europäischer Politik und dem Formalismus europäischer Rechtsprechung im Umfang mit dem "sozialen Defizit" des Integrationsprojekts, ZERP-Diskussionspapier 2/2008, p. 12.

leads *de facto* to the application of multiple regulatory regimes in a Member State. Taken to its extreme, if service providers from every Member State had to operate on one national market, 27 different legal regimes would be applicable to the various operations. Complicating matters further, the authorities of the host state are usually not very well informed about the legal requirements of the home states. The crucial argument of the paper is that, in the end, the popular acceptance of mutual recognition in services will greatly depend upon whether there is a “real competition” between different market players, or whether the competition actually takes place between different regulatory regimes. Susanne Schmidt puts it concisely in the following words: mutual recognition is acceptable if competition is about markets, not rules. This is an attractive and powerful finding. The key question is, however, how to distinguish competition between markets from competition between rules. This question is, in essence, the same question as the one raised above in the context of the GATS national treatment obligation: If two companies are competitors on a given market, which conditions constitute the competitive basis of their businesses? Which governmental measures would distort the competitive basis and which measures would establish this basis by creating a level playing-field?

5. The conditions of competition: Economics, politics or both?

Taking Susanne Schmidt’s distinction between markets and rules as a starting point, one would have to distinguish the economic and regulatory conditions of a competitive relationship. Economic conditions relate to the production costs. They could involve the technology used by the service supplier (for example, special software), its machinery and equipment, management measures and the qualification of its work-force. If a foreign service supplier is able to provide a service at lower costs than a domestic supplier due to better technology or a better qualified work-force, this would clearly be a competition in markets. Regulatory conditions refer to the legal regime applicable to the service and the service supplier. If a foreign service supplier is able to provide a service at lower costs because the registration requirements in the home country are less burdensome than those requirements in the host country, this could be labelled as competition in rules. Susanne Schmidt would argue that mutual recognition in this situation gives the foreign service supplier an “unfair advantage”, because neither the domestic nor the foreign service supplier can influence the regulatory conditions. In the context of GATS, non-discriminatory burdensome domestic regulations, which have an effect upon the competitive basis, should

not be addressed by Article XVII GATS, but by the disciplines on domestic regulation according to Article VI:4 GATS.

Labour costs are difficult to characterise in this scheme. On the one hand, they are clearly part of the production costs and depend, to a large extent, on the productivity of the labour force. In fact, if this is the only factor which influences labour costs, it seems convincing to assume that labour costs should be considered as part of the economic conditions. A national measure requiring the foreign service supplier to pay the same average wage as domestic service suppliers would, therefore, modify the conditions of competition to the detriment of the foreign service supplier within the meaning of Article XVII:3 GATS. On the other hand, labour costs often also depend on the legal framework, in particular, if a country has a law on minimum wages. Such a law could be regarded as part of the regulatory conditions because the requirement is imposed on the service suppliers without any possibility for them to change this condition. The same argument could be made about the conditions of public procurement such as the mandatory declaration to pay its employees a minimum wage by the bidder, which was at stake in the *Rüffert* case.

The situation becomes even more complex if – as in the *Laval* and *Viking* cases – the measures in question are not the measures of governments but are, instead, imposed by collective agreements. These are clearly not regulatory measures, but they are often functionally equivalent to labour law and social regulation, in particular, concerning working hours, holidays and social benefits. This is why the ECJ extended the scope of the free movement of workers and the free movement of services to such collective agreements. However, collective agreements can also be considered as part of the economic conditions because they often contain the general structure and the level of the wages to be paid, and therefore supplement the individual contracts signed between the employer and the employee. In the end, it can be said that collective agreements do contain elements of economic and of regulatory conditions.

What does the double-nature of collective agreements imply about the applicability of the GATS or the EC free movement of services? Here, a distinction between EC and GATS law seems necessary. Under EC law, collective action is recognised as “a fundamental right which forms an integral part of the general principles of Community law”.⁹ Furthermore, labour

⁹ *Viking*, above note 4, para. 44; *Laval*, above note 5, para. 91.

protection and social policy is an important aspect of the EC legal order, since the EC has “not only an economic but also a social purpose”.¹⁰ As a consequence, EC law should be deferential to collective agreements and leave them intact as much as possible. The national courts and the ECJ should therefore place great emphasis on the value of such agreements as important instruments of protecting labour when assessing whether the restrictions that they may impose on a fundamental freedom are necessary.

Unlike EC law, the WTO legal order does not recognise fundamental rights and has no social purpose. It aims at economic integration, but not at social integration. It would therefore seem possible to argue that WTO law should not be interpreted and applied in deference to collective labour agreements. Yet, the WTO agreements are international agreements which oblige, first and foremost, the states (and other subjects of public international law) and their agencies. WTO law has generally no direct effect.¹¹ Individuals cannot rely on WTO law or derive any individual rights from it. As a consequence, WTO law should also not be interpreted in order to create direct obligations imposed on individuals or non-state actors. Labour unions are not normally associated with the state. Hence, collective agreements should generally be considered as being outside the scope of WTO law despite the fact that they may contain rules which are functionally equivalent to national labour laws.

To summarise, competitiveness should be determined by economic factors which reflect production costs which can be influenced by the service supplier, in other words, which are a result of an entrepreneurial decision. Other factors, including laws, regulations and collective wage agreements should be regarded as the regulatory framework of the service supply. Service suppliers should compete with each other for better entrepreneurship, but should not exploit differences in regulatory frameworks which reflect the policy choices of a particular society and which are part of that respective social model.

¹⁰ *Viking*, above note 4, para. 79; *Laval*, above note 5, para. 105.

¹¹ ECJ, Case C-149/96, *Portugal v Council* [1999] E.C.R. I-8395; *US – Section 301-310 of the Trade Act of 1974*, Report of the Panel, WT/DS152/R, para. 7.72.

Section Two

Labour Standards

Chapter 4

WTO and ILO: Can Social Responsibility be Maintained in International Trade?

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I. Labour standards in the Havana Charter for an International Trade Organisation

Although the Havana Charter for an International Trade Organisation (ITO) could not be realized, Article 7 on fair labour standards can be seen as an ambitious attempt to integrate social aspects into a Trade Agreement. The members should recognise that measures relating to employment must take the rights of workers under inter-governmental declarations, conventions and agreements fully into account. The achievement and maintenance of fair labour standards were seen as a common interest of countries, irrespective of their different degree of industrialisation. In a very open manner, it was recognised that unfair labour conditions, particularly in production for export, may create difficulties in international trade. This understanding of the relations between trade and labour standards corresponded with the Preamble to the Constitution of the International Labour Organisation (ILO). The Havana Charter for an International Trade Organisation, 24 March 1948¹ acknowledged the prominent standing of the ILO and its labour standards.

¹ Source: United Nations, United Nations Conference on Trade and Employment, held at Havana, Cuba, from 21 November 1947, to 24 March 1948: Final Act and Related Documents, Lake Success, New York: Interim Commission for the International Trade Organisation April 1948, p. 7.

Article 7: Fair Labour Standards

1. *The Members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognize that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity permit. The Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.*
2. *Members which are also members of the International Labour Organisation shall co-operate with that organization in giving effect to this undertaking.*
3. *In all matters relating to labour standards that may be referred to the Organisation in accordance with the provisions of Articles 94 or 95, it shall consult and co-operate with the International Labour Organisation.*

2. Labour standards – not welcome as issue on the agenda of the WTO

Labour standards are not subject to any WTO rules or disciplines at present. Some WTO member governments in Europe and North America have argued that the issue must be taken up by the WTO if public confidence in the WTO and the global trading system is to be strengthened. Without any success, they have argued that a narrower set of internationally recognised “core” labour standards – such as freedom of association and collective bargaining, prohibition of forced labour and of the worst forms of child labour, elimination of discrimination in the workplace (including gender discrimination) – should be put on the WTO’s agenda of future work. There is no other “trade and”-issue which inspires more intense debate among WTO members than the issue of trade and core labour standards.

At the 1996 Singapore Ministerial Conference, members defined the WTO’s role on this issue, identifying the International Labour Organisation (ILO) as the competent International Organisation to negotiate International Labour Standards in the form of Conventions and Recommendations, and to supervise their implementation. There is no work on this subject in the WTO’s Councils and Committees. In the past, some member governments did suggest that a WTO working party be established to examine the link between trade and core labour standards, in other words, the social issues that are affected by more and more globalised markets for goods and services. Such a working group could link the WTO to the relevant activities of other

International Organisations and associations of workers and employers in this field. But there are deeply-rooted differences between some developed and the most developing countries on this topic. Member governments from the developing world believe attempts to introduce this issue into the WTO represent a thinly-veiled form of protectionism which is designed to undermine the comparative advantage of lower wages in many developing countries. They argue that workplace conditions will improve through economic growth and development, which would be hindered should industrialised countries apply trade sanctions to their exports for reasons relating to labour standards. The application of such sanctions, so the arguments go, would perpetuate poverty and delay developmental efforts including those aimed at improving conditions in the workplace.

Because the core labour standards are, at the same time, basic social human rights, this controversy is very closely connected with the debate on the respect of human rights in the world trading system.

The highly controversial issue of trade and labour standards has been with the WTO since its foundation. In April 1994, when trade ministers gathered in Marrakesh to sign the Final Act of the Uruguay Round, nearly all the ministers expressed their very controversial views on this issue. The Preamble of the WTO Agreement states that “relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living (and) ensuring full employment”.

At the First WTO Ministerial Conference in Singapore in December 1996, the issue was taken up again and addressed in Paragraph 4 of the Ministerial Declaration, 13 December 1996:²

We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organisation (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contributed to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.

² WT/MIN 96/DEC/W.

This Declaration was supplemented with some very pointed comments made by the Chairman of the Conference as follows:³

In the first place, with regard to paragraph 4 – core labour standards – we have agreed on a text which sets out a balanced framework of how this matter should be dealt with. The text embodies the following important elements: First, it recognizes that the ILO is the competent body to set and deal with labour standards. Second, it rejects the use of labour standards for protectionist purposes. This is a very important safeguard for the multilateral trading system, and in particular for developing countries. Third, it agrees that the comparative advantages of countries, particularly low-wage developing countries, must in no way be put into question. Fourth, it does not inscribe the relationship between trade and core labour standards on the WTO agenda. Fifth, there is no authorization in the text for any new work on this issue. Sixth, we note that the WTO and the ILO Secretariats will continue their existing collaboration, as with many other intergovernmental organizations. The collaboration respects fully the respect and separate mandates of the two organizations. Some delegations had expressed the concerns that this text may leave the WTO to acquire a competence to undertake further work in the relationship between trade and core labour standards. I want to assure these delegations that this text will not permit such development.

In June 1994, the Governing Body of the ILO decided to set up a Working Party to discuss all relevant aspects of the social dimensions of the liberalisation of international trade, which would be open to all members of the Governing Body. In June 1999, the Governing Body decided to reconstitute this Working Party with a new mandate and to give it the new title “Working Party on the Social Dimension of Globalization”.

At the Third Ministerial Meeting in Seattle in December 1999, the issue of core labour standards was perhaps the most divisive issue on the agenda. Both the United States and the EC put forward proposals for addressing the issue of labour standards inside the WTO. Although trade sanctions as reactions to violations of labour standards are not envisaged, the proposals were fiercely opposed by the governments of developing countries. Debates in a working group showed strong disagreement among the members; consensus on any role for the WTO on the question of labour standards could not be attained.

³ Concluding remarks by H.E. Mr Yeo Cheow Tong, Chairman of the Ministerial Conference, Minister for Trade and Industry of Singapore.

Since the Seattle Ministerial Conference, governments from around the world have turned their attention to the ILO as the forum for addressing questions on the relationship between trade, globalisation and labour standards. During the June 2001 meeting of the ILO Governing Body, the Working Party on the Social Dimension of Globalization reached several agreements on how it might proceed with its work. It was agreed that trade liberalisation and employment and investment, with a special emphasis on poverty reduction, should be issues that are taken up by the Working Party. There was also a general agreement that a permanent forum for exchange of views should be established. Members also generally agreed that the ILO contribution to the international policy framework on the question of globalisation needed to be enhanced and that a report on the social dimension of globalisation should be written. One idea was that a global commission of eminent personalities could be formed to examine the social aspects of globalisation and to write a report on the social dimension of globalisation in order to launch - in a very prominent way - ideas for a coherent political framework as an answer to the challenges of the globalisation. Meanwhile, Paragraph 8 of the Doha Ministerial Declaration in November 2001⁴ had re-affirmed the declaration made at the Singapore Ministerial Conference with regard to internationally recognised core labour standards:

We re-affirm our declaration made at the Singapore Ministerial Conference regarding internationally recognized core labour standards. We take note of work under way in the International Labour Organization (ILO) on the social dimension of globalization.

In February 2001, Arthur Dunkel, Peter Sutherland and Renato Ruggiero had published a joint statement on the future on the multilateral trading system.⁵ They underlined that labour standards should not be put on the agenda of the WTO:

Labour rights and environment are often linked as issues to be dealt with by the WTO. They should not be linked. The GATT and, especially, the WTO have been able to consider, if not always resolve, questions related to the intersection between environmental and trade policies; no doubt that will continue. It is not the case for labour rights.

⁴ WT/MIN(01)/DEC/1.

⁵ Arthur Dunkel, Peter Sutherland, Renato Ruggiero, Joint statement on the multilateral trading system, 1 February 2001, http://www.wto.org/english/news_e/news01_e/jointstatdavos_jan01_1e.htm.

We accept that many of those who call for recognition of a link between international labour standards and trade do so out of genuine concern for the welfare of foreign workers. It is clear, however, that there is no basis for agreement on such a link being examined and acted upon within any delegate body of the WTO. That is the case for certain other areas where social development or human rights objectives are said to intersect with trade policy.

The real problem is much wider. We accept that there is some genuine public disquiet, sometimes a sense of insecurity, about the nature and the speed of globalisation. There is some truth in the view that there is a lack of balance in the management by the international community of the social and developmental elements of global change.

Indeed, there are many issues for which a complete and valid understanding requires the co-ordinated and focused attention of a number of international agencies. We therefore propose that a new commission be established, which brings together the heads of all relevant trade, financial and development institutions, to assist governments in understanding and managing the balance between the social and developmental aspects of global economic change.

The collaboration between the WTO and ILO secretariats, both located in Geneva, seems to be of a very formalistic nature. It includes the participation of the WTO in the meetings of ILO bodies, the exchange of documentation and informal co-operation between the two secretariats. In March 2007, the Secretariats of the WTO and of the ILO presented the study “Trade and Employment Challenges for Policy Research” as the first result of collaborative research. With the relationship between trade and employment, it addresses an issue that is of important concern to both organisations. The foreword to this study demonstrates as clearly as possible, that the WTO and the ILO are – ten years after the Singapore Declaration – at the very beginning of their co-operation:

The multilateral trading system has the potential to contribute to increasing global welfare and to promote better employment outcomes. The challenge all our Members face is to find ways of realizing this potential as fully as possible. A first step in that direction is to improve our understanding of how trade and labour markets interact and affect the lives of millions around the world.

We consider this joint study undertaken by the ILO and the Secretariat of the WTO a useful and timely initiative that will promote greater understanding and assist governments in making decisions in an increasingly complex and fast-changing environment. In joining the expertise of the two Secretariats, this technical study aims to provide a broad and impartial view of what can be said – and with what degree of confidence – about the relationship between trade and employment, and the way in which trade policies and labour market policies affect this relationship. The study also identifies questions that are not always well understood in the literature, and on which more research would be useful.

We are therefore pleased to present this study as an encouraging illustration of how useful collaboration can be developed between the two Secretariats on issues of common interest.

The study is finished with a statement between hope and lack of knowledge and far from a perspective for common actions:

The main conclusion that emerges from this study is that trade policies and labour and social policies do interact and that greater policy coherence in the two domains can have significantly positive impacts on the growth effects of trade reforms and thus ultimately on their potential to improve the quality of jobs around the world. From this perspective, research directed at supporting the formulation of more effective and coherent policies would clearly have a high pay-off to the international community.

3. World Commission on the Social Dimension of Globalization – WCSDG

Globalisation is one of the most divisive issues of our time. Some view globalisation as a positive force that spreads wealth; others blame it for the world's numerous problems. What is absent from much of this discussion, however, is the impact of globalisation on ordinary people throughout the world.

This question was at the heart of the work of the independent World Commission on the Social Dimension of Globalization (WCSDG) which was created by decision of the ILO Governing Body in November 2001. The Commission was to prepare a major authoritative report on the social dimension of globalisation, including the interaction between the global

economy and the world of work.⁶ The ILO's Director-General was invited to consult widely in order to appoint Commissioners with recognised eminence and authority, with due regard to gender, regional balance, tripartite perspectives, and reflecting the principal views and policy concerns in globalisation debates. Under the co-chairs of Tarja Halonen, the President of the Republic of Finland, and of Benjamin Mkaspa, the President of the United Republic of Tanzania, nineteen other members were appointed from across the world's regions, with diverse backgrounds and expertise. Five *ex-officio* members, including the Director-General and the Officers of the Governing Body, provided linkage between the Commission and the ILO. The Commission has functioned as an independent body and takes full and independent responsibility for its Report and its methods of work.

The Commission's report, "A Fair Globalization – Creating Opportunities for All", was published in February 2004.⁷ It was commented world-wide by heads of state and government, ministers, international organisations, parliamentarians, representatives of business and trade unions, national Economic and Social Councils, civil society organisations and the press, mainly in a favourable way.⁸ However, one cannot find any reaction on the part of the WTO, be it its Secretary-General, the General Council or its other bodies.

The report's main conclusion is that globalisation has enormous potential for goods, but urgently needs to become fairer, with its benefits extending to many more people and countries. This means changing the path of globalisation. In the words of the report:

There are deep-seated and persistent imbalances in the current workings of the global economy, which are ethically unacceptable and politically unsustainable. [...] Seen through the eyes of the vast majority of men and women, globalization has not met their simple and legitimate aspirations for decent jobs and a better future for their children.

⁶ See ILO Governing Body documents. "Enhancing the action of the Working Party on the Social Dimension of Globalization: Next Steps" (GB.282/WP/SDG/1), Geneva, November 2001; and "Report of the Working Party on the Social Dimension of Globalization" (GB.282/12), Geneva, November 2001.

⁷ The Report and some follow-up materials are available at: <http://www.ilo.org/wsdg>.

⁸ A collection of references is available at:

<http://www.ilo.org/public/english/fairglobalization/report/references.htm>.

The report recommends changes in attitudes and policies to create a strong social dimension for globalisation. This should be based upon universal values, including respect for human rights and individual dignity, democracy and opportunity for all. While there are no miracle cures, the report puts forward a series of recommendations and proposals to help make globalisation a positive force for all people and countries.

The report outlines a series of co-ordinated actions at national, regional and international levels involving international bodies, governments, workers, employers and civil society. In addition to fairer rules on trade, finance and migration, the report calls for policies to promote decent employment, sustainable economic development, social security, education and health care. Decent work, which meets people's aspirations and respects their rights and dignity, should become a global goal.

Globalisation needs a strong social dimension if it is to uphold basic human values and improve the well-being of people. The essential elements of this social dimension include:

- basing globalisation upon universally-shared values, with economic development founded on the respect for human rights;
- an international commitment to eradicate poverty and meet the basic material and other needs of all people;
- a path of development that provides opportunities for all, expands sustainable livelihoods and employment, promotes gender equality and reduces disparities between countries and people;
- making the system for governing globalisation more democratic and accountable.

As the world becomes more interconnected through globalisation, there is increased need for effective international policies, rules and institutions. The report strongly recommends for the creation of a better international system to overcome the present fragmented and incoherent system which consists of a patchwork of overlapping networks and agencies in the economic, social and environmental fields. It outlines reforms to make multilateral organisations more democratic, accountable, transparent and coherent. It calls on international organisations to help find a better balance between social goals and economic policies, and to shift the focus from the markets to the people. International bodies should systematically examine the implications that their policies have for decent work, gender equality, education, health and social development. Such agencies should also work together to address

the social dimension of globalisation through “Policy Coherence Initiatives”, which aim to find new solutions to global problems, taking different perspectives into account. The report recommends the setting up of a Globalisation Policy Forum among interested international bodies. This would provide an opportunity for the United Nations and its specialised agencies to work with others to foster a more balanced and fair globalisation.

4. ILO Declaration on Fundamental Principles and Rights at Work

As the report of the WCSDG says, it is essential that respect for core labour standards form part of a broad international agenda for development. The international community recognises the value of international labour standards in improving employment and labour conditions worldwide. Such standards are contained in the conventions and recommendations of the ILO, which are adopted in the tripartite framework by employers, workers and governments from the ILO’s 177 member countries. International labour standards are seen as a central plank of “decent work”. Over many years, a consensus has emerged on a series of “core” labour standards as a minimum set of rules for labour in the global economy. One important stage in this process is the Copenhagen Declaration on Social Development, 12 March 1995:

Commitment 3⁹

We commit ourselves to promoting the goal of full employment as a basic priority of our economic and social policies, and to enabling all men and women to attain secure and sustainable livelihoods through freely chosen productive employment and work.

To this end, at the national level we will:

[...]

(i) Pursue the goal of ensuring quality jobs, and safeguard the basic rights and interests of workers and to this end, freely promote respect for relevant International Labour Organization conventions, including those on the prohibition of forced and child labour, the freedom of association, the right to organize and bargain collectively, and the principle of non-discrimination.

⁹ Reaffirmed by the UN General Assembly Special Session (Copenhagen+5): World Summit for Social Development and Beyond: Achieving Social Development for All in a Globalized World (United Nations, Further initiatives for social development, A/RES/D/S-24/2, New York 2000: United Nations, pp. 21.23.

The ILO Declaration on Fundamental Principles and Rights at Work aims to ensure that social progress goes hand in hand with economic progress and development. The Declaration is a promotional instrument and a re-affirmation by the ILO's government, employer and worker constituents of the central belief set out in the organisation's Constitution.

Adopted in 1998, the Declaration commits member states to respect and promote principles and rights in four categories, independently of whether or not they have ratified the relevant Conventions. These categories are: freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour, and the elimination of discrimination in respect of employment and occupation. The Declaration underlines that these rights are universal, and apply to all people in all states – regardless of the level of economic development.

This commitment is supported by a follow-up procedure. Member states that have not ratified one or more of the core Conventions are asked each year to report on the status of the relevant rights and principles within their borders, noting impediments to ratification, and areas where assistance may be required. These reports are reviewed by the Committee of Independent Expert Advisers. Their observations are, in turn, considered by the ILO's Governing Body.

The Declaration and its Follow-up provide three ways to help countries, employers and workers achieve the full realisation of the objective of the Declaration:

- An *Annual Review* composed of reports from countries that have not yet ratified one or more of the relevant ILO Conventions. This reporting process provides governments with an opportunity to state what measures they have taken towards achieving respect for the Declaration. It also gives organisations of employers and workers a chance to voice their views on the progress made and the actions taken relating to enduring inactivity.
- The yearly *Global Report* provides a dynamic global picture of the current situation of the principles and rights expressed in the Declaration. It is an objective view of the global and regional trends on the issues relevant to the Declaration and serves to highlight those areas that require greater attention. It serves as a basis for determining priorities for technical co-operation.

- *Technical co-operation projects* are designed to address identifiable needs in relation to the Declaration, and to strengthen local capacities thereby translating principles into practice.

The Fundamental Principles and Rights at Work are gaining wider recognition among organisations, communities and enterprises. They provide benchmarks for responsible business conduct, and are incorporated into the ILO's own Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. The OECD's Guidelines for Multinational Enterprises emphasise them and the UN Global Compact promotes them as universal values to be achieved in business dealings around the world. A growing number of private sector codes of conduct and similar initiatives also refer to the fundamental principles and rights at work.

The Declaration explicitly states that these core labour standards should not be used for protectionist trade purposes, and that nothing in the Declaration and in the Follow-up process is to be invoked or otherwise used for such purposes; the comparative advantage of any country should in no way be called into question.

Table one gives an overview of the Fundamental ILO Conventions and the Number of Ratifications in June 1998, the date of the ILO Declaration on Fundamental Principles and Rights at Work, and in November 2007. Additionally, the main content of the several Conventions is summarised.

Table 1: Fundamental ILO Conventions and Number of Ratifications

No.	Title and Aim of Convention	Ratifications	
		6/98	11/07
29	Forced Labour Convention (1930) <ul style="list-style-type: none"> – Ratifying States are under the obligation to suppress all forms of forced or compulsory labour. – Illegal exaction of forced or compulsory labour must be punishable as a criminal offence. 	145	172
87	Freedom of Association and Protection of the Right to Organise Convention (1948) <ul style="list-style-type: none"> – Workers and employers, without discrimination whatsoever, have the right to establish and join organisations of their own choosing with a view to furthering and defending their respective interests. – These organisations must enjoy full freedom to draw up their rules, designate their representatives and formulate their programmes. 	121	148

No.	Title and Aim of Convention	Ratifications	
		6/98	11/07
98	<p>Right to Organise and Collective Bargaining Convention (1949)</p> <ul style="list-style-type: none"> – Workers must enjoy adequate protection against acts of anti-union discrimination. – Workers' and employers' organisations must enjoy protection against acts of interference by each other. – Voluntary collective bargaining to regulate terms and conditions of employment must be promoted. 	137	158
100	<p>Equal Remuneration Convention (1957)</p> <ul style="list-style-type: none"> – Ratifying States undertake to promote and, where possible, to ensure application to all workers of the principle of equal remuneration for men and women for work of equal value. 	136	164
105	<p>Abolition of Forced Labour Convention (1957)</p> <p>Ratifying States undertake to suppress the recourse to any form of forced or compulsory labour:</p> <ul style="list-style-type: none"> – as means of political repression; – as a method of mobilization of labour for economic development; – as a means of labour discipline; – as a punishment for having participated in strikes; – as a means of racial, social, national or religious discrimination. 	130	170
111	<p>Discrimination (Employment and Occupation) Convention (1958)</p> <p>Calls for a national policy to eliminate discrimination in access to employment, training and working conditions, on grounds of race, colour, sex, religion, political opinion, national extraction or social origin, and to promote equal opportunity and treatment.</p>	129	166
138	<p>Minimum Age Convention (1973)</p> <ul style="list-style-type: none"> – A general minimum age for admission to employment or work must be set, not lower than the age of completion of compulsory education and not less than 15 years. – Minimum age must not be less than 18 years in employment or work likely to jeopardize the health, safety or morals of young persons. – Light work may be permitted to young persons of 13 to 15 years of age, provided it does not prejudice their education. 	64	150
182	<p>Worst Form of Child Labour Convention (1999)</p> <p>Ratifying States must take immediate and effective measures to prohibit and eliminate the worst forms of child labour, namely, slavery and forced labour, prostitution and pornography, illicit activities, and work likely to harm health, safety or morals.</p>	0	165

5. Possibilities for implementing social standards

Flexible forms of transnational production and processes of economic globalisation are increasingly challenging the traditional capacity of domestic labour law to promote justice in the world of work. Three international and transnational modes of regulation are forming beyond the state: First, the International Labour Organisation is promoting a set of labour rights with which all states ought to comply as a matter of international law. Secondly, numerous institutions and actors are linking international labour rights with trade liberalisation initiatives. Thirdly, corporations are increasingly relying on codes of conduct to govern their employment relations.

These developments are establishing relatively firm footholds in international law, and operate in tandem to provide international legal authority for innovative domestic regulation of transnational corporate activity. Together with more general principles of international human rights law, they authorise a state to require all corporations operating within its jurisdiction and all corporations operating outside its jurisdiction seeking domestic market access to comply with a domestically enforceable code of conduct that enshrines international labour rights. This new labour law authorises a hybrid form of domestic labour market regulation, one that combines public and private power, and invests international commitments with domestic legal force. It supplements traditional forms of domestic labour law to enable a state to regulate not only production within its jurisdiction, but also flexible forms of transnational production both at home and abroad.¹⁰

Table two gives an overview of these implementing social standards. It differentiates between governments and privates as actors. Regulations and actions for implementing social standards with the participation of governments can be found at multilateral or bilateral level as well as in the UN human rights area, in the trade policy area and in the development policy. Reports and sanctions are mainly used as common instruments. Private actors use international, branch-related or firm-related levels as a playing field; codes of conduct and quality seals, as well as other forms of social labelling play a prominent role.

¹⁰ For more details, see Patrick Macklem, 'Labour Law Beyond Borders', (2002) 5 *Journal of International Economic Law*, pp. 595-645.

Table 2: Possibilities for implementing social standards

Actors	Level	Organisations	Instruments		
Government-Government	1. Multilateral, Regional, UN human rights area	ILO	Reports, Grievances / complaints, Promotional measures		
		CESCR	Reports		
		CRC	Reports		
		Trade policy area:			
		WTO	Sanctions		
		NAFTA	Reports, Sanctions		
		GSP	Sanctions (positive, negative)		
		Development policy:			
		World Bank et al.	Preparation of standards, Advising governments		
	2. Bilateral		Sanctions, Foreign policy dialogue, Development policy		
Government-private	1. Multilateral, UN Global Compact, Regional		Codes of conduct		
		OECD	Codes of Conduct		
		EC	EC monitoring agency for behaviour of EC TNCs		
	2. Bilateral Ethical Trading Initiative			Monitoring quality of codes	
			DC measures	Advertising governments etc.	
		Private-Private	1. International	NGOs / firms	Quality seals: Social accountability 8000, Rugmark, Flower Label Programmes
			2. Branches	e.g. Toy industry	Codes of conduct
3. Firm-related	Only firm-international		In-house of conduct		
		Firms / NGOs	Ethics /business principles		
		Only NGOs			

Source: GTZ, Social Standards in Technical Cooperation, Eschborn 2004, p. 32.

Acronyms: CESCR Committee on Economic, Social and cultural Rights
 CRC Committee on the Rights of the Child
 DC Development Cooperation
 GSP General System of Preferences
 NAFTA North American Free Trade Agreement
 TNC Transnational corporation

6. Corporate Social Responsibility – CSR

Corporate Social Responsibility (CSR) is a concept whereby organisations consider the interests of society by taking responsibility for the impact of their activities on customers, employees, shareholders, communities and the environment in all aspects of their operations. This obligation is seen to extend beyond the statutory obligation to comply with legislation, and sees organisations voluntarily taking further steps to improve the quality of life for both their employees and their families as well as for the local community and society at large. The term “corporate social responsibility” came into common use in the early 1970s. Many large companies now issue a corporate social responsibility report along with their annual report.

There is no universally-accepted definition of CSR. Selected definitions by CSR organizations and actors include:

Corporate Social Responsibility is the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as the local community and society at large.¹¹

Corporate social responsibility is undertaking the role of ‘corporate citizenship’ and ensuring the business values and behaviour is aligned to balance between improving and developing the wealth of the business, with the intention to improve society, people and the planet.¹²

Corporate social responsibility is the commitment of business to contribute to sustainable economic development by working with employees, their families, the local community and society at large to improve their lives in ways that are good for business and for development.¹³

A concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.¹⁴

¹¹ World Business Council for Sustainable Development, Corporate Social Responsibility: Making good business sense, 2000.

¹² A brief history of social reporting, Business Respect 2003.

¹³ International Finance Corporation, <http://www.ifc.org> (accessed 24 September 2008)

¹⁴ http://ec.europa.eu/enterprise/csr/index_en.htm (accessed 24 September 2008)

It is apparent that, in today's business practice, CSR is entwined in many multinational organisations strategic planning processes. The reasons or drive behind social responsibility towards human and environmental responsibility is still questionable, and whether they are based upon genuine interests or have underlining ulterior motives still remains a valid question. Critics argue that CSR cherry-picks the good activities that a company is involved in and ignores the others, thus "greenwashing" their image as a socially or environmentally responsible company. There are other people who argue that it inhibits free markets. Some critics believe that CSR programmes are often undertaken in an effort to distract the public from the ethical questions posed by their core operations.

The concept of CSR is closely connected with the idea of ethical consumerism. In many cases, international organisations and governments themselves have set the agenda for social responsibility. In many instances, separate organisational bodies are established to administer the workings of fair-trading at both a local and a global front.

Table three gives an overview of benefits and costs of CSR for different stakeholder groups inside and outside the corporations. *Table four* shows the most well-known initiatives and their main issues. It differentiates between governmental and intergovernmental initiatives, company-led initiatives, NGO-led initiatives and governance initiatives. The last group is only in a very vague manner connected with the CSR concepts and has mainly managerial aims.

Table 3: Corporate Social Responsibility – Benefits and Costs for Different Stakeholder Groups

Stakeholder group	Benefits	Costs
Directors	More independent non-executive directors	More meetings and briefings
Shareholders	Increased investment from ethically based pension funds	Increased reporting costs, more openness
Managers	Better human rights policies lead to increased motivation	Increased training in ethics
	More awareness of ethical issues lead to more confidence about employees	Focus group sessions and reporting
Employees	Better human rights policies lead to increased motivation	Inclusion of ethics training
	Good ethical conduct by superiors lead to increased productivity	More intra-company communications
	Less labour relations disputes, less strikes	More efforts on labour relations
	Better working conditions	
	Easier recruitment of high flyers and young people	Will need to implement human rights policies
	Reduced costs of recruitment	
Customers	Move to ethical consumption captured by company Less disputes Advertising can cite CSR Enhanced reputation Brand quality recognition	Costs of goods may increase in the short term
Subcontractors/	Better quality inputs	Cost of inputs may increase in the short term
Suppliers	Less harmful effect on public image	
Community	More willingness to accept New investments Improved public image	Requires continual interaction with community
Government	More confidence in company	
	Fewer legal battles, no new potentially harmful legislation	Costs of adhering to new regulations will increase
	More favourable trading regime	
	More willingness to accept expansion or downsizing	
Environment	Less legal battles Improved public image	Investment in environmental damage control

Source: Michael Hopkins, Corporate social responsibility: an issues paper, Policy Integration Department Working Paper prepared for the World Commission on the Social Dimension of Globalization, No. 27, May 2004, p. 30.

Table 4: Corporate Social Responsibility – Most well-known initiatives and their specific issues

Initiatives	Date	Main Issues
Governmental and Intergovernmental Initiatives:		
ILO Tripartite Declaration on TNCs	Geneva, 1977, rev. 3/2000	Employment
OECD Guidelines for MNEs	Paris, 1976, rev. 6/2000	Employment, environment, combating bribery, consumer interests, science and technology, competition, taxation
UN Global Compact	New York, 7/2000	Human rights, labour and environment
UNEP Financial Statement	Paris, 1992, rev. 5/1997	Environment
EC Principles	Brussels, 2001, rev. 2002	Multi-stakeholder
Voluntary Principles on Security and Human Rights, US & UK Govt.	Washington DC and London, 12/2000	Security and human rights for extractive and energy industries
US Model Business Practices corruption, community, law	Washington DC, 1996	Health and safety, labour, environment
Ethical Trading Initiative, UK, Govt. NGOs	London, 9/1998	Labour practices essentially on trade links and NGOs
Company-led Initiatives:		
Caux Principles	Minnesota, 1994	Multi-stakeholder
Fair Labor Association (FLA), US	California, 11/1998	Labour practices
Global Sullivan Principles	USA, 11/1999	Mainly external stakeholders
ICC Business Charter for Sustainable Development	Brussels, 1991	Environment, health and safety
World Economic Forum	Davos/Geneva, 2002	Corporate governance
NGO-led initiatives:		
AccountAbility 1000	London, 1999, rev. 2002	Social and ethical assurance, not environment, Stakeholder model
Amnesty International Human Rights	London, 9/1998	Human rights and security
CERES Principles	USA, 1989	Environmental ethical standards
Global Reporting Initiative (GRI)	Boston 1997, rev. 2002	Multi-stakeholder, triple bottom line indicators
ICFTU Code of Labour Practice	Brussels/Geneva, 1997	Labour and trade union issues
SA 8000	London, 1998, rev. 2002	Says CSR, but is mainly labour
Social Venture Network Standards on CSR	Brussels, 1999	CSR multi-stakeholder, corporate Governance mentioned, social audits

Initiatives	Date	Main Issues
Sigma Sustainable Principles	London, 1999	Multi-stakeholder, bias towards environment, no management shareholders
Q-Res Codes of Ethics	Italy, 1999	Multi-stakeholder
Governance Initiatives:		
General Motors Board Guidelines	Detroit	Management
OECD Principles / Millstein Report International	Paris	Management
Bosch Report, Australia	Australia	Management
Merged Code Recommendations	Brussels	Management
Turnbull Report, UK	London	Management
King Report, South Africa	Johannesburg, 2002	Management and ethics
King Report, Commonwealth	London, 2001	Management and ethics
World Bank Corporate	Washington DC, 2000	Management and finance, Governance Forum

Source: Michael Hopkins, Corporate social responsibility: an issues paper, Policy Integration Department Working Paper prepared for the World Commission on the Social Dimension of Globalisation, No. 27, May 2004, p. 30.

7. Guidelines for Multinational Enterprises

The first versions of Guidelines for Multinational Enterprises (MNEs) can be seen as predecessors for the recent debate on the linkages between trade and core labour standards.

The OECD Guidelines for Multinational Enterprises are recommendations addressed by governments to MNEs operating in or from adhering countries (the 30 OECD member countries plus ten non-member countries¹⁵). They provide voluntary principles and standards for responsible business conduct, in a variety of areas including employment and industrial relations, humans rights, the environment, information disclosure, competition, taxation, and science and technology. The OECD Guidelines are the only multilaterally endorsed and comprehensive code that governments are committed to promote. The Guidelines' recommendations express the shared values of the governments of countries that are the source of most of the world's direct investment flows and home to most MNEs. They aim to promote the positive contributions that MNEs can make to economic, environmental and social progress. They are an annex to the OECD Declaration on International Investment and Multinational Enterprises, and were adopted by the OECD in 1976, and were revised in 1979, 1982, 1984, 1991 and 2000.

¹⁵ Argentina, Brazil, Chile, Egypt, Estonia, Israel, Lavia, Lithuania, Romania and Slovenia.

OECD Guidelines for Multinational Enterprises, revised version 2000

Selected outline

Preface:

1. The *Guidelines for Multinational Enterprises* (the *Guidelines*) are recommendations addressed by governments to multinational enterprises. They provide voluntary principles and standards for responsible business conduct consistent with applicable laws. They aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by MNEs.

I. Concepts and Principles:

1. The *Guidelines* are recommendations jointly addressed by governments to multinational enterprises. They provide principles and standards of good practice consistent with applicable laws. Observance of *Guidelines* by enterprises is voluntary and not legally enforceable.
6. Governments adhering to the *Guidelines* should not use them for protectionist purposes nor use them in a way that calls into question the comparative advantage of any country where multinational enterprises invest.
7. Governments have the right to prescribe the conditions under which MNEs operate within their jurisdictions, subject to international law.
10. Governments adhering to the *Guidelines* will promote them and encourage their use. They will establish National Contact Points that promote the *Guidelines* and act as a forum for discussion of all matters relating to the *Guidelines*. The adhering Governments will also participate in appropriate review and consultation procedures to address issues concerning interpretation of the *Guidelines* in a changing world.

IV. Employment and Industrial Relations:

Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices:

1. a) Respect the right of their employees to be represented by trade unions and other bona fide representatives of employees, and engage in constructive negotiations with such representatives with a view to reaching agreements on employment conditions.
- b) Contribute to the effective abolition of child labour.

- c) Contribute to the elimination of all forms of forced or compulsory labour.
 - d) Not discriminate against their employees with respect to employment or occupation on such grounds as race, sex, religion, political opinion, national extraction or social origin, unless selectivity concerning employee characteristics furthers established governmental policies which specifically promote greater equality of employment opportunity or relates to the inherent requirements of a job.
2.
 - a) Provide facilities to employee representatives as may be necessary to assist in the development or effective collective agreements.
 - b) Provide information to employee representatives which is needed for meaningful negotiations on conditions of employment.
 - c) Promote consultation and co-operation between employees and employers and their representatives on matters of mutual concern.
 3. Provide information to employees and their representatives which enables them to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole.
 4.
 - a) Observe standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country.
 - b) Take adequate steps to ensure occupational health and safety in their operations.
 5. In their operations, to the greatest extent practicable, employ local personnel and provide training with a view to improving skill levels, in co-operation with employee representatives and, where appropriate, relevant governmental authorities.

The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted in 1977, is addressed to both the governments of home and host countries, and to the MNEs themselves. MNEs are, above all, required to respect the national policy objectives of countries in which they operate with regard to employment promotion, job security, non-discrimination, training, wages, and safety at work. They must also comply with national laws to the highest possible standard, and not to treat their employees less favourably than comparable national enterprises would treat them. MNEs, governments, and employers' and workers' organisations should help to implement the ILO Declaration on the Fundamental Principles and Rights at Work. The text of the MNE

Declaration is regularly updated to include references to new instruments, adopted by the International Labour Conference and the Governing Body, which are of relevance to the issues it covers. In March 2000, the text was revised to incorporate the Fundamental Principles and Rights at Work. During the last update, which was adopted in March 2006, the list of ILO Conventions that member states are invited to ratify was extended to all the fundamental Conventions.

ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, Nov. 1977, revised Nov. 2000 and March 2006
Selected outline

Aims:

5. These principles are intended to guide the governments, the employers' and workers' organizations and the multinational enterprises in taking such measures and actions and adopting such social policies, including those based on the principles laid down in the Constitution and the relevant Conventions and Recommendations of the ILO, as would further social progress.
7. This Declaration sets out principles which governments, employers' and workers' organizations and multinational enterprises are recommended to observe on a voluntary basis; its provisions shall not limit or otherwise affect obligations arising out of ratification of any ILO Convention.

Means:

3. This aim will be furthered by appropriate laws and policies, measures and actions adopted by the governments and by cooperation among the governments and the employers' and workers' organizations of all countries.

Addressees:

4. The principles that out in this Declaration are commended to the governments, employers' and workers' organizations of home and host countries and to the multinational enterprises themselves.

General polices:

8. All the parties concerned by this Declaration should respect the sovereign rights of States, obey the national laws and regulations, give due consideration to local practices and respect relevant international standards. They should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations as well as the Constitution of the ILO and its

principles. They should contribute to the realization of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted in 1998.

10. Multinational enterprises should take fully into account established general policy objectives of the countries in which they operate. Their activities should be in harmony with the development priorities and social aims and structure of the country in which they operate.
11. Multinational and national enterprises should be subject to the same expectations in respect of their conduct in general and their social practises in particular.

Employment:

Employment promotion

16. Multinational enterprises, particularly when operating in developing countries should endeavour to increase employment opportunities and standards.
18. Multinational enterprises should give priority to the employment, occupational development, promotion and advancement of nationals of the host country at all levels.

Equality of opportunity and treatment

22. Multinational enterprises should be guided by this general principle throughout their operations without prejudice to the measures envisaged in par. 19 or to government policies designed to correct historical patterns of discrimination and thereby to extend equality of opportunity and treatment in employment.

Conditions of work and life:

Wages, benefits and conditions of work

33. Wages, benefits and conditions of work offered by multinational enterprises should be not less favourable to the workers than those offered by comparable employers in the country concerned.

Minimum age

36. Multinational enterprises, as well as national enterprises, should respect the minimum age for admission to employment or work in order to secure the effective abolition of child labour and should take immediate and effective measures within their own competence to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.

Safety and health

38. Multinational enterprises should maintain the highest standards of safety and health, in conformity with national requirements,

bearing in mind their relevant experience within the enterprise as a whole, including any knowledge of special hazards.

Industrial Relations:

41. Multinational enterprises should observe standards of industrial relations not less favourable than those observed by comparable employers in the country concerned.

Freedom of association and the right to organize

42. Workers employed by multinational enterprises as well as those employed by national enterprises should have the right to establish and to join organizations of their own choosing without previous authorisation. They should also enjoy adequate protection against acts of antiunion discrimination in respect of their employment.

Collective bargaining

49. Workers employed by multinational enterprises should have the right, in accordance with national law and practice, to have representative organizations of their own choosing recognized for the purpose of collective bargaining.
53. Multinational enterprises should not threaten to utilize a capacity to transfer the whole or part of an operating unit from the country concerned in order to influence unfairly those negotiations or to hinder the exercise of the right to organize; nor should they transfer workers from affiliates in foreign countries with a view to undermining bona fide negotiations with the workers' representatives or the workers' exercise of their right to organize.
55. Multinational enterprises should provide workers' representatives with information required for meaningful negotiations with the entity involved and, where this accords with local law and practices, should also provide information to enable them to obtain a true and fair view of the performance of the entity or of the enterprise as whole.

Table 5 gives an overview of the many multilateral sources of the OECD Guidelines for Multinational Enterprises. *Table 6* entails a comparison of the OECD Guidelines for MNEs with the ten principles of the UN Global Compact.

Table 5: Multilateral Sources of the OECD Guidelines for Multinational Enterprises

OECD Guidelines	Established International Framework mentioned in the OECD Guidelines
Preface	1948 Universal Declaration of Human Rights, 1995 Copenhagen Declaration for Social Development, 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1999 OECD Principles of Corporate Governance, 1999 OECD Guidelines for Consumer Protection in the Context of Electronic Commerce, 1995 OECD Transfer Pricing Guidelines for MNEs and Tax Administration
I. Concept and Principles	
II. General Policies	1948 Universal Declaration of Human Rights, 1999 OECD Principles of Corporate Governance
III. Disclosure	1999 OECD Principles of Corporate Governance
IV. Employment and	1977 ILO Tripartite Declaration of Principles concerning MNEs and Social Policy, Industrial Relations 1998 ILO Declaration of Fundamental Principles and Rights at Work; ILO Conventions: No. 29 of 1930 concerning Forced and Compulsory Labour, No. 105 of 1957 on the Abolition of Forced Labour, No. 111 of 1958 concerning Discrimination with respect to Employment and Occupation, No. 182 of 1999 concerning the Prohibition and Immediate Action for the Elimination of Worst Forms of Child Labour, No. 138 of 1973 concerning Minimum Age for Admission to Employment; ILO Recommendations: No. 94 of 1952 concerning Consultation and Cooperation between Employers and Workers at level of Undertaking, No. 146 of 1973 concerning Minimum Age for Admission to Employment
V. Environment	1992 Rio Declaration on Environment and Development and Agenda 21, 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters
VI. Combating Bribery	1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997 OECD Revised Recommendation on Combating Bribery in International Business Transactions, 1996 OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials
VII. Consumer Interests	1999 Revised UN Guidelines for Consumer Protection, 1999 OECD Guidelines for Consumer Protection in the Context

	of Electronic Commerce, 1980 OECD Guidelines Governing the Protection of Privacy and Trans-border Flows of Personal Data
VIII. Science & Technology	No OECD or external references
IX. Competition	1998 Recommendation of the OECD Council concerning Effective Sanctions Against Hard Core Cartels, C (98)35/Final, 1995 Recommendation of the Council, concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade, C(95)130/Final, <i>Making International Markets More Efficient Through Positive Comity in Competition Law Enforcement</i> . Report of the OECD Committee on Competition Law and Policy
X. Taxation	1995 OECD Transfer Pricing Guidelines for MNEs & Tax Administrations, Recommendation of the OECD Council on the Determination of Transfer Pricing between Associated Enterprises

Source: Kathryn Gordon / Clelia Mitidieri, Multilateral Influences on the OECD Guidelines for Multinational Enterprises, OECD Working Papers on International Investment No. 2005/2, Paris, Sept. 2005, p. 7.

Table 6: Comparison of the Coverage of the UN Global Compact Principles and the OECD Guidelines for Multinational Enterprises

<i>Global Compact Principles</i>	<i>OECD Guidelines' Chapter</i>
Human Rights:	
Principle 1: Business should support and respect the the protection of internationally proclaimed human rights.	Chapter II – General Principles Chapter VII – Consumer Interests
Principle 2: Make sure that they are not complicit in human rights abuses.	Chapter II – General Policies
Labour:	
Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining	Chapter IV – Employment and Industrial Relations
Principle 4: Elimination of all forms of forced and compulsory labour	Chapter IV – Employment and Industrial Relations
Principle 5: Effective abolition of Child Labour	Chapter IV – Employment and Industrial Relations
Principle 6: Elimination of discrimination in respect of employment and occupation	Chapter IV – Employment and Industrial Relations
Environment:	
Principle 7: Businesses should support a precautionary approach to environmental challenges.	Chapter V – Environment and Industrial Relations
Principle 8: Undertake initiatives to promote greater environmental responsibility.	Chapter V – Environment
Principle 9: Encourage the development and diffusion of environmentally friendly technologies.	Chapter V – Environment

<i>Global Compact Principles</i>	<i>OECD Guidelines' Chapter</i>
Anti-corruption:	
Principle 10: Business should work against all forms of corruption, including extortion and bribery.	Chapter VI – Combating Bribery
Other issues:	
	Chapter III – Disclosure Chapter VII – Consumer Interests Chapter VIII – Science and Technology Chapter IX – Competition Chapter X – Taxation

Source: OECD Secretariat / UN Global Compact Office, The UN Global Compact and the OECD Guidelines for Multination Enterprises: Complementarities and Distinctive Contributions, Paris, 26 April 2005, p. 5.

8. United Nations Global Compact

The United Nations Global Compact is an initiative to encourage businesses worldwide to adopt sustainable and socially-responsible policies, and to report on them. Under the Compact, companies are brought together with UN agencies, labour groups and civil society representatives.

The UN Global Compact was first announced by UN Secretary-General Kofi Annan in an address to the World Economic Forum on 31 January 1999, and was officially launched at UN Headquarters in New York on 26 July 2000. As of 2006, it included more than 3,300 companies from all regions of the world, as well as around 1,000 labour and civil society organisations, also from all regions of the world. The Global Compact Office is supported by six UN agencies: the United Nations High Commissioner for Refugees (UNHCR), the United Nations Environment Programme (UNEP), the International Labour Organisation (ILO), the United Nations Development Programme (UNDP), the United Nations Industrial Development Organisation (UNIDO), and the United Nations Office on Drugs and Crime (UNODC).

The Global Compact is not a regulatory instrument, but is, instead, a forum for discussion and a network for communication, which includes governments, companies and trade unions, whose actions it seeks to influence, and civil society organisations, which represent its stakeholders. The Compact's goals are intentionally flexible and vague; it distinguishes the following channels through which it provides facilitation and encourages dialogue: policy dialogues, learning, local networks and projects. The ten

leading principles in the fields human rights, labour, environment and anti-corruption are included in Table 6.

Global Compact Critics is an informal network of organisations and people with concerns about the Global Compact. Many NGOs, such as Greenpeace ActionAid, CorpWatch and the Berne Declaration, believe that, without any effective monitoring and enforcement provisions, the Global Compact fails to hold corporations accountable. Moreover, these organisations argue that companies can misuse the Global Compact as a public instrument for “blue-washing”, as both an excuse and an argument to oppose any binding international regulation on corporate accountability, and as an entry door to increase corporate influence on the policy discourse and the development strategies of the United Nations.

9. Conditionality of General Systems of Preferences as linkage between trade and labour

The purpose of the General Systems of Preferences (GSP), which was initiated by the United States and other industrial countries in the 1970s, is to promote economic growth in developing countries by stimulating their exports. The EC introduces the GSP and its successor programme GSP+ for developing countries to be granted preferential status when exporting into the EC and, among others, applying fundamental human rights, core labour standards and some Multilateral Environment Agreements. This instrument is, therefore, an incentive-based system which should contribute to the implementation of fundamental labour standards in developing countries. The special incentive arrangement for sustainable development and good governance may be granted to a country which has ratified and effectively implemented the relevant conventions. The European Commission is to keep the status of ratification and effective implementation of the conventions under review. The examination must take the findings of the relevant international organisations and agencies into account. The preferential arrangements may be temporarily withdrawn with regard to serious and systematic violations of principles laid down in the relevant conventions.

Conditions referred to in Art. 9 of Council Regulation (EC) No. 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences, OJ L 169, 30.6.2005, 1-43

Annex III, Part A: Core human and labour rights, UN/ILO Conventions

1. International Covenant on Civil and Political Rights
2. International Covenant on Economic, Social and Cultural Rights
3. International Covenant on the Elimination of All Forms of Racial Discrimination (CERD)
4. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
5. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
6. Convention on the Rights of the Child (CRC)
7. Convention on the Prevention and Punishment of the Crime of Genocide
8. ILO Convention No. 138 concerning Minimum Age for Admission to Employment
9. ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour
10. ILO Convention No. 105 concerning the Abolition of Forced Labour
11. ILO Convention No. 29 Forced or Compulsory Labour
12. ILO Convention No. 100 concerning Equal Remuneration of Men and Women Workers for Work of Equal Value
13. ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation
14. ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise
15. ILO Convention No. 98 concerning the Application of the Principles to Organise and to Bargain Collectively
16. International Convention on the Suppression and Punishment of the Crime of Apartheid

Annex III, Part B: Conventions related to the environment and governance principles

17. Montreal Protocol on Substances that Deplete the Ozone Layer
18. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal
19. Stockholm Convention on Persistent Organic Pollutants
20. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

21. Convention on Biological Diversity (CBD)
22. Cartagena Protocol on Biological Diversity
23. Kyoto Protocol to the United Nations Framework Convention on Climate Change
24. United Nations Single Convention on Narcotic Drugs (1961)
25. United Nations Convention on Psychotropic Substances (1971)
26. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)
27. United Nations Convention against Corruption (Mexico)

10. The Trade Policy Review Mechanism as a means to consider labour standards inside the WTO

A possible compromise approach, which, on the one hand, would employ the WTO in considering core labour standards, but which, on the other, would allow time to establish the best way in which they could be enforced, involves using the WTO's Trade Policy Review Mechanism (TPRM).¹⁶ The TPRM was established in 1988 as the very first result of the starting Uruguay Round. Subsequently established as a key component of the WTO, the objective of the TPRM is to review the trade policies and practices of the members and their impact on the functioning of the multilateral trading system.

The reviews are carried out by the WTO Secretariat, whose report is subsequently sent to the WTO General Council. In this way, the TPRM is essentially a kind of peer-group assessment. Although all WTO members are subject to review under TPRM, the regularity is determined by their share of world trade. The top four members are subject to review every two years, the next 16 are reviewed every four years, while the remainder are reviewed every six years. However, the TPRM does not hand out "punishments", nor can it be used for the enforcement of specific obligations or to settle disputes.

The TPRM provides a constructive and non-confrontational way through which institutional links can be established between social issues and trade.¹⁷ It is also an approach favoured by the International Confederation of Free Trade Unions (ICFTU) which contends that labour standards must be regarded as among the trade-related policies and practices that are central to the TPRM process. As a way of demonstrating the efficacy of the process, the

¹⁶ For more details, see Sean Turnell, 'Core Labour Standards and the WTO', (2002) 13 *Economics and Labour Relations Review*.

¹⁷ Mehmet *et al.*, 1990, p. 202.

ICFTU has begun producing its own labour standards reports for the countries subject to the periodic Trade Policy Review.¹⁸

Mehmet *et al.* (1999, p. 203) are impressed by the educative possibilities of the use of the TPRM process, noting that “it may be the best way to develop our conceptual and empirical understanding of the linkage that is required to develop further policy in this area, and, in particular, to determine the extent that labour standards can be subsidising trade or investment, whether in a traditional or non-traditional conceptualisation of subsidy’. The TPRM also provides the means, they argue, by which “aggressive unilateralism” could be avoided, while, at the same time, exposing the emerging labour tensions in international economic relations before they are allowed to escalate into trade disputes.

¹⁸ These reports can be found at the website of the ICFTU, <http://www.icftu.org>.

Chapter 5

Reframing RECON: Perspectives on Transnationalisation and Post-national Democracy from Labour Law

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I. Introduction

RECON takes as its challenge the task of discovering whether supranational governance can achieve a democratic character. It assumes that an essential core of the concept of democracy can be disembedded from the notion and institutions of the constitutional nation state and re-planted within transnational governance systems, in the EU and beyond, even while these fail to provide for representation and accountability along traditional lines.¹ It further asserts that social ordering deriving from transnational governance that is *democratic* will be *legitimate*.²

RECON's "yardstick" for these two properties is deliberative: democratic legitimacy, it says, "requires public justification of the results to those who are affected by them". Deliberation is further claimed to embody the democratic principles of congruence ("those affected by laws should also be authorised to make them") and accountability (which relates to reason-giving practice

¹ E.O. Eriksen & J.E. Fossum, "Europe in Transformation. How to Reconstitute Democracy?", RECON Online Working Paper 2007/1, (Oslo: ARENA, 2007), at 4.

² See, further, E.O. Eriksen & J.E. Fossum, "Europe in Search of Legitimacy: Strategies of Legitimation Assessed," (2004) 25 *International Political Science Review*, p. 435.

“wherein the decision-makers can be held responsible to the citizenry, and that, in the last resort, it is possible to dismiss [...] incompetent rulers”).³

Within this framework, Work Package 9 seeks to explore the dynamics of interaction between transnational economic integration, proceeding through law, as in the EU and WTO, and constitutional norms and standards, of both national and international origin, subsumed by such systems. Its project is to assess, “...whether the...‘package’ once associated with state citizenship, including all of the classical attributes of legal, political and socio-economic citizenship can be reconstructed and reconfigured across different ‘constitutional’ sites, or whether the language and practices of constitutionalism beyond the state instead ‘hollow out’ the capacity for state constitutional citizenship without adequate replacement or substitution at the post-national level.

To this inquiry, this paper contributes a study of recent reflections on the consequences of global economic integration within the field of labour law. Its purpose is to provide the basis for a synchronic comparison, in outline, across legal sub-disciplines. In their framings, methodologies, precepts, and functional identities, social science disciplines and sub-disciplines evince and prosecute a range of cognitive and normative concerns.⁴ Viewing the transformations and potentials of globalisation and supranational governance through the lens of labour law ought, then, to help to illuminate the preferences and selections of constitutional theory and general public law, the mainstays of RECON’s theoretical framework, and so offer means to refine and enrich it.

The first main finding taken to emerge from this exercise is that the working definitions of democratic legitimacy, congruence and accountability stated at the start tend to re-produce a limited democratic horizon that is classically liberal in orientation. Axiomatically and functionally, labour law is concerned with the sphere of market relations. Normatively, it is engaged by challenges

³ Eriksen & Fossum, n. 1, at 4, and further (at 8): “The *public sphere* located in civil society holds a unique position, because this is where everyone has the opportunity to participate in the discussion about how common affairs should be attended to. It signifies that equal citizens assemble into a public, which is *constituted by a set of civil and political rights and liberties*, and set their own agenda through communication” (emphasis added).

⁴ R. Mayntz, “Embedded Theorizing. Perspectives on Globalization and Global Governance”, MPIfG Discussion Paper 05/14 (Cologne, MPIfG, 2005); M. Bevir & R.A.W. Rhodes, “A Decentred Theory of Governance: Rational Choice, Institutionalism, and Interpretation”, Berkeley Institute of Governmental Studies Working Paper 2001-10, (Berkeley CA: IGS, 2001).

to individual autonomy which arise in the course of work – its understanding of which essentially embraces distributive issues – and which may be crystallised in “private” legal relations, principally contract. During the twentieth century, labour law – through state constitutions, national and sectoral collective agreements, statute and court decisions⁵ – articulated individual and collective rights in response to such challenges. At various moments, it sought to extend the scope of application of concepts of civil rights, citizenship and democracy into the realm of industrial production, as a framework for the conduct of economic life (since, originally, they set parameters channelling the conduct of politics).⁶ Feminist labour analyses, for their part, have conclusively shown interdependencies, and the gendered nature of the boundary between market/non-market rights, rewards, and statuses within the constitutional frameworks of existing democratic states.⁷

By contrast the “deliberative yardstick” as defined implicitly reaffirms a liberal constitutional paradigm⁸ that restricts the scope of democratic self-governance, citizenship and associated rights to one side of the conventional constitutional public-private divide. Analysis with this starting point, it is suggested, already “...hollows out the capacity” for state constitutional citizenship” including “all of the classical attributes of legal, political and socio-economic citizenship”, before it begins. RECON should, I argue, instead explicitly acknowledge and engage with communication, rule-making and coercive power⁹ within the economy as well as in the “public” sphere and civil society, and should include in the scope of study the altered dynamics affecting them that stem from transnationalisation’s de-borderings and re-borderings.¹⁰ If it elects to take the other course, at the very minimum, it must openly register and defend this choice as such.

⁵ F. Rödl, “Towards a Reflexive Labour Constitution. On the Form of Regulating Labour Relations in Europe”, Cidel concluding conference Paper No. 14 (Florence, ARENA/CIDEL/EUI, 2005).

⁶ T.H. Marshall, *Citizenship and Social Class*, (London: Pluto, 1992 (1950)), H. Arthurs, “Developing industrial citizenship: a challenge for Canada’s second century”, (1967) XLV *La revue de Barreau canadien*, p. 786; C. Pateman, *Participation and Democratic Theory*, (Cambridge: Cambridge University Press, 1970), P. Selznick, *Law, Society and Industrial Justice*, (New Brunswick: Transaction, 1978).

⁷ Classically, F. Olsen, “The Family and the Market: A Study of Ideology and Legal Reform”, (1983) 96 *Harvard Law Review*, p. 1497.

⁸ J. Habermas, “Paradigms of Law”, in: M. Rosenfeld & A. Arato (eds), *Habermas on Law and Democracy*, (Berkeley CA: University of California Press, 1996).

⁹ As discussed further, in interview, by Iris Marion Young and Jane Mansbridge: A. Fung, “Deliberation’s Darker Side: A Discussion with Iris Marion Young and Jane Mansbridge”, (2004) 93 *National Civic Review*, p. 47.

¹⁰ S. Sassen, *Territory, Authority, Rights. From Medieval to Global Assemblages*, (Princeton, Princeton University Press, 2006).

The second conclusion has a methodological basis. Labour law – more frequently than constitutional legal theory – historicises its concepts and institutions.¹¹ It thus highlights the co-evolution of democratic constitutions with industrialisation and the development of national welfare regimes. Social integration, it underlines, has material as well as political and cultural bases: national constitutions represent settlements with distributive as well as political dimensions, and modern democratic legitimacy has depended on the delivery of acceptable standards of living as much as on public justification, formal rights of political participation or the power to dismiss rulers.¹² “[T]he solidaristic basis of the nation state, as well as of the welfare state”, it has been said, encompasses *more* than “the symbolic ‘we’”.¹³ On this basis, RECON’s “results” requiring public justification, understood fully, must extend to material social outcomes for whose achievement constitutions provide the framework, and which derive not just from the public but also the private arrangements they permit, including in the world of work. Moreover, principled calibration of such results – prerequisite to justification through rational discourse, as *deliberative* cosmopolitanism would demand – will require collection and evaluation of information regarding substantive (including relative) levels of individual and collective welfare, in terms of both their public and private components. There are, in other words, technical-institutional implications, flowing from a normative preference for deliberative cosmopolitanism, which touch on distribution and “private” social ordering, in addition to those relating, for example, to supporting the coalescence of post-national communicative space and party-political representation.¹⁴

These observations, it is suggested, run flush with, and lend support to, a *thick* theory of deliberation, that is, one which sees a wide range of factors, social as well as personal, as affecting the extent and quality of individual participation

¹¹ Ch. Joerges, B. Stråth & P. Wagner (eds), *The Economy as Polity: The Political Constitution of Contemporary Capitalism*, (London: UCL Press, 2005) marks an exception.

¹² See F. Block, “Towards a New Understanding of Economic Modernity”, Ch. 1 in: *The Economy as a Polity: The Political Constitution of Contemporary Capitalism*, (London: UCL Press, 2005), Ch. Joerges, B. Stråth & P. Wagner (eds), for discussion of perceptions of historical complementarities between market expansion and popular “protective counter-movements”, despite superficially contradictory objectives, in the works of Karl Polanyi, Karl Marx and E.P. Thomson (at 13–14).

¹³ See Fossum & Eriksen (*supra* n. 1, at 20): “A legally integrated state-based order is often seen as premised on the existence of a sense of common destiny, an imagined common fate... This constitutes the solidaristic basis of the nation state, as well as of the welfare state...”

¹⁴ See M. Nussbaum, “Capabilities as Fundamental Entitlements: Sen and Global Justice”, (2003) 9 *Feminist Economics*, p. 33.

in rational discussion preceding the making and approval of legal norms,¹⁵ and the extent to which these norms express the needs, preferences and values of different social groups.¹⁶ Failure *explicitly* to specify substantive social, welfare and labour objectives (which may be structured through reference to socio-economic rights) as both a *goal* and *pre-condition* of reconstructed cosmopolitan democracy by contrast seems unlikely, in the context of negative market integration underpinned by law, to restrain trends favouring market values over social values.¹⁷

This leads back to RECON's starting point, the crisis of European constitutionalism. In an early response, one authoritative voice stated the aim must now be "...to 'conserve the great democratic achievements of the European nation-state, beyond its own limits", including "...not only formal guarantees of civil rights, but levels of social welfare, education and leisure *that are the precondition of both an effective private autonomy and of democratic citizenship*".¹⁸ In other words, the resource-distributive dimension of democratic self-governance, key to both social productivity and social reproduction, and highlighted here through the lens of labour law, must be embraced by the "language and practices of constitutionalism beyond the state" if they are to secure, for the EU, or any other supranational governance system, the legitimacy desired.

I proceed as follows. Section 2 breaks down recent labour law readings of global economic integration according to the perceived impact of the latter's major trends on its foundational sub-disciplinary concepts and categories: industrial production, labour, work, the worker, the employment relationship and collective worker representation. The discussion substantiates the points outlined above. Labour law, in reflecting on global economic integration, is chiefly concerned with the impact in the private sphere, whether directly via transnationalisation of private law, or indirectly, via market dynamics affecting private law's conduct or states' capacity to regulate in the labour field. In gauging changes to its institutions and norms, labour law envisions them in social-historical context, products of the interwoven emergence of markets and democracies.

¹⁵ See, for example, D. Crocker, "Deliberative Participation. The Capabilities Approach and Deliberative Democracy" (*mimeo*, 2004).

¹⁶ See I.M. Young, *Inclusion and Democracy*, (Oxford: Oxford University Press, 2000); see, also, J. Nagel, *Participation*, (Upper Saddle River: Prentice Hall, 1987).

¹⁷ See Nussbaum, *supra* n. 14.

¹⁸ See J. Habermas, "Why Europe Needs a Constitution", (2001) 11 *New Left Review*, p. 5, at 6 (emphasis added).

The following section presents four reconstructions proposed by labour lawyers in response to a perceived “crisis” of the sub-discipline provoked by transnational economic integration. Assessing national legislatures and trade unions as now beset by systematic limitations, each seeks to reanimate labour law’s distributive democratic agenda by a novel route. Respectively, they concentrate on the contract of employment;¹⁹ site-level worker representation;²⁰ the corporation;²¹ and supranational social citizenship, re-defined as an expanded set of procedural rights alongside substantive social and welfare entitlements.²² Mis-assumptions, I, however, suggest, invalidate the first three reconstructions. Not so the fourth, which is recommended as a necessary complement to supranational governance, capable of countering the tendencies of its modalities (such as subsidiarity and self-regulation) in practice to autonomise market power. Consequently, it is urged, this, or a similar vision of social citizenship, must form an integral element of RECON’s model of post-national deliberative supranationalism. In conclusion, the case for reframing RECON is recapitulated.

2. Globalisation, transnational economic integration and labour

As a sub-discipline, labour law sees itself as profoundly altered by globalisation, which has acted on its baseline concept, industrial labour, via changes to the various elements that previously constituted it: industrial production, work, the standard employment relationship, and the contract of employment. These are also indicated to have transformed, and partially dissolved, the former foundations of labour solidarity, as well as its national and international institutional embodiments. Voiced first in the 1970s,²³ but

¹⁹ See H. Collins, “Is There a Third Way in Labour Law?”, in: J. Conaghan, R.M. Fischl & K. Klare (eds), *Labour Law in an Era of Globalization. Transformative Practices and Possibilities*, (Oxford: Oxford University Press, 2002).

²⁰ See C. Estlund, “Rebuilding the law of the workplace in an era of self-regulation”, (2005) 105 *Columbia Law Review*, at 319.

²¹ See S. Deakin, “The Many Futures of the Contract of Employment”, and P. Ireland, “From Amelioration to Transformation: Capitalism, the Market and Corporate Reform”, both in: Conaghan *et al.* (eds), *supra* n. 19.

²² See A. Supiot, “The transformation of work and the future of labour law in Europe: A multidisciplinary perspective”, (1999) 138 *International Labour Review*, p. 31, and *ibid.*, *Au-delà de de l’emploi: Transformations du travail et l’avenir du droit du travail en Europe. Rapport pour la Commission Européenne*, (Paris: Flammarion, 1999).

²³ In 1972, Kahn-Freund observed “the entire basis of our thinking on collective labour relations and collective labour law is destroyed”, (O. Kahn-Freund, “A Lawyer’s Reflections on Multinational Corporations”, (1972) *Journal of Industrial Relations (Aus.)*, at 351.

prominently from the mid-1990s, allusions to the crisis,²⁴ or “disintegration” of labour law, and a need for its re-invention,²⁵ are commonplace.²⁶ In this section, the bases of these evaluations are examined in greater detail.

2.1. Global economic and political transformations

Concerning globalisation trends, labour law shares basic viewpoints with political science, economics, international relations, and other legal sub-disciplines, refining and adapting these to its own context and concerns. That the world economy has, over the last thirty years, undergone qualitative alteration is thus widely accepted. Technological innovation has extended the horizons of information systems, accelerated communications, de-materialised goods and services and stimulated the development of cross-border corporate and social networks.²⁷ Facilitated by liberalisations affecting global currency transactions, trade, foreign direct investment, inter-national capital flows, and privatisation, these trends continue to deepen and thicken transnational economic and political relations, constituting transnational markets. In turn, this has permitted the rise of multinational enterprises (MNEs): directly, for example, by permitting MNE entry into formerly public sectors, and indirectly, by allowing the concentration of market power on a global scale. Completing the circle, through their legal and commercial praxis, and in the influence which they wield over policy at national and international levels, MNEs themselves are agents and promoters of transnational market integration.

Labour lawyers also identify a qualitative political shift as having occurred. Neo-liberal hegemony followed swiftly on the demise of socialist states, substituting for Keynesian reliance on state ownership, planning and intervention as strategies to achieve political goals, including with respect to regulation of labour markets,²⁸ renewed confidence in the legitimacy, as well

²⁴ See M. D’Antona, “Diritto del Lavoro di Fine Secolo: Una Crisi di Identità?”, (1998) 48 *Rivista Giuridica del Lavoro e della Previdenza Sociale*, at 31; see, also, H. Collins, “The Productive Disintegration of Labour Law,” (1997) 26 *Industrial Law Journal*, at 295.

²⁵ See K. Klare, “The Horizons of Transformative Labour and Employment Law”, in: Conaghan, Fischl & Klare (eds), *supra* n. 19; see, also, A Supiot, *supra* n. 22.

²⁶ For example, “[...] [the] social and political world classically imagined by labour law is disappearing, gradually in some places, quite abruptly in others”, so that, “labour law must be invented”: see, also, Klare, *supra* n. 25, at 4.

²⁷ See Klare, *ibid.*, at 5; see, generally, M. Castells, *The Information Age: The Rise of the Network Society*, Vol. I (Cambridge: Blackwell, 2000).

²⁸ See, for example, C. Kollonay Lehoczky, “Ways and Effects of Deconstructing Protection in the Post-socialist New Member States - Based on Hungarian Experience”, in: G. Davidov & B. Langille (eds), *Boundaries and Frontiers of Labour Law. Goals and Means in the Regulation of Work*, (Oxford: Hart, 2006). D’Antona (*supra* n. 24, at 34-5, & 38) highlights, in this context, the marginalisation of worker interests and labour law within national constitutions.

as efficiency, of competitive markets as a distributive mechanism.²⁹ Critical labour lawyers sometimes supplement this general account by pinpointing the operation of interest-driven political dynamics of specific historical moments.³⁰ State sovereignty over labour regulation, it is said in this context, was subjected to policy steering by international organisations, under which “social controls” on foreign investment and state support for domestic production were eliminated,³¹ restraining “Third World” development and re-instating dependence on industrialised nations.³²

2.2. Transformations affecting production, employment and “the worker”

Labour law envisages various connections between macro-level economic and political transformations and the alteration of the character of industrial production, work, the employment relationship, and the legal and social identities of the “worker”. Starting with production, in Europe and elsewhere in the developed world, diminishing labour demand, due to mechanisation, has been followed (often via long transitional periods of high unemployment) by the growth of employment of different kinds, for instance, in light manufacturing and services. Increasing ease of transportation of production factors and dematerialisation marginalised the need for continuous plant operation by a local workforce. Facilitated by the liberalisations mentioned above, this has meant that vertically integrated production systems contained by national boundaries have yielded to global supply chains – production networks held together by non-ownership legal

²⁹ See, for example, H. Arthurs, “Private Ordering and Workers’ Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation”, in: Conaghan *et al.* (eds.), *supra* n. 19. See, also, Habermas, *supra* n. 18, at 11-12.

³⁰ For example, highlighting the 1980s “global debt crisis” of the 1980s as the platform for definitive insertion into the institutional frameworks of developing countries of neo-liberal trade and economic policies, via IFI-imposed structural adjustment packages, including labour market flexibility agenda; secondly, via trade-related treaties concluded with developed countries. Rittich highlights labour rights and labour market flexibility as “distinct normative visions with respect to the structure and operation of labo[u]r markets and the location of authority and control in the workplace [...]”: K. Rittich, “Labor Law Beyond Borders: ADR and the Internationalization of Labor Dispute Settlement”, in: *Labor Law Beyond Borders: ADR and the Internationalization of Labor Dispute Settlement*, (The Hague, Kluwer International, 2003) at 161.

³¹ See, for example P. Alston, “Labor Rights Provisions in US Trade Law: ‘Aggressive Unilateralism?’”, (1993) 15 *Human Rights Quarterly*, at 1, for early critique of the NAFTA regime’s impact on national labour rights.

³² See, for example, D. Montgomery, “Labor Rights and Human Rights. A Historical Perspective”, in: L. Compa & S. Diamond, *Human Rights, Labor Rights, and International Trade*, (Philadelphia: University of Pennsylvania Press, 1996) at 15; see, also, Rittich, *supra* n. 30.

relations, principally contract, but also, for example, licensing and franchising agreements.

Concerning employment, one effect of such changes has been to normalise short-term relationships between employers and employees, removing the need and incentive to undertake long-range investment in training and wellbeing of workforces, and in relationships with their representatives. Sub-contracting fragments responsibility, and decreases transparency for employers, employees and third parties. It also creates novel spaces for informal working in transnational production which, in contrast with national production in many developing countries, was previously largely formalised.

With respect to work, one effect is intensification,³³ for instance, proceeding via revision of job descriptions and categories in the context of weakening union representation. Another dimension, flagged by labour lawyers as transformative, but infrequently recognised in general social scientific accounts of globalisation, is “feminisation” – the “gendered transformation of work”.³⁴ Feminisation has been made possible, in part, by relative dematerialisation, diminishing the need for heavy manual labour, but also by enhanced personal mobility and communications, and the social and cultural impacts of political movements for women’s equality that have followed autonomous trajectories.

Feminisation does not correspond merely to the rise of women in the global workforce numerically. Rather, it stands for what has accompanied this, that is, the pronounced growth of “contingent, non-standard or atypical work”, “part-time, casual, temporary, own account or self-employed, home work, and contract work”, sometimes given the label “precarious” work,³⁵ and the *normalisation* of these forms of work, and the terms of their performance, with respect to the workforce as a whole.³⁶ Increasingly, these substitute the

³³ See, generally, R. Sennett, *The Corrosion of Character: The Personal Consequences of Work in the New Capitalism*, (New York: Norton, 1998).

³⁴ See K. Rittich, “Feminization and Contingency: Regulating the Stakes of Work for Women”, in: Conaghan *et al.* (eds), *supra* n. 19.

³⁵ See J. Fudge & R. Owens, *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms*, (Oxford: Hart, 2006).

³⁶ See G. Standing, “Global Feminization Through Flexible Labour”, (1989) 17 *World Development*, p. 1077, and G. Standing, “Global Feminization through Flexible Labour: A Theme Revisited”, (1999) 27 *World Development*, p. 583. According to recent studies, migrant workers number 80-100 million: about half of these workers are women, amongst whom domestic work is the most common occupation (ILO, About MIGRANT <http://www.ilo.org/public/english/protection/migrant/about/index.htm>,

“standard employment” norm, around which labour and welfare law, and the ends and modalities of collective action, were historically constituted: the (typically white) male head of household, engaged continuously from post-education to standard retirement age, on the basis of a permanent, full-time contract, performing site-based work, according to a regular schedule, and earning, and socially understood as entitled to, a “breadwinner” or “family” wage.³⁷

A further consequence of feminisation, then, is the foregrounding of the instability, rising with global market integration as defined above, of the boundaries “public”/“private”, “market”/“home–family–social”. These have been identified by feminist labour theorists as the principal sites on which the tensions between the functions of individuals with regard to society’s *productive* and *reproductive* capacities are played out.³⁸ Always contingent and infused by ideology, the distinction between market- and non-market work is blurred as a combination of the two becomes the norm for individual workers, also exposing the “interconstitution” of structures of production and reproduction.³⁹ Its corrosion proceeds across multiple dimensions: geographical, in the vanishing separation between work/non-work space (for example, as in homeworking); temporal, in the fusion of work/non-work time (for example, self-employment); financial, in the meshing of workers’ production and living costs (for example, child care expenditure). As a side-effect, this to an extent problematises the corporation which increasingly serves a vehicle for own-account working. In aggregate, these developments mean that women workers collectively are subsidising both the costs and risks of production, while, as individuals, they suffer cuts in real income and the dilution of the benefits of paid work.

Thus revealed is labour law’s founding ideal of the male unencumbered worker. Also uncovered is the constitution/production of the legal and policy categories of labour, work and employment by wider frameworks of legal regulation, their still-gendered distributions of legal rights, property and goods, both public and “private”, as well as by the national, international and

Preventing Discrimination, Exploitation and Abuse of Women Migrant Workers: An Information Guide-Booklet 1: Why the Focus on Women International Migrant Workers 5 (2003)).

³⁷ See Rittich in: Conaghan *et al.* (eds), *supra* n. 19, at 117.

³⁸ See Fudge & Owens, *supra* n. 35.

³⁹ See Rittich, *supra* n. 34, at 128. Appreciation of the interdependence of market and non-market activities, risks and rewards is mirrored by international human rights law discourses’ notions of “interdependence and indivisibility” of human rights across the categories of civil and political, social and economic human rights (see, for example, 1995 Beijing Declaration of the UN’s Fourth World Conference on Women).

supranational constitutions that frame them. Family law, taxation, social welfare law, health care policy – all impact on the ability to perform paid and unpaid work, and to access the attached payments. Feminisation presents fresh opportunities, then, to consider the ways “employment” on the one hand, and work, on the other, are “formed by and articulated with other [social] institutions such as the family or household”. It should also force recognition, at last, of the lack of any necessary definitional relationship between them and their non-coextensivity in practice.⁴⁰

2.3. Collective labour institutions – trade unions

Despite diversity in national arrangements, historically and persisting to the present time,⁴¹ trade unions’ trajectories over the last two decades display certain similarities across jurisdictions. Union density and union membership have declined “precipitously” across developed and developing economies where they were formerly strong.⁴² How does labour law explain these changes? A typical answer links the demise of Keynesian labour policies of “counter-cyclical job creation, collective bargaining, protective labour legislation, and equality-enhancing strategies”⁴³ to the dismantling of the “four pillars” on which they formerly rested – nation state, large factories, full-time employment, and generalised union representation.⁴⁴

Some authors points to supplementary factors. A significant strand in the literature (and one whose discussion goes beyond the scope of this paper) asserts the role of regulatory competition in creating downward pressure on national regimes of labour regulation.⁴⁵ Secondly, feminist labour analysis

⁴⁰ Rittich, *ibid.*, at 123.

⁴¹ For example, in socialist states, trade unions were often integrated into totalitarian systems of rule; as a result, they were generally unable to exert strong influence over post-Communist labour constitutions. In some post-colonial states, by contrast, trade unions functioned as organs of civil resistance to military rule; elsewhere, as quasi-official “workers” organisations”, their collusion won industry-specific protectionist intervention within directed economies. In some states, such as China, free trade unions do not yet exist.

⁴² See, for example, R.M. Fischl, “Organizing Low-Wage Workers in the US: Some Lessons from the Miami Janitors Campaign”, *mimeo* ; and P. Benjamin, “Beyond the Boundaries: Prospects for Expanding Labour Market Regulation”, in: Davidov & Langille, (eds), *Boundaries and Frontiers of Labour Law. Goals and Means in the Regulation of Work*, (Oxford: Hart, 2006) with regard to South Africa.

⁴³ See H. Arthurs, in: Conaghan *et al.*, (eds) *supra* n. 19, at 471.

⁴⁴ See D’Antona, *supra* n. 24.

⁴⁵ See, now classically, W. Streeck, “Industrial citizenship under regime competition: the case of the European works councils”, (1997) 4 *Journal of European Public Policy*, p. 643; and, also, C. Barnard, “Social Dumping and the Race to the Bottom: Some Lessons for the European Union from Delaware”, (2000) 25 *European Law Review*, p. 57, and S. Deakin, “Legal

points to trade unions' hesitance in responding to changing work patterns and recognising non-standard workers, as a result of which women and racial minorities were historically denied equal employment rights.⁴⁶ Against this background, the normalisation of atypical work can be seen to have had a dual relationship with union decline. In the first instance, precarious work emerges partly as a result of non-standard workers "definitional exclusion" by collective organisations.⁴⁷ Unprotected as they entered the labour market, non-standard workers subsequently functioned, through no fault of their own, to encourage the spread and embedding of atypical, less advantageous terms and conditions of work.

Secondly, the incompatibility of full-time, long-term continuous commitment with the demands of women's unpaid work undoubtedly encouraged the growth of atypical employment to meet women's needs, albeit unsatisfactorily. Individualised and de-sited, and hence, "invisible", precarious work poses obstacles to the coalescence of solidarity and worker organisation. In combination with their political and social marginalisation – partly prior, but also an effect of low employment status and lack of employment-related benefits (for example, income, healthcare, pension) in the past restricted to unionised sectors – this has had the outcome that a substantial segment of the total working population are now relatively disempowered by the standards of earlier decades.⁴⁸ Whereas national and international politics and law-making at one time often sought explicitly to articulate employees' (and trade unions') interests, now this scarcely happens.⁴⁹

Subsequently, unions have sought to embrace atypical workers (such as the notionally "self-employed") even where this threatens standard employment

Diversity and Regulatory Competition: Which Model for Europe?", (2006) 12 *European Law Journal*, p. 440.

⁴⁶ See Fischl, *supra* n. 42, at 3. Practices such as giving priority to full-time workers for promotion and job security tend disadvantage of female workers.

⁴⁷ See Rittich, *supra* n. 30, at 118.

⁴⁸ See M. Ontiveros, "A New Course for Labour Unions: Identity-Based Organizing as a Response to Globalization", in: Conaghan *et al.* (eds), *supra* n. 19, observes, in addition to sex discrimination, female workers' ongoing subordination via family roles and expectations strongly influenced by patriarchal social structures. On the other hand, Fischl (*supra* n. 42) describes migrant workers as geographically and temporally dispersed, racially and culturally heterogeneous, economically disempowered and precarious, due to irregular immigration status.

⁴⁹ See S. Deakin, "The Many Futures of the Contract of Employment", in: Conaghan *et al.*, (eds) (at 194) frames this as a shift in the role of trade unions, from that of co-regulator, to monitor and enforcer, *ex post facto*, of labour-related legal norms.

terms and conflicts with the interests of existing members.⁵⁰ Some unions, for instance, now select organising goals and strategies *ad hoc* according to target groups and the nature of the work performed.⁵¹ Identity-based organising⁵² takes a multi-dimensional view of workers: in addition to the economic interests that were historically the explicit basis of solidarity, it recognises the inter-linked individual, social and cultural identities of workers, and the obstacles, as well as possible routes, to empowerment, now increasingly broadly understood, that may be attached to them. The specificities of the formal legal status of workers, within complex corporate and contractual relationships, and more widely (for instance, with regard to immigration) may also be taken into account. Moreover, this wider canvas for the articulation of claims is linked in some unions' activity to the substitution of labour procedures prescribed by national law by recourse to non-legal forms of "enforcement" involving new actors (NGOs, media, *etc.*), based on employers' voluntary commitments, and which avoid reliance on state coercion which, in any case, is less reliable than before.⁵³ In some instances (though this is not yet a general trend), organising is expressly based upon "dignity and justice",⁵⁴ and directed to objectives framed in terms of citizenship, political participation and empowerment.⁵⁵ Such "grass roots"

⁵⁰ For example, the US Service Employees International Union was established in the 1990s as a break-away from AFL-CIO, over the latter's "perceived failure to devote sufficient resources and ingenuity to organizing new workers": Fischl, *supra* n. 42 at 1.

⁵¹ See Ontiveros, *supra* n. 48. Fischl, *supra* n. 42, illustrates with reference to site security jobs, which cannot be outsourced, and are already sub-contracted.

⁵² Ontiveros, *supra* n. 48 defines identity-based organising as "a way of organizing the whole identity of a human being, not just his or her workplace identity", with reference to personal identity factors including "race, gender, ethnicity, national origin, citizenship status, community, sexual orientation, and religion", as well as class identity factors, these being "job, social class, career, income and wealth" (at 417).

⁵³ Fischl, *supra* n. 42, even refers to a "law avoidance strategy" by unions in the US, for example, substituting organised ballots with direct action, including "corporate campaigns" seeking to provoke public or contractor pressure on targeted companies who may not be the legal employer, but who may be more visible, locally or nationally, and sensitive to publicity (at 5). See Ontiveros, *supra* n. 48, at 418, relates avoidance of "traditional administrative process used by unions in the USA", on grounds of ineffectiveness. Non-legal action is highlighted as especially important where workers, despite large numbers and longevity of employment, are irregular. For countless further examples of extra-legal organisation, see Business and Human Rights Resource Centre (<http://www.business-humanrights.org/Home>).

⁵⁴ Reflecting "specific affronts to human dignity encountered by immigrant workers, as immigrants and workers": See Ontiveros, *supra* n. 48, at 418, with reference to the Los Angeles Justice for Janitors campaign undertaken by the Service Employees International Union (SEIU).

⁵⁵ Ontiveros, *supra* n. 48, illustrates with reference to Teamsters Local 890's Citizenship Project in California, addressed to the Latino community (at 421), <http://www.newcitizen.org>. This contrasts with past constructions of "countervailing workers' power" which focussed on negotiation within the frame of the long-term contract of employment (Klare & D'Antona (at

developments have been paralleled by pressure on unions to extend full effective access to sectors of the workforce that were previously excluded, stemming from activism drawing authority from international human rights standards.⁵⁶

What implications for labour law do labour lawyers draw from such developments? Evidence of unions' progressive adaptation to evolving contexts and worker profiles through systemic internal changes can certainly be viewed as encouraging.⁵⁷ Some theorists, however, see in organised labour's relative decline the de-centring of the category of labour and the demise of the "binary capital-labour frame".⁵⁸ "Pluralistic" labour relations – a reference to the newly diverse social bases and modalities of worker organisation – are, on the one hand, in line with the unmasking of "worker" as a contingent and partial, as opposed to the totalising identity economic determinism construed it to be; on the other hand, the criss-crossing of received "public-private" legal and policy boundaries by novel worker concerns, illustrated above, is suggested to indicate "de-stabilisation" of the social meaning of work.

2.4. The contract of employment

Contrasting law and economics' depiction of the employer-employee relation as a bargain struck between "private" and freely-contracting individuals in abstraction from both social conditions and individual characteristics, labour lawyers frequently adopt an historicised account of the origins of the contract of employment. This approach highlights the co-originality of employee status with industrialisation, over the course of which it gradually superseded other legal arrangements for performance and payment of work, such as master-servant and the contract for hire, and constituted the category (if not the class) of wage-dependent labour. The arrival, in parallel, of workplace and social welfare legislation constituted the enterprise, as employer, *locus* of fiscal revenue collection, bearer of health and safety duties, and, also, with the introduction of compensation schemes (for example, for interruption of

42), both in: Conaghan *et al.*, (eds), *supra* n. 19) to such an extent that "goals of job enrichment and self-realization" during work performance were often overlooked: Ireland, *supra* n. 21, at 198.

⁵⁶ For example, the campaign for an ILO Convention relating to the rights of domestic workers, see, further, <http://communicatinglabourrights.wordpress.com/2008/03/22/domestic-workers-step-towards-an-ilo-international-convention/>.

⁵⁷ Ontiveros, *supra* n. 48, at 420-421 cites AFL-CIO's 2000 reversal of its "traditional nativist approach to immigration".

⁵⁸ Klare, *supra* n. 25, at 13, suggests the assumption of the employment relationship as the "essential substrate of social organization" is no longer valid.

earnings through sickness or injury) as a vehicle for redistribution of the risks of industrial production.⁵⁹ In like fashion, it has been suggested, collective representation, the articulation of job categories, statutory employment protection rights, and the emergence of larger firms, were subsequently mutually conditioning.⁶⁰

On other (though reconcilable and partly overlapping) readings offered by institutionalism (economic and/or sociological), the contract of employment, in its traditional form, is explained on the basis that it rewarded employees with security in return for subordination – to state authority, legislation and bureaucracies (industrialisation coinciding with the consolidation of national government and identities in many countries) and employers. To the latter flowed benefits, first, in the form of decreased information, search and transaction costs, and second, flexibility, in the form of the “managerial prerogative”, the exercise of which gave content to an otherwise largely indeterminate agreement. In return, employees were rewarded with resources which facilitated family subsistence and social inclusion to a basic level.⁶¹ Importantly, the state was implicated in this arrangement in a number of ways: exploiting it to collectivise risks via social insurance,⁶² it also made the assumption of long-range employment relations between parties of stable identity the platform for a range of social policy interventions.

As with the sovereign nation state and democracy,⁶³ the gradual embedding of the employment relation in this institutional framework led to their habitual identification. Now, however, welfare and other social systems, and employment, are increasingly prised apart. Short-termism, and geographical

⁵⁹ According to Deakin, with reference to regulation, private and social insurance, “...the enterprise became the main conduit for the wider process of risk-sharing at which the laws were aimed”: *supra* n. 49, at 184.

⁶⁰ See S. Deakin, *ibid.*, at 182-4, citing R. Coase “The Nature of the Firm” (1951) 4 *Economica* (NS), at 386; Simon, “A Formal Theory of the Employment Relation”, (1985) 19 *Econometrica*, at 293, and Williamson, *The Economic Institutions of Capitalism*, (New York: Free Press, 1985), Ch. 9.

⁶¹ Klare, *supra* n. 25, at 12-13, suggests that according to the ideal of typical employment, workers “leave strategic decision-making and risk to the employer in return for a modicum of security, fair-play and (theoretically) a family wage”; employees, during employment, “are and should be command-followers”. Suptot refers to the trading of “economic dependence” for “social protection”: A. Suptot, *Au-delà de de l’emploi: Transformations du travail et l’avenir du droit du travail en Europe. Rapport pour la Commission Européenne*, (Paris: Flammarion, 1999), at 10.

⁶² See Deakin, *supra* n. 49 at 178.

⁶³ See Eriksen & Fossum, *supra* n. 1. See, also, Zürn, “The State in the Post-National Constellation – Societal Denationalisation and Multi-Level Governance”, Arena Working Papers WP 99/35 (Oslo: ARENA, 1999), and Sassen, *supra* n. 10.

dispersal of those engaged by single enterprises, even within individual production lines, and via cross-border service provision, are significant alterations to the context of the employment contract. National borders no longer contain contracting parties or tasks performed, nor do they define applicable regulatory regimes (consider special fiscal arrangements applicable to Export Processing Zones and the increasing role of regional authorities). The “employer” is no longer a local, dependable locus of material or financial resources or administrative infrastructure, nor is its legal identity and longevity assured.

Moreover, as production becomes a “flatter” affair,⁶⁴ workers are called upon to be more entrepreneurial, to collaborate with firms, instead of awaiting their instruction, for example, and to predict future production trends and respond to these proactively. Flexible labour market policies in practice often entail that it is individuals, and not employers, who assume the costs and risks of acquiring new skills and qualifications. Negotiation is complicated by the diminishing portion of workers who are, in technical legal terms, “employees”; others’ interests, as discussed above, are still only barely represented by trade unions.⁶⁵ In the ultimate result, for many workers, employment’s original promise and reward of long-term security and supported career progression has been withdrawn.⁶⁶

Accordingly, it has been concluded, the employment contract is now “less suitable as a vehicle for sharing and redistributing risks among the working population” than before.⁶⁷ Nonetheless, this serves only to underline that the employment relationship has been, and remains, an emergent socio-legal institution: a “complex bundle of conventions and norms of varying degrees of formality [...]”; cumulative, path-dependent, and contingent; and, critically, the product of a multitude of interactions of “[...] economic organisation, dispute resolution, and political mobilisation.”⁶⁸ It “encodes” political solutions to social co-ordination problems, as filtered by court and legislative processes.⁶⁹ It captures a compromise between market-making and

⁶⁴ See T. Friedman, *The World is Flat*, (New York: Farrar, Straus and Giroux, 2005); C. Sabel, “Learning by Monitoring: The Institutions of Economic Development”, in: N. Smelser & R. Swedberg, *The Handbook of Economic Sociology*, (Princeton, Princeton University Press, 1994).

⁶⁵ For example, with the growth of notional self-employment.

⁶⁶ See Deakin, *supra* n. 49, at 178.

⁶⁷ See Deakin, *supra* n. 49, at 179.

⁶⁸ See Deakin, *supra* n. 49, 185–6.

⁶⁹ Deakin, *supra* n. 49 at 181, in this context, he refers to the classical employment contract as a “relational contract”, in which market exchange is enmeshed by “political and social processes of the relation, internal and external” (citing MacNeil, “The Many Futures of Contracts”,

market-correcting impulses for a given political space and time. But it can only be accurately read and understood in conjunction with the national constitutional and welfare arrangements that it presupposes and, *vice versa*, which presuppose it. Within constitutional nation states, all have been part of the same complex device for sharing the risks of social production and reproduction. The legitimacy of private relations hinges upon the overall distributive outcomes achieved by the wider constitutional systems of which they are part, and democratic legitimacy depends on the protection provided for both public *and* private autonomy, against both public *and* private coercion.

3. Labour rights under globalisation: Four reconstructions

Recognition of the employment relationship's status as an emergent socio-legal institution justifies the following four attempts by labour lawyers to reconstruct the discipline – that is, having identified a central normative objective, to re-interpret its scope and concrete applications, with the aim of securing its achievement in changed external conditions.⁷⁰

3.1. Responding to global competition: The “symbiotic” employment contract

At least in “OECD world”,⁷¹ it was noted, the social legitimacy of the employment contract formerly rested on the exchange of individual subordination to managerial prerogative for material security and, secondly, on its minimum but progressive terms, set legislatively, rewarding loyalty to national authorities and acceptance of the market mechanism, and providing a bond between individuals and the state, thus supporting the coalescence of national identity and citizenship. When fewer workers enjoy security of employment, or rewards and resources as favourable as those that self-employment paradigmatically presupposes; when social security provision is restricted, even for nationals; and when migrant workers, enjoying few, if any, of the benefits of citizenship, now represent a large proportion of the global workforce, what can the legitimising basis of the employment contract be? This section considers a reconstruction of the employment contract, intended to answer this dilemma.⁷²

(1974) 47 *Southern California Law Review*, p. 691).

⁷⁰ See Mayntz's observation of the “hermeneutic and interpretive” approach of legal studies, in general, with regard to globalisation (Mayntz, *supra* n. 4).

⁷¹ Michael Zürn's expression: *supra* n. 63.

⁷² See H. Collins, “Is There a Third Way in Labour Law?” in: Conaghan *et al.*, (eds), *supra* n. 19. Its immediate pretext is Third Way politics and its “reconfiguration” of employment

In general, OECD states' policies increasingly substitute concern for equality of outcome with the goal of "real equality of opportunity", that is, formal equality supplemented by the "necessary resources in terms of education, training, skills and other financial support, so that they [workers] can participate fully in the opportunities afforded by a flourishing market economy".⁷³ Similarly, they have adopted a revised (and by now orthodox) understanding of the regulatory role of the state, as rudder, not rower: governments can modulate the operation of market forces, but they take their place only on proof of failure. Thus, there is a tendency to eschew redistribution in the workplace as a legislative goal, hence also concern with labour rights, to the extent these are considered redistributive, and any special commitment to trade unions (non-union entities, such as quality circles, works councils, recognised as equivalents). Thirdly, given the *prima facie* legitimacy of markets, individual labour rights' justification is increasingly recast as functional, in promoting efficiency.⁷⁴ Against the background of economic integration, this defines a new global function for labour law: to improve competitiveness of business operations located within the jurisdiction (no point being taken on firms' nationality) and to avoid social exclusion, by guaranteeing equal access to labour markets, enhancing employability, and reconciling family and other social responsibilities with labour market participation. Together, these strands displace social democracy's traditional conceptual framework, under which trade unions and collective bargaining, statutory intervention, and individual rights⁷⁵ were essential to achieving social equality.⁷⁶

Concerning specific employment policies, in line with this general view, "*Partnership at Work*", a UK legislative initiative, is taken to be exemplary.

standards (see, for example, A. Giddens, *The Third Way: The Renewal of Social Democracy*, (Cambridge MA: Polity, 1998). Since these are interpreted as a response to the re-contextualisation of national economies and politics within global economic integration it is, however, suggested as an account of potentially broader, perhaps even general, application. Interestingly while Collins (*ibid.*, at 450) suggests these trends contradict "aspects of accepted international norms as embodied in the Conventions of the ILO", there would now appear to be a degree of convergence between ILO and Third Way agenda: see, for example, ILO/Auer, "In search of optimal labour market institutions," Economic and Labour Market Paper 2007/3, (Geneva, ILO, 2003) concluding active labour market policies as "optimal labour market institutions" for the contemporary economic setting for developed countries.

⁷³ See Collins, "Is There a Third Way in Labour Law?" in: Conaghan *et al.*, (eds), *supra* n. 19, at 452-453.

⁷⁴ *Ibid.*, at 451.

⁷⁵ The suggestion is that flexibility discourages the "adoption of mandatory and inalienable rights", which might be inefficient, or obstruct steps to employer-worker co-operation.

⁷⁶ See Collins, *supra* n. 73, at 455.

For trade union rights, this substituted information exchange, and a commitment to use information “[...] co-operatively to improve the efficiency of the relations of production”. Diverging further from historical labour norms, while communication facilitated by information exchange may concern “details and objectives of production”, and perhaps business strategy, it will not concern “the price of labour except [...] as [...] part of productivity-enhancing agreements”.⁷⁷ Non-union entities, mentioned above, are recognised for this purpose. Once more, competition provides both practical rationale and normative justification: “countries that pay high [*sic*] wages” must compete in terms of “quality, design, responsiveness to changes in the market, and technological superiority”, as must companies individually, this reflected in the spread of total quality management, just-in-time, and human resources management, and a new emphasis in management (rhetoric) on “partnership inside the firm”. Accordingly, the content of “partnerships” varies in line with the competitive needs of firms, whose dynamism precludes statutory specification of any single partnership model.⁷⁸ As for the state, it meets labour market access and flexibility objectives through supply-side measures, for example, certifying work-related education, subsidies for low wages via tax credits, and “family-friendly” labour market policies, such as equal treatment for part-time work and promoting access to childcare.

This package is identified as the basis for a reconstruction of employment’s legal form, with the “symbiotic” employment contract assuming the role of new regulative ideal.⁷⁹ Under this concept, in place of the traditional asymmetric exchange relationship noted at the outset, employers are to provide work and skills in return for co-operation and innovation and – the critical difference – *vice-versa*, the employee. Contrasting with the verticality of the old employment contract (a result of the constitutive role of managerial prerogative), this is a horizontal vision of employment, with potential to make work “more fulfilling and democratic” and to balance work with other parts of life. But traditionally, labour law proceeded from the presumption of the inevitability of a conflict of interest between employer and employee. In partnership, by contrast, mutual trust appears to be foundational. How is this circle to be squared?

⁷⁷ *Ibid.*, at 457.

⁷⁸ See W. Scheuerman, “Democratic Experimentalism or Capitalist Synchronization? Critical Reflections on Directly-Deliberative Polyarchy”, (2004) 17 *Canadian Journal of Law and Jurisprudence*, p. 101.

⁷⁹ Collins attributes to Schanze the “symbiotic contract” concept, said to contain the “seeds of a radically new approach to labour law”: E. Schanze, “Symbiotic Contracts: Exploring Long-Term Agency Structures between Contract and Corporation”, in: Ch. Joerges (ed), *Franchising and the Law*, (Baden Baden: Nomos, 1991).

The response is that trust is, indeed, foundational – and traditional coercive legal intervention has never been able to compel it. Two alternatives are, on this basis, advocated. First, procedural, reflexive, responsive regulatory approaches, whose capacity to compensate unequal bargaining power between labour and capital is asserted;⁸⁰ second, *voluntary* company action on basic and minimal workers' entitlements, which are claimed to yield "credible promises".⁸¹

If these premises are accepted, *Partnership at Work* can be characterised not as "a policy of abstention from legal intervention",⁸² but as a more sophisticated route to achieving "credible commitments to fairness at work".⁸³ Further regulatory devices pursuant to both symbiotic contract and the two principles just mentioned (*i.e.*, proceduralism and voluntarism) would include, for instance, allowing opt-out from legislatively-specified schemes upon introduction of a company's "own bespoke system";⁸⁴ the approval of company rules by independent third parties to transform codes of practice into certification standards;⁸⁵ tiered systems of opt-out or modification of rights, according to their categorisation in terms of the likely scope for individual (as opposed to collective) employee bargaining to achieve optimal outcomes;⁸⁶ and finally, and claimed as ultimately necessary for the realisation

⁸⁰ "New Regulatory Method" seeks "[...]to provoke the parties themselves to re-engineer their own economic and social relations through partnerships and contractual agreements"; and aims at "[...]inducing employers to revise the internal rules of their organization" by describing "explicitly the kinds of procedures required, though leaving the detail to employers to determine, and to provide incentives to adopt these procedures", for example, whistle-blower laws, European Works Council Directive 94/45/EC [1994] OJ L254, 64464 (Collins, *supra* n. 72 at 468).

⁸¹ Collins, *supra* n. 73 at 463. He continues: "If the employer structures its procedures and rules that comprise the organisation around respect for fairness, the bureaucracy is likely to carry out these standing orders... [R]eliance upon background legal rights enforceable in an employment tribunal is likely to produce little sense of commitment towards the employer [...] In order to enhance the credibility of the employer's commitment, the task of legal regulation is not primarily to grant employees legal entitlements that may be enforced by way of compensation in tribunals, but rather to re-engineer the internal rules of organisations so that they present credible commitments towards fairness."

⁸² Echoing and implicitly rejecting Kahn-Freund's "collective *laissez-faire*".

⁸³ It is claimed to aim at inducing "voluntary arrangements for consultation and sharing of information" (Collins, *supra* n. 73 at 461).

⁸⁴ For example, UK Employment Relations Act 1999 incentivises adoption of partnerships by establishing the possibility of imposed union recognition and collective bargaining where employers decline to introduce own arrangements for consultation and participation.

⁸⁵ Collins, *supra* n. 73 at 465, suggests taking this approach to equal opportunities "[...] would do more than any legal measures to achieve a change in the culture of management practices and a reduction in discrimination".

⁸⁶ Some rights would be categorised as alienable by individuals, others only following

of true partnerships, profit-sharing measures, such as employee share-ownership schemes, and profit-related pay, to be encouraged, for example, through tax incentives.

Favouring Collins' reconstruction is the undoubted normative appeal of establishing parity of the parties to the employment relationship as a new basis for labour law. Likewise, it might seem, the general legal theoretical arguments backing procedural approaches and the compromised position of trade unions and national autonomy over employment regulation with global economic integration. Yet do not these last two factors entail that procedural regulation in the workplace will, in practice, amount to devolving near total discretion to company management over the form and content of legal arrangements governing work, and rights incidental to them – preventing the “symbiotic” dynamic in the employment relationship assumed to legitimate the move from traditional routes of workers interest definition and promotion, and prevent the risks associated with it from eventuating? Various studies of EU labour regulation cast empirical light on this question. However, staying on the normative plane, a second reconstruction superficially appears to indicate that competitive market dynamics and inequality of workplace bargaining power need not be definitive.

3.2. Responding to de-unionisation: independently monitored self-regulation

Estlund's (2005) starting point is the US' progression, over the twentieth century, from the “New Deal model” of industrial relations, reliant on workers' self-organization and voluntary collective bargaining “over most terms and conditions of employment [...]”,⁸⁷ through a “regulatory model” of statutorily-determined minimum standards enforced by administrative

conclusion of a collective agreement or after a procedurally fair settlement; and others not at all, along lines shown by the UK Working Time Regulations 1998.

⁸⁷ The New Deal model's principal elements are identified as: i) the 1935 National Labor Relations Act which, in the perspective of industrial democracy, is also described as a “[...] ‘constitution’ of the private sector workplace – a framework for self-governance supported by a set of individual and group rights, and an administrative enforcement scheme”, and based on a vision of workers as citizens and the workplace as a site of self-determination; ii) the 1938 Fair Labor Standards Act, establishing enforcement duties on the Federal Department of Labour, as well as universal minimum statutory protections (for example, minimum wage and overtime *premia*). Social security legislation setting minimum provisions on retirement security, and subsequent health and safety legislation, by contrast, are described as conferring rights without participation, rendering employees “passive beneficiaries of the government's protection”: C. Estlund, “Rebuilding the law of the workplace in an era of self-regulation”, (2005) 105 *Columbia Law Review*, p. 319, at 326.

agencies,⁸⁸ and a “rights model” of judicially enforceable individual workplace rights,⁸⁹ concluding with a contemporary gravitation towards “employer ‘self-regulation’”⁹⁰ and, in parallel, the “privatisation of enforcement”.⁹¹ Self-regulation, Estlund defines as “[...] internal systems for enforcement of rights and regulatory standards – and of legal inducements to self-regulation in the form of reduced public oversight or sanctions”. This evolutionary “mega-trend” is explained with reference to interest-driven employer resistance,⁹² but also on the basis of “[...] challenges to the efficacy of regulation and litigation of workplace rights and standards [...] from scholars and employee advocates [...]”. It is accepted, then, that there are valid normative grounds for employer self-regulation, in the form of (moderate) regulation theory’s critique of “command and control”.

Yet, noting the US’ recent “drastic decline in unionization”, at the same time it is acknowledged that self-regulation in the labour domain poses a dilemma: despite potential functional gains, the goals it sets may represent a narrowed agenda, perhaps even tending to de-regulation. How, then, to proceed?

⁸⁸ Here the Occupational Health and Safety Act 1970 (“OSHA”), targeted by Bardach and Kagan’s epochal critique of “regulatory unreasonableness” is taken as paradigmatic: E. Bardach & R. Kagan, *Going by the book: The problem of regulatory unreasonableness*, (Philadelphia: Temple University Press, 1982).

⁸⁹ Referring principally to the Civil Rights Act 1964, Pub L. No.88-352, § 703, 78 Stat. 241, 255 (codified as amended at 42 USC § 2000e-2 (2000)).

⁹⁰ Estlund, *supra* n. 87 at 319, supporting this claim with reference to the Federal Sentencing Guidelines which, for example, allow mitigation for firms “[i]f the offense occurred despite an effective program to prevent and detect violations of the law, provided firm promptly reported violations once occurred (US Sentencing Guidelines Manual § 8C2.5 (f) (2003), at fn.96; and also OSHA’s 1982 Voluntary Protection Programme, under which employers showing commitment and internal organisational capacity to comply with health and safety standards and improve safety records, and employee involvement in safety programmes, could be relieved of regular inspections and “put onto a more conciliatory enforcement track” (Estlund *supra* n. 87 at 345). Statutorily incentivised self-regulation of this kind is distinguishable from the orientation, for example, of the second Bush administration, to mere voluntary compliance with guidelines.

⁹¹ Illustrating this with reference to private civil rights litigation (*ibid.*, at 334); diversity programs, internal dispute resolution, and mandatory arbitration clauses (at 338). “Non-union grievance procedures”, Estlund further notes, “[...] vary in their complexity from simple open-door policies to multi-step grievance procedures involving peer review, mediation and arbitration” (at 335). Private labour regulation can be judicially enforced, for example, via defences of “reasonable care” and where an employee failed to use “preventive or corrective opportunities provided by the employer”, (*Burlington Industries and Ellerth* 524 US 742 (1998) and *Farragher v City of Boca Raton* 524 US 775 (1998)). See Hepple’s description of similar phenomena in the UK setting (B. Hepple, “Enforcement: the law and politics of cooperation and compliance”, in: B. Hepple (ed), *Social and labour rights in a global context. International and Comparative Perspectives*, (Cambridge: Cambridge University Press, 2002).

⁹² Notably, in Estlund’s analysis, a phenomenon still defined on the national plane.

Estlund's "monitored self-regulation" ("MSR") proposal draws extensively on two earlier approaches: Ayres and Braithwaite's "responsive regulation"⁹³ ("RR"), and the *Ratcheting Labour Standards* model ("RLS").⁹⁴

From RR is taken, firstly, the idea of the regulatory pyramid which "situates self-regulation in a broader scheme, in which traditional inspections, enforcement and punitive sanctions continue to operate for the low road or less capable actors at the bottom of the labour market".⁹⁵ Self-regulation, in other words, in the shadow of law. Estlund secondly appropriates from RR the principle of tripartism, précised as based upon the insight that workers' participation in company-level compliance activity "[...] can introduce flexibility and responsiveness into the regulatory regime, and can reduce the costs and contentiousness associated with litigation, while promoting the internalization of public law norms into the workplace itself".⁹⁶

However, RR, Estlund suggests, demands levels of union involvement that are unlikely to be seen again soon in the US. This leads her to RLS, which re-allocates the policing of labour standards within global production systems from trade unions and national regulatory authorities to market forces, driven by ethical consumer preferences, in turn reflecting information supplied by NGOs and multi-stakeholder initiatives on companies' respective social performance, under codes of conduct and the like.

Under the influence of this approach, MSR gives "independent workplace monitors" – non-trade union, but nonetheless "worker-oriented" bodies⁹⁷ – the role of enforcing company-level self-regulation. They are to act as "watchdogs" and help "leverage limited public enforcement resources" with regard to corporate social responsibility norms. Eschewing *any* role for trade unions and state regulation, as RLS does, is, however, seen as expecting too

⁹³ See I. Ayres & J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, (Oxford: Oxford University Press, 1992).

⁹⁴ See C. Sabel, D. O'Rourke & A. Fung, "Ratcheting Labour Standards: Regulation for Continuous Improvement in the Global Workplace", Columbia Law School, The Center for Law and Economic Studies Working Paper No. 185, Public Law & Legal Theory Research Paper Group, Paper No. 21, May 2, 2000.

⁹⁵ See Estlund, *supra* n. 87, at 359.

⁹⁶ *Ibid.*, at 323.

⁹⁷ Idiosyncratic US statutory prohibitions of "employer unions" are suggested as providing an additional reason in favour of this element of MSR: NLRA prohibits most intermediate options between individual bargaining and full union representation, and further "[...] limits the range of potential experimentation with alternative forms of employee representation within a tripartite scheme [...]", *ibid.*, at 365.

much of companies and consumers.⁹⁸ Because they remain in the “[...] best position to monitor employer compliance with the labour and employment laws”, employees retain a supporting role in MSR, as whistleblowers and monitor-informants; likewise, targeted public enforcement action⁹⁹ and private statutory rights litigation. Instances of non-union workplace monitoring enhancing employers’ conformity with legal obligations on pay and conditions are cited in support.¹⁰⁰

The net result, it is claimed, is MSR’s hybrid model, which uses conventional “hard” enforcement (*i.e.*, administrative action and private litigation) to induce companies to participate in “monitored, quasi-tripartite self-regulation”. Effective self-regulation, it is claimed, would rest on an “[...] explicit code of conduct encompassing at least employers’ substantive legal obligations and employees’ rights...to communicate with each other and with monitors and regulators regarding code compliance...[which] would be the responsibility of specified managerial officials and monitored by independent outside monitors accountable in part to workers”.¹⁰¹

Already made clear by this summary, however, is MSR’s assumption of two conditions whose problematisation by economic globalisation has been the starting point of labour lawyers’ diagnosis of a need for alternative frameworks, as described in Section 2 above. First, national legislative autonomy in the field of labour regulation. MSR presumes “[...] the threat of

⁹⁸ With regard to the former, Estlund observes, “simply ignoring the law is an especially tempting strategy for marginal producers at the bottom of the production chain, who have little fixed capital or stake in their reputation...and who often rely heavily on undocumented immigrant workers who are too fearful or desperate to complain,” *ibid.*, at 330 & 370.

⁹⁹ The Fair Labour Standards Act’s “joint employer” and hot goods provisions are highlighted as the kind of “hard” inducements capable of convincing employers to “take the [regulatory] high road”.

¹⁰⁰ Giving as examples: i) the New York State Greengrocers’ Code of Conduct, addressing issues including: labour and employment laws including relating to minimum wage and working hours, payroll records, training, and employee information; appointment of employee spokespersons; and regular inspections by monitors, who are appointed by the New York City Attorney General. Monitors report on violations under the Code to the Attorney General’s office and a tripartite Code of Conduct Committee, which certifies new signatories and marshals disputes. Subscribing to the Code can earn partial amnesty for past statutory breaches. ii) the Maintenance Cooperation Trust Fund, a “non-profit watchdog organisation”, established by the Service Employees International Union and unionized employers in the janitorial services sector, that was established to monitor compliance with statutory obligations and promote enforcement via private lawsuits, state and federal regulatory action (Estlund (2005), at 353).

¹⁰¹ Estlund suggests that provisions regarding certification and selection of monitors, approved inspection protocols and conflict of interest prohibitions could follow along the lines set by the Sarbanes-Oxley Act.

potent sanctions against the worst lawbreakers”, and statutorily grounded rights of private action.¹⁰² Second, labour’s bargaining power and organisation *qua* labour: tripartism cannot function, whatever form it takes, under systemic power imbalance.¹⁰³ Estlund recognises both assumptions.¹⁰⁴ But possible underlying reasons for the seeming disappearance of the first in the US, and further afield, are not investigated. Concerning the second, the hope is expressed that external monitoring may be “[...] a step toward the liberation of employee voice more generally”.¹⁰⁵ But the main examples of MSR provided in evidence of the approach’s viability were, in fact, triggered either by state authorities or by established trade unions. Moreover, their major concern has been to improve employer compliance with existing minimum protections set by state or federal law.

In her defence, Estlund does take care to note the shortage, up to the present time, of empirical evidence concerning the impacts of MSR-style projects. And the modesty of MSR’s underlying vision,¹⁰⁶ anathema to the social democratic tradition, might be thought to have pragmatism in its favour, for workers outside that “golden circle” – migrant, undocumented, and non-unionised labour whose rising numbers, as noted earlier, are steadily forcing a re-definition of typical” employment. MSR, then, is at least important in highlighting the heterogeneity that global regulation in the labour domain must accommodate.

¹⁰² See Estlund, *supra* n. 87, at 379.

¹⁰³ “Where there is no power base and no information base for the weaker party, tripartism will not work [...]” Estlund, *supra* n. 87, at 358, quoting Ayers and Braithwaite (1992, at 59). Further revealing confusion on this point, Estlund later states that as a consequence of the problem of “chronic [regulatory] under-enforcement” state regulators must “[...] come up with strategies to secure compliance that do not depend on intensive continuing oversight...” and so “will need to draw on non-governmental regulatory resources”, the latter which she interprets as opening the way for her model’s independent monitoring arrangements. However, chronic under-enforcement is endogenous to Ayers and Braithwaite’s RR model which, by contrast, demanded that any tripartite agreement address not just substantive issues but “[...] adherence to the institutional requisites of effective self-regulation [...]”, including granting freedom of association to workers.

¹⁰⁴ “Without a greater coercive threat, it will be difficult to induce most employers to take meaningful steps toward effective self-regulation, and perhaps least of all toward employee representation,”: Estlund, *supra* n. 87, at 365. She also states that a move towards self-regulation must be “[...] part of a regulatory scheme in which serious sanctions also play a role” (at 403).

¹⁰⁵ See Estlund, *supra* n. 87, at 374.

¹⁰⁶ Underlined subsequently with the suggestion that, “Part of what the monitors must monitor is the workers’ freedom, individually and collectively, to speak for themselves, both during and in between visits that will necessarily be occasional”.

But the starting point of this section was the question of whether non-trade union supported labour self-regulation can shore up Collins' "horizontal" employment contract, to prevent its collapse into a form of "partnership" drained of substantive content in terms of employee rights and protections against subordination?¹⁰⁷ The claimed effectiveness of MSR has been shown to depend on either: a) the initiative and engagement of state authorities and trade unions; or b) a radically attenuated vision of labour rights. Consequently, the aspiration of horizontal employment relationship remains as much at risk as before. Can anything be done, then, to restrain the effects – for workers – of the underlying trends leading to de-unionisation and/or the weakening autonomy of states with regard to social and labour standards? The two remaining reconstructions converge on a suggested solution.

3.3. Reconstructing labour law via corporate law¹⁰⁸

A widening gap between the legal concept of the corporation and the economic and social functions that provided its original legitimation is highlighted by certain labour lawyers. Historically, the limited liability company promoted enterprise by pooling resources and sharing risk for relatively small numbers of direct investors, and the rights and duties of shareholders reflected their typically "hands-on" engagement in company operations, through which, it may be said, they exercised genuine, rather than merely formal, co-ownership.

Yet, over the last hundred years, the management role of shareholders has diminished and their connections to companies has become steadily more distant. In parallel, directors' and managerial powers have expanded and a separate corporate personality individuated. Company law, particularly its Anglo-Saxon forms, has become primarily concerned with "financial claims on the assets and income streams of the firm"; no longer is it "directly interested in the relations of production, and employees feature either as marginal subjects [...] or in so far as they happen to be creditors or shareholders."¹⁰⁹ While the legal concept of the *enterprise*, where it applies, still

¹⁰⁷ Estlund is not insensible to this risk: "Employment law, both its regulatory and its rights dimensions, is in many ways a poor substitute for the system of self-governance envisioned by the labour laws [...] and collective representation key to rights and regulations enforcement."

¹⁰⁸ For a reconstruction of the corporation, but from the perspective of human rights, rather than labour law, see J. Dine, *Companies, International Trade and Human Rights*, (Cambridge: Cambridge University Press, 2005).

¹⁰⁹ See S. Deakin, "Enterprise-Risk: The Juridical Nature of the Firm Revisited", (2003) 32 *Industrial Law Journal*, p. 97, at 98. See, also, Ireland (*supra* n. 21), coming from a more or less Marxist position, shares the view that shareholders ("passive *rentiers*") are "severed from the firm's productive purpose", and further asserts that shareholders benefit from "unpaid labour",

defines a risk management function, this is in tension with company law's explicit content and aims. Individual enterprises are frequently fragmented into "multi-corporate" form, whereas there is still no "generally accepted legal concept of the corporate group adequately expressing this complex social and economic 'reality'".¹¹⁰

Labour law, in contrast, remains intrinsically concerned with the relations of production inside enterprises; to this end, for instance, conferring as separate legal identities employer, undertaking, and establishment. During the twentieth century, moreover, labour law in some jurisdictions articulated ideals of "worker participation" and industrial democracy, and concern with power and control. Its more radical forms put on the agenda, *vis à vis* corporate law, "relaxation of the goal of profit maximisation", "diminution of shareholder rights" and a more general "re-orientation of corporate goals".¹¹¹ Not just contingent inequality of capital, then, but the "fundamental institutional framework of capitalist relations of production" and the "institutional design of firms"¹¹² were implicated in labour law's critique of corporate law, its ultimate ambition to replace capitalistic hierarchy with "democratic" relations in the economic sphere.¹¹³ Derailed by the 1970s' economic crises, to a limited extent such aspirations reappeared in the 1980s and early 1990s, with ideas of "stakeholder democracy", retaining at least some of previous decades' concern with the devolution of control over work

i.e., in the form of residual profits, so that there can be no moral case for giving them ownership rights. This is said to explain the relatively recent emergence of the "efficiency case" for shareholder rights. Property and commodity exchange are identified in this perspective as the principal means of extracting surplus labour, relocating social subjugation in the economic sphere, claimed by market liberals as "private", inherently democratic, and a domain of "freedom and voluntary activity".

¹¹⁰ *Ibid.*

¹¹¹ Ireland, *supra* n. 109, suggests the expression "industrial democracy" usually implied the goal of the "introduction of worker representatives on corporate boards" as under German law. See alternative definitions provided by T.H. Marshall, Phillip Selznick (both *supra* n. 6) and Harry Arthurs, *supra* n. 6 and H. Arthurs, "The new economy and the demise of industrial citizenship. The new economy and the demise of industrial citizenship, Don Wood Lecture, Industrial Relations Centre, Queen's University, Toronto, *mimeo*."

¹¹² See H. Collins, "Labour Law as a Vocation", (1989) 104 *LQR*, p. 468, and "Market Power, Bureaucratic Power and the Contract of Employment", (1986) 15 *ILJ*, p. 1.

¹¹³ Ireland, *supra* n. 109, notes Kahn-Freund's dissent from this view (O. Kahn-Freund, "Industrial Democracy," 6 *ILJ* 65), rejecting the possibility of a unity of interest embracing capital and labour, and urging the inevitability of interest pluralism and so fundamental conflict between the two (see Chantal Mouffe's critique of deliberative rationalist theory's similar assumptions (C. Mouffe, "Democracy and Pluralism: A Critique of the Rationalist Approach", (1995) 16 *Cardozo Law Review*, 1533; this point is taken up in Conclusion.

to employees and moderation, if not elimination, of institutional hierarchies inside the enterprise.

Against this background, the thesis of “flexibilisation as a transformative opportunity”¹¹⁴ is seen as significant slippage. Its vision of companies as “communities of interest”, and “[...] based upon a micro-corporatist coalition of producers”¹¹⁵ wherein neither labour, capital nor management has a natural or exclusive claim to control might, momentarily, appear to accord with the ideal of workplace democracy – especially when tied to calls for “enhanced workers’ rights” and greater worker involvement in management, perhaps even where such goals are included only for the sake of their instrumental value in contributing to competitive advantage (*i.e.*, via trust). But reflexive corporate governance which, as, for instance, under *Partnership at Work*, stops at *consideration* of workers’ perspectives and interests in managers’ and directors’ formulation of corporate goals falls far short of *participation*,¹¹⁶ especially when “socially disembodied liquidity and mobility of shares” are intensifying market imperatives and increasing pressure to subordinate workers’ rights in pursuit of greater efficiency.

For some contributors, it is only by excavating to a deeper level of analysis that we can understand this progression. Economic history, they suggest, can demonstrate that the structural necessity of labour’s exploitation within systems of capitalist exchange derives not from the relationship between capital and wage labour, but directly from the operation of competition. “Democratising” companies, whether radically or moderately, cannot, therefore, end labour’s instrumentalisation. Nor can the re-introduction of regulations on capital movements, work councils, stake-holding companies, social clauses, “universal labour standards” or voluntary corporate codes: all such measures are merely “ameliorative”.¹¹⁷ Only by recognising the historical

¹¹⁴ With reference to H. Collins, “The Productive Disintegration of Labour Law”, (1997) 26 *ILJ*, at 295, and H. Collins, “Flexibility and Empowerment”, in: T. Wilthagen (ed), *Advancing Theory in Labour Law and Industrial Relations in a Global Context*, (Amsterdam, Royal Netherlands Academy of Arts and Sciences, 1998), at 117. See, further, the analysis of Collins’ account presented above, in Section 3.2.

¹¹⁵ With reference to G. Teubner, *Law as an Autopoietic System*, (Oxford: Blackwell, 1993), at 6.

¹¹⁶ See, also, C. Barnard, S. Deakin & R. Hobbs, “Reflexive Law, Corporate Social Responsibility and the Evolution of Labour Standards: The Case of Working Time”, ESCR Centre for Business Research, University of Cambridge Working Paper No. 294, (Cambridge: CBR, 2004).

¹¹⁷ See Ireland, *supra* n. 109, at 211, citing (at fn.38) E. Meiksins Wood, “The Politics of Capitalism”, (1999) 51 *Monthly Review*, p. 12. Pension fund socialism and “shareholder activism” are dismissed for the same reason, *i.e.*, the imperative to maximise returns on shares at multiple points is intrinsic to capitalism, for example, shrinking public pension provision,

specificity of current property forms (the company and share first and foremost) and then re-conceptualising them, will the transformation to non-exploitative modes of production become possible. Consequently, to de-commodify labour, and simultaneously restore political autonomy, fading under the advance of neo-liberalism,¹¹⁸ requires the reconstruction of corporations as social institutions, and a “process of experimentation in which they are increasingly placed under a combination of worker, community, supplier, and consumer *control*.”¹¹⁹ The rise of flexibility agenda, on the other hand, is said to demonstrate that without such reconstructive measures, social democracy cannot restrain capitalism and “that high labour standards, let alone true industrial democracy, are simply incompatible with it”.¹²⁰

3.4. Reconstructing labour law through social rights

Were this analysis, for sake of argument, to be accepted, to what ends, precisely, should the re-defined, reflexive corporation be dedicated? By reference to which values or goals could the corporation be born again as a “social institution”, instead of one of capitalist exploitation? Scope for explicitly investing corporations with exclusively, or predominantly, social functions, through their *internal* legal constitutions, *i.e.*, the course of action recommended in the last section, would appear politically restricted. Might the same end-point be reached by another route?

In answer to the phenomena described in Sections 2 and 3 above, the Supiot Report proposes, in the EU context, a reconfiguration of labour law based upon a new understanding, not of the corporation, but of the goal of individual employment security.¹²¹ Its principal elements are three. First, a new concept of *occupational status*.¹²² In the light of trends affecting work and the employment relationship, the aim here is to “protect continuity of a

pension funds subject to competitive pressures.

¹¹⁸ See Ireland, *supra* n. 109, at 205.

¹¹⁹ See Ireland, *ibid.*, at 217 (emphasis added).

¹²⁰ See Ireland, *ibid.*, at 211. He also suggests this shows that global economic integration is eroding “national class compacts” on which the corporatist and welfarist capitalisms respectively of Germany and Sweden were based on up to the 1990s.

¹²¹ A. Supiot, *supra* n. 22, at 31, states: “Labour law, whether national or international, is rooted in an industrial model that is currently being undermined by technological and economic changes [...]”, and later, “Employment practices have always varied widely, and the industrial model has never been universal. Yet, it was by reference to this model that the western countries’ labour law was developed. To a large extent, the same holds true of international labour law as embodied in the institutions of the International Labour Organisation in particular” (*ibid.*, at 33).

¹²² Alternatively, “labour market” status (in the original, the expression used is *statut professionnel*).

lifelong trajectory rather than the stability of particular jobs". As a substitute for "employee status", which, as observed, historically combined "subordination and security", by contrast, this would "reconcile the requisites of freedom, security and responsibility," thereby rectifying the imbalances increasingly in play in the employer-employee bargain.¹²³ It would aim to facilitate "career individualisation and mobility" on the one hand, and new production processes, demanding higher job turnover and skills upgrading, for instance, on the other. Its practical aspects would include protecting workers during transitions between jobs, establishing new linkages between training and employment, and addressing transitions in status (for example, between self-employment and salaried work).¹²⁴

Second, an extended concept of *work* would replace employment as the basis for access to social protection. The inclusion of "non-market work", it is suggested, would contribute to meeting the "requirements of equality between men and women, continuing training, involvement in public-interest assignments, family responsibilities and workers' occupational freedom." Work would, accordingly, be re-defined as activity "[...] linked to some obligation undertaken voluntarily or imposed by law, which is performed for a valuable consideration or without consideration within some statutory framework or under contract".¹²⁵

Third, a new concept of *social drawing rights*, attached to occupational status and which would permit individuals to "manage their own flexibility" and achieve "active security" under conditions of uncertainty. Supplementary to traditional labour and social rights, these would encompass freedom from employment, and be discretionarily exercisable by the individual. Four clusters of rights within this categorisation are distinguished: i) rights accruing specifically from wage employment; ii) rights common to all forms of employment; iii) rights deriving from non-occupational work (such as caring for dependents, voluntary work or self-training); and iv) universal social rights. The content of social drawing rights is to be discerned with reference to international human rights and labour standards: the Working Time

¹²³ Referring principally to the rising intensity of work, a similar degree of dependence, albeit without security of employment, income or social security in return.

¹²⁴ Supiot, *supra* n. 22, at 36. See ILO/Auer, *supra* n. 72 for a similar analysis, which concludes the need for "a new combination of employment security and social security", and "new framework of protected mobility (or protected LM transitions)" as "one possible form of an optimal institutional setting for a globalising world, at least for the developed world"); and "[...] allowing workforce adjustment in relative security, without jeopardising productivity and labour market performance".

¹²⁵ Supiot, *supra* n. 22, at 37.

Directive's¹²⁶ “Fordist definition of free time” and concern only with workers’ health and safety falls to be re-appraised, the report suggests, with regard to norms of respect for family life under Article 8 ECHR and ILO Convention No.156.¹²⁷

Finally, the report begins to unpack the implications of its proposed reconfiguration of labour law for the state and for citizenship. On the basis that national autonomy over labour regulation is compromised,¹²⁸ it identifies a need for a “new *modus operandi* for state intervention”. Flowing from a “comprehensive view of social rights based on solidarity”, a new approach is outlined, with both procedural and substantive dimensions. Procedural guarantees are necessary *because the norm of participation can no longer be restricted to political representation, on the twin grounds of political legitimacy and regulatory efficacy*. Substantive content is to be derived from rights already located in the EU’s Community Social Charter, and ILO instruments, although these, it is added “[...] could usefully be written into constitutional law at the European level [...]”. These two dimensions are then united in the concept of *social citizenship*. This is to be a vehicle for synthesising reorganised labour *and* social security law, in circumstances where the old concept of social protection is no longer viable. It is also proposed as a new constitutional “cornerstone” at EU level. Amongst its additional advantages are “*inclusiveness*”, the linking of social and labour rights to *social integration* (*i.e.*, not only to work), and expression of the *ideal of participation*.¹²⁹

Thus Supiot proposes, for labour law, a reconstructed regulative ideal – *individual security based on occupational status* – and a new substantive agenda, to be defined by reference to EU and international social, labour and human rights standards. Both elements give shape, next, to a broadened notion of social citizenship, which extends participation from the political and civil spheres into the economic sphere, renewing the legitimacy of exchange relations between individual, state and (where there is one) employer – and

¹²⁶ Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, OJ L.307, Vol. 36, 13 Dec 1993, 18–24.

¹²⁷ Supiot, *supra* n. 22, at 39. Workers with Family Responsibilities Convention, 1981 (No. 156). The indication is that law needs to take a broader view of time, and “Work must be adapted to the worker who performs it – not *vice versa*”.

¹²⁸ Supiot, *supra* n. 22, at 42–43.

¹²⁹ That is, because citizenship “[...] implies that the people it covers should participate in the framing and realization of their rights” [citation], with these words making clear the indebtedness of the Report’s vision to Habermas’ law-making ideal.

answering the question from which this section departed.¹³⁰ How, though, do these connect, as indicated above, with the claim that the only hope for labour, under global capitalism, lies in a reconstruction of corporate law?

Though beyond the remit of the Supiot Report, possible linkages are signalled by other labour lawyers. Barnard and Deakin see social rights and citizenship as having consequences for corporate law at two levels. At the macro level of “regulatory competition between different legal orders”, social rights “[...] set the parameters within which procedural solutions are sought”, to legal determinations affecting corporate law, as other legal domains.¹³¹ At the micro level which, under subsidiarity, increasingly refers to standard-setting within the firm or enterprise, social rights act as “general principles”, and so as “[...] reference points capable of ‘steering’ or ‘channelling’ the process of negotiation between the social partners”, so that social dialogue, at all levels, becomes “framed” by fundamental social rights.

For Barnard and Deakin’s account, as for Supiot’s,¹³² this duality, of external legal framing and self-regulatory process, including at workplace level, is key. Absent explicit constitutional commitments to social citizenship rights, and within the context of economic integration within post-national constellations, procedural law and reflexive governance approaches are unlikely to preserve the “space for local experimentation and adaptation” that provide its main functional rationale. More likely is that they will constitute a

¹³⁰ S. Deakin, “The Many Futures of the Contract of Employment”, in: Conaghan *et al.*, (eds), *supra* n. 19, at 195, echoing this view, at the same time, reveals a Marshallian genealogy. Suggesting that a conception of social citizenship provided the underlying “normative force” for the employment contract’s original function of spreading market risk through the working population while underpinning relations of production at the level of the enterprise, social citizenship “[...] extend[ed] the bases for social and economic participation in the same way that rights of democratic participation had been extended through political reform”.

¹³¹ See C. Barnard & S. Deakin, “Corporate governance, European governance and social rights”, in: B. Hepple (ed), *Social and Labour Rights in a Global Context. International and Comparative Perspectives*, (Cambridge: Cambridge University Press, 2002), at 149, giving as examples the decisions of the ECJ in *UK v Council (Working Time) Case C-84/94* [1996] ECR-I 5755, and *Albany International v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

¹³² See Supiot, *supra* n. 22, at 44: “The law can do no more than lay down principles whose implementation then falls within the scope of the law of collective agreements. It follows that a collective agreement should no longer be seen simply as a means of adjusting the particular interests of the parties thereto, but as a legal instrument whereby those parties are joined in the pursuit of objectives laid down by the law. In this process of determining the public interest, independent agencies could also play a useful role provided that democratic debate does not become sidetracked under the influence of “experts”.”

“market for legal rules that can lead to a race to the bottom”;¹³³ at minimum, the outcome will not be clearly distinguishable from the “levelling down” to minimum standards achievable via “negative integration”.¹³⁴

Hence, even if it is no longer thought appropriate to use law to impose specific distributive outcomes¹³⁵ at national or supranational level, legal standards remain necessary. Procedural and heterarchical forms of governance (of which deliberative cosmopolitanism is one variant) still need laws (such as those supporting individual participation and group representation) to secure the input legitimacy in turn needed to induce the desired ‘second order effects’ shown in Section 2, to be a required element of democratic legitimacy.

4. Conclusion: Reframing RECON

Sparely defined by RECON’s founding fathers, democracy is a “principle which specifies what it means to get political results right”. On the other hand, under the cosmopolitan hypothesis, as noted at the outset, democratic legitimacy “[...] requires public justification of the results to those who are affected by them”; and deliberation embodies the democratic principles of congruence (“those affected by laws should also be authorised to make them”) and accountability (the means by which decision-makers can be held responsible to, and ultimately dismissed by, citizens).¹³⁶

I have argued that as matters stand there is a discrepancy between the first, teleological statement and its subsequent operationalisation, deriving not from any necessary defect in cosmopolitanism’s aims, but from a tendency, still, to lean towards the classical liberal assumption of a division between the public and private spheres that confines democracy, constitutions and citizenship to one side of it.

¹³³ See Barnard & Deakin, *supra* n. 131; see, also, F. Scharpf, “The problem-solving capacity of multi-level governance”, (1997) 4 *Journal of European Public Policy*, p. 520.

¹³⁴ Even given a “[...] close link, in practice, between procedural rights and substantive outcomes”, Barnard and Deakin caution, “...the merits of the procedural approach must be carefully weighed against the costs in terms of uncertainty over the meaning and application of legal rights”.

¹³⁵ Including via comprehensive justiciability of socio-economic rights, for this point citing (*supra* n. 131, at 148), A. Lo Faro, *Regulating Social Europe: Reality and Myth of Collective Bargaining in the EC Legal Order*, (Oxford: Oxford University Press, 2000), at 152.

¹³⁶ See Eriksen & Fossum, *supra* n. 1, at 4, and further (at 8): “The *public sphere* located in *civil society* holds a unique position, because this is where everyone has the opportunity to participate in the discussion about how common affairs should be attended to. It signifies that equal citizens assemble into a public, which is *constituted by a set of civil and political rights and liberties*, and set their own agenda through communication” (emphasis added).

In doing so, cosmopolitanism partakes of a venerable orthodoxy.¹³⁷ Over decades, jurisprudential analyses have demonstrated that normative constitutional argument experiences difficulty in “subjecting private power to greater scrutiny and control”.¹³⁸ This has given rise to scepticism concerning law’s autonomy from the influences of politics and market, itself turning into an enduring strand of legal scholarship (and one that survived the strongest, passing claims of economic determinism or “synchronisation”¹³⁹). From this viewpoint, contemporary “hegemonic globalisation” articulates with rights-based constitutionalism, and “the most important artefact” of this relationship is a “state-civil society divide” that “[...] serves the crucial legitimating function of obscuring the broader constellation of law and political power – including corporate political power – operating in society”.¹⁴⁰

Labour law, this contribution has shown, by contrast, paradigmatically focuses on the employment relationship as a site where public and private ordering coincide, and where individual autonomy and collective self-rule must be guaranteed.¹⁴¹ Again, to use RECON’s terms, it considers the labour market as *polity* (comprising “authoritative institutions equipped with and organised capacity to make binding decisions and allocate resources”) and *forum* (“a common communicative space located in civil society, where the citizens can jointly form opinions and put the power holders to account”).¹⁴² Historically, national constitutions, read in conjunction with the broader social risk and resource redistributive arrangements that accompanied them, have usually taken the same view, in Polanyi’s double movement,¹⁴³ even if this may be overlooked today, due to the ascendance of representations to the contrary.¹⁴⁴

¹³⁷ As noted by Gavin Anderson, “Until recently, the critique that a constitutionalism which embodied these [classical liberal] values failed to take seriously the threat from private power left mainstream constitutional theory largely undisturbed. This can perhaps be explained by the strong belief that the business of constitutional law is the regulation of the state [...]”: G Anderson, “Social Democracy and the Limits of Rights Constitutionalism”, (2004) 17 *Canadian Journal of Law and Jurisprudence*, p. 31, at 33 (footnote omitted).

¹³⁸ *Ibid.*, at 32 & 33, and generally, for discussion of whether Dworkin’s “law as argument” approach can counter this claim.

¹³⁹ See Scheuerman, *supra* n. 78.

¹⁴⁰ See Anderson, *supra* n. 137, at 58.

¹⁴¹ See Fossum & Eriksen, *supra* n. 1, at 7-8, defining autonomy as “[...] constituted, when actors have to seek justification in relation to what others can approve of, *viz.*, everyone who is subject to collective decision-making must be able to find an acceptable basis for such decisions”.

¹⁴² See Fossum & Eriksen, *supra* n. 1, at 8.

¹⁴³ See Block, *supra* n. 12.

¹⁴⁴ For example, the “good governance” narrative of the rule of law as market liberalisation, as discussed, for instance, in Bevir & Rhodes, *supra* n. 4.

Some constitutional theorists, and feminist scholars foremost, share and continue to press this position. “If democratic self-governance is a moral value,” according to Iris Marion Young, “then it should be present at places where persons have the greatest stake and where they are vulnerable to domination by others; workplaces are prime among them.”¹⁴⁵ RECON for the moment seems to overlook this. One might possibly find principled reasons for doing so: it might be seen as necessary to restrict the ambit of cosmopolitan deliberation on the basis, for instance, of weaker communication or identification at supranational level. What cannot be acceptable, is for cosmopolitan theorising and, more specifically, RECON’s framework, to slip into liberalism and thin proceduralism¹⁴⁶ by default,¹⁴⁷ while communicating these selections as a neutral, natural, value-free position.¹⁴⁸ Even then, space for normative and strategic contestation will certainly remain. European integration, the project of *political* union, requires “the legitimation of shared values”, “a particular ethos”, and the attraction of a specific way of life”.¹⁴⁹ Historically, Europe’s values have been as social democratic as they have been liberal. Now is no time to give up the ghost.

¹⁴⁵ See Iris Marion Young, quoted in Fung, *supra* n. 9, at 47. See, also, D. Sciulli, “Foundations of Societal Constitutionalism: Principles from the Concepts of Communicative Action and Procedural Integrity”, (1988) 39 *British Journal of Sociology*, p. 377.

¹⁴⁶ Anderson, *supra* n. 137, at 31 (footnote omitted) denotes a “procedural account of democracy, best actualised through the participation of formal equals in popular elections.”

¹⁴⁷ Scheuerman, *supra* n. 78, at 118, criticises the experimentalist reconstruction of democracy, for presupposing “far-reaching social equality” as a condition of its success, with reference to J. Cohen & J. Rogers, “Power and Reason”, in: A. Fung & E.O. Wright (eds), *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance*, (New York: Verso, 2001).

¹⁴⁸ See Nanz’s definition of law, adopted here, as “a normative discourse in which competing claims are contested”: P. Nanz, “Democratic Legitimacy and Constitutionalisation of Transnational Trade Governance: A View from Political Theory”, in: Ch. Joerges & E-U. Petersmann (eds), *Constitutionalism, Multi-level Trade Governance and Social Regulation*, (Oxford: Hart, 2006).

¹⁴⁹ Habermas, *supra* n. 18, at 8, (footnote 3 omitted), citing J.E. Fossum, “Constitution-making in the EU,” in: E.O. Eriksen & J.E. Fossum (eds), *Democracy in the EU – Integration through Deliberation?* (London: Routledge, 2000), pp.111-63).

Chapter 6

Transnational Governance and Human Rights: The Obligations of Private Actors in the Global Context

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I. Introduction

We live in a world of complex global economic, political, ecological and social processes that influence our lives enormously. It is difficult to trace the causes of these developments and to determine who is obliged to remedy the massive problems that we face today, such as global poverty, slavery and exploitation, and the destruction of our environment. Moral philosophy and political theory are struggling to discover an adequate conception of our obligations in global and regional contexts. The prevailing common sense morality says that the primary moral actor is the individual and the obligations of collectives are often more or less ignored. From this perspective, the individual is overburdened with responsibility for mitigating large-scale problems effectively. Things look quite different, however, when we turn to political theory and look at the political legitimation of rules in international relations. While the individual is seen as the principal and ideal actor in processes of democratic will-formation and rule-setting *within* the nation-state, governance beyond the nation-state has other demands.

It needs to address the fact that the international world order has changed rapidly during the last decades. The state-centred international system of law included only one type of “player”, the nation state. The current international political order, however, consists of a multi-level system, without a world government but with multiple players in functionally

differentiated fields of activities. The international community has established the United Nations as the single power on a supranational level that has the authority to implement enduring peace and prevent massive human rights violations. At the level “below”, the transnational level, networks and organisations converge and overlap to satisfy the different functional demands of co-ordination. The various forms of co-ordination between transnational state organisations, state and non-state actors, and simple private self-regulation address not only “technical” problems such as quality standards, telecommunication, and the prevention of catastrophes; they are also increasingly involved in regulations of a genuinely political nature such as financial and economic issues, energy and the environment, poverty reduction and health care.

In keeping with current notions of international governance, the citizen has given way to collectives as the primary political actor. Private collectives, in particular, have gained increasing prominence in international negotiations, public deliberation, and rule-setting.

We, therefore, face the somewhat awkward situation that, in moral frameworks, the obligations attributed to the individual have become quite extensive, whereas, in political frameworks, the legitimacy of a citizen’s participation in global agreements has been curtailed. However, both frameworks have their pitfalls. Our understanding of the moral obligations required to address large-scale problems is as inadequate as the prevailing ideas concerning legitimate governance in international relations. In this paper, I will discuss these issues, focusing on the obligations of transnational corporations in international relations.

The transnational corporation (TNC) became a main international actor during the second half of the twentieth century.¹ The revenue of some transnational corporations exceeds the gross national product of the smaller European states, not to mention the African states, which gives them

¹ See M. Koenig-Archibugi, “Transnational Corporations and Public Accountability”, (2004) 39 *Government and Opposition*, pp. 234-259, at 234. Their growth has been enormous: in 1976, there were 11,000 TNCs with 82,600 foreign affiliates. In 2002, there were 64,592 TNCs with 851,167 foreign affiliates. It is not just the growth in TNCs that make them relevant in international relations; it is also that their roles have changed. While nation-states have lost important decision-making competencies at the international level, TNCs have gained tremendous political and economic power; see, also, O. de Schutter, “Transnational Corporations and Human Rights: An Introduction”, 2005, Hauser Global Law Working Paper, http://www.nyulawglobal.org/workingpapers/GLWP_0105.htm.

inordinate influence over international market regulations and national legislative and political processes.² More than 54 million people are employed by TNCs, and this number is even higher when one includes non-equity relationships such as sub-contracting and licensing.

At the centre of these developments is the issue of transnational corporations' obligations to respect basic human rights. They embody the most basic moral rules with global scope. It is widely held that human rights treaties are, first and foremost, addressed to individuals and to states. States, for various reasons, no longer sufficiently control the implementation of human rights law. *Non-state actors* - not by accident defined in contrast to the "state" - are not parties to such treaties because - or so it is said - they have not been involved in the drafting process, cannot report to the treaty bodies, and cannot participate in electing the expert members.³ This position, however, no longer seems tenable and has raised pressing theoretical questions. I will address two of these questions in this article.

The first question focuses on the normative side of the topic: Do corporations have human rights obligations, and, if so, do they differ fundamentally from the human rights obligations of states on the one hand, and of individuals on the other? I will argue that collective actors do have obligations to avoid directly violating human rights, and have an obligation to mitigate in situations in which rights are being violated by others, if they have the power to intervene. Moreover, having broached upon the subject of an "extended notion of corporate obligations", what should be the content of these obligations?

Normative studies are often criticised for being trapped in the powerlessness of "ought to" language. My approach combines a normative and empirical perspective, connecting the normative grounds for corporate obligations to an empirical analysis of the current global and EU policies that work towards the implementation of corporate obligations. Against the background of the normative proposal offered in Section 1, I will look at some institutional arrangements and corporate initiatives that aim at norm compliance and asks the following question: Which modes of governance already allow for

² The value of the exchanges at Merrill Lynch every day exceed the total GDP of the whole of Africa. Many thanks to Chris Engert for this remark.

³ On this claim, see P. Alston, "The "Not-a-Cat-Syndrome": Can the International Human Rights Regime Accommodate Non-State Actors?" In: P. Alston (ed): *Non-State-Actors and Human Rights*, (Oxford: Oxford University Press, 2005), pp. 3-37, at 9; however, this is not the position, which he defends.

private-public co-operation in the implementation of human rights obligations? I will offer three criteria for the critical evaluation of just two (because of page constraints) international initiatives that aim at enhancing corporate human rights compliance.

Thirdly, I will argue that one has to put these analyses into a broader institutional context. A third question is, therefore, what entities, and what institutional, contractual arrangements and strategies support, or hinder, the implementation of the new modes of governance which aim to establish human rights standards within market processes and beyond. I will argue that a network of diverse regulations concerning the responsibility of non-state actors has brought about a new institutional context of justification and control.

However, not all of these new policies meet the standards of democratic legitimation. I will conclude with a sceptical note on the political equality of private collective actors within global governance processes.

2. The obligations of the collective actor

States remain the major violators of human rights, but there is now also widespread concern at human rights abuses committed by corporations that have the power to escape national legal responsibilities. At the same time, TNCs have become an important partner to states, intergovernmental agencies, and non-governmental organisations in the development of mechanisms to enforce human rights-related standards, such as adequate wages and leisure time for workers, and environmental protection. The corporation appears both as a potential human rights violator and as a political bargaining partner in governance processes that establish human rights standards.

In moral philosophy and political theory, most approaches bear the hallmarks of what Samuel Scheffler has called “common sense morality”. It includes assumptions that not only influence theory but are also entrenched in everyday practices.⁴ Four assumptions in particular make it very difficult to speak about the obligations of a collective actor.⁵ These are: that collective

⁴ S. Scheffler, “Individual Responsibility in a Global Age”, in: *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought*, (New York: Oxford University Press, 2001), pp. 32-48, at 37.

⁵ The first assumption is not mentioned in S. Scheffler, “Individual Responsibility in a Global Age”, in: *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought*, (New York: Oxford University Press, 2001), pp. 32-48. For the other three, see, also, the very

actors do not act intentionally; that the individual (and not the collective) is the primary moral actor; that action is more morally significant than omission; and that consequences that have proximity in time and space are more significant than remote consequences. In the sub-section that follows, I will first address these four assumptions and argue that we should, in fact, attribute obligations to collective actors, including transnational corporations, as there are advantages to assigning obligations to collectives, rather than to individuals. Secondly, I will focus on the content of these obligations, thereby taking into consideration that corporation's obligations do not transform the corporation or any other collective actor into a moral person.

2.1. The "unintended-action-argument"

When considering the obligations of corporations, we are first confronted with the common sense-based objection that the actor we are talking about is a *collective* whose way of "acting" differs fundamentally from that of an individual. By a "collective actor", I mean an entity with an internal organisation structure that is able to make decisions and direct its activities accordingly.

In an argument that can be traced to Adam Smith, Friedrich von Hayek, and later to Niklas Luhmann, it is commonly held that the activities of corporations are *not regulated intentionally* but arise spontaneously as a result of the establishment of a sub-system in an expanding capitalist world economy. Market processes, they say, can best be understood in terms of a game, "partly of skills and partly of chance"⁶ whose outcome is not foreseeable but is instead unpredictable and has winners and losers. The economic system is metaphorically driven by an "invisible hand" (Adam Smith) or "steering medium" (Niklas Luhmann).⁷ As part of the systematic economic order, corporations are self-referential entities, subject to the imperatives of economic rationality, such as the exchange of economic goods, the

illuminating article of M. Green, "Institutional Responsibility for Moral Problems", in: A. Kuper (ed): *Global Responsibilities. Who must deliver on human rights?*, (New York, Oxford: Routledge, 2005), pp. 117-135.

⁶ See F.A. von Hayek, "Law, Legislation and Liberty", Vol.2: *The Mirage of Social Justice*, (London, Chicago: University of Chicago Press, 1976), p. 71.

⁷ See A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (ed). by R.H. Campbell, A.S. Skinner & W.B. Todd, (Oxford: Clarendon Press, [1776] 1976) (The Glasgow Edition of the Work and Correspondence of Adam Smith.); F.A. von Hayek, "Law, Legislation and Liberty", Vol.2: *The Mirage of Social Justice*, London, Chicago: University of Chicago Press, 1976; N. Luhmann, *Die Gesellschaft der Gesellschaft*, (Frankfurt aM: Suhrkamp, 1997).

maximising of profit under conditions of competition, and the accumulation of power. The argument for restricted corporate obligations concludes that because the actors in the market are driven by the forces of economic rationality, and do not have intentionality, one cannot say the corporate actor was ever in a position to act otherwise.⁸

This emphasis on an interest-neutral and completely unintended co-ordination of activities seems to be overly one-sided.⁹ This becomes obvious when we consider the problems or conflicts that occur within the market that require reactions from corporations. Stakeholder demands, moreover, have led to new institutional mechanisms such as progress reports, benchmarking, and peer review.¹⁰ Corporations clearly react to new external demands, and can be said to be involved in learning processes. Shell in Nigeria is a prominent example of a firm dealing with external demands in a way which, at first glance, seems to contradict one major aim of a corporation, which is, to increase its profits. The impact of oil extraction on the Ogoni people and the Delta environment and, in particular the execution of Ken-Saro-Wiwa led to very negative publicity for the company worldwide. For a long time, Shell's standard answer to criticism of its role in Nigeria was to strengthen the "division of work" between the state and the corporation.¹¹ A change in opinion came after public pressure against the company strengthened. Shell admitted that "not to take action could itself be a political act", and declared a commitment to a wider concept of responsibility for its future activities. This potential for corporations to change their behaviour paves the way for further normative consideration of the foundation of the obligations of collective actors. Let us consider the three remaining assumptions of common sense morality that restrict the notion of corporate obligations.

⁸ For the relationship between responsibility and the freedom to act otherwise, see J.M. Fischer & M. Ravell, "Responsibility for Consequences", in: J.M. Fischer & M. Ravizza (eds), *Perspectives on Moral Responsibility*, (Ithaca: Cornell University, 1993), pp. 322-349.

⁹ See J. Gray, "Hayek on Liberty, Rights, and Justice", in: (1981) 92 *Ethics*, pp. 73-84.

¹⁰ The European Union, for example, has increasingly used so-called *soft modes of governance* to orchestrate different actors, including TNCs, to solve complex social problems through deliberation, based upon voluntary and non-sanctioned forms of policy-making (public or non-public). See, for one of the first articles on this, F. Snyder, "Soft Law and Institutional Practice in the European Community", in: M. Stephen (ed), *The Construction of Europe. Essays in Honour of Emile Noel*, (Dordrecht: Kluwer, 1994), pp. 197-225; later E. Best, "Alternative Regulations or Complementary Methods? Evolving Options in European Governance", in: (2003) 3 *Eipascope*, pp. 2-18.

¹¹ D. McBarnet, "Human Rights, Corporate Responsibility and the New Accountability", in: T. Campbell & S. Miller, (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organizations*, (Dordrecht: Kluwer, 2004), pp. 63-81, at 67.

2.2. The priority of the individual over the collective

The second assumption is the idea that individuals are the primary bearers of moral obligations.¹² This means that my independent actions are regarded as more important for an outcome than my actions as a member of a group. If I produce a piece of artwork that becomes very famous, I will receive much more attention for my effort if I produce it alone than as a member of a group or school. The focus on the relative contribution of the individual to the final product has consequences on our daily assessment of our obligations. This is one reason why it is difficult to address direct responsibility for climate changes. If I drive my car every day and use electricity, this activity on its own cannot cause global warming. We see our contribution without focusing on the aggregated effects that our actions have in concert with those of others. This shapes our ideas about collectives. In so far as collective actors play a substantial role in common sense morality at all, their actions and obligations are seen as being derived from those of individuals.

This perspective, however, seems shortsighted; it neglects the overall effects of unco-ordinated collective harm. This is true also with view to the collective actor's activities. Even though the market system operates according to economic demands, examination of the effects of a corporation's activities allows a normative evaluation of the collective activities. Against Hayek's assumption, the systemic mechanisms (power and the exchange of goods) are "embedded" in society through the effects of the collective actions,¹³ which means that economic actors are "linked" to processes of co-operation and interaction in the "life-world". In a global economy, this "link" is more or less reduced to confronting the sometimes desired, but often undesired, aggregated effects of radical modernisation. Growing political awareness beyond national borders has triggered an *evaluation of the effects*¹⁴ of the activities of corporations in different public spheres. Consider, for example, the debates on the ecological and human rights abuses caused by multinationals. Because they affect people's lives in massive, not marginal, ways, corporations are being said to bear some responsibility for their actions.

¹² See, for the following aspect, M. Green, Institutional Responsibility for Moral Problems, in: A. Kuper (ed): *Global Responsibilities. Who must deliver on human rights?*, (New York, Oxford: Routledge, 2005), pp. 117-135, at 118.

¹³ For the notion of "embeddedness", see K. Polanyi, *The Great Transformation: The Political and Economic Origins of our Time*, (Boston: Beacon Press, [1944] 2001).

¹⁴ U. Beck, A. Giddens & A.S. Last, *Reflexive Modernization. Politics, Tradition and Aesthetics in the Modern Social Order*, (Cambridge MA: Polity Press, 1997).

2.3. The priority of action over omission

A third common assumption is the idea that actions and their direct effects are more morally relevant than omissions and their possible effects. If I cheat someone out of their money, this is a greater wrong than watching somebody cheat someone else and not taking any steps to intervene. We could be tempted to conclude that we have a strong duty not to undertake certain actions that harm others, but much less duty to prevent others from committing harm.¹⁵ Not to help in a situation of need, however, is a failure to render assistance, which is usually also declared as a moral, and even a legal, wrong. I may have good reasons for inaction, such as fear of being attacked, being too shocked to act, or perhaps thinking myself too weak to be effective. These considerations may postpone a decision, but they do not actually change the duty to offer help.

The situation is less complicated if we slightly change the example. Imagine a person who watches a person cheat another, and then receives part of the take as a kind of hush money. In this case, we speak of complicity, and we would say that the bystander is co-responsible for what has happened as he or she profits from the harm inflicted on others. These considerations have consequences for the question of corporation's obligations. It is not just the direct action and the influence of corporations that makes them a legitimate subject of obligations. If we say that everyone who contributes to the furtherance of injustice, including unjust institutions, and those who *profit* from it bear responsibility for the results, then we have another argument for corporations's obligations.¹⁶ If collective actors profit from the current domestic or international system, they are not only bystanders, but also participants, and by this they contribute to the negative effects on peoples' lives. Think of an oil company, for example, that lays a pipeline through a country whose government forcibly resettles its indigenous peoples to accommodate the pipeline. The company is indirectly implicated, and, by this, it is obliged to cease engaging in a process that causes harm.¹⁷ Even though a corporation cannot be held liable in a juridical sense for a host government's systematic violations of civil, political, economic, social and

¹⁵ T. Pogge, "Assisting" the Global Poor", in: D.K. Chatterjee (ed), *The Ethics of Assistance. Morality and the Distant Needy*, (Cambridge: Cambridge University Press, 2004), pp. 260-289, at 279-280.

¹⁶ T. Pogge, *World Poverty and Human Rights*, (Oxford: Polity Press, 2002).

¹⁷ See R.G. Steinhardt, "The New Lex Mercatoria", in: P. Alston (ed): *Non-State-Actors and Human Rights*, (Oxford: Oxford University Press, 2005), pp. 177-227, at 185. There is no domestic legislation defining a comprehensive, enforceable code of human rights conduct for multinationals, but there are other models for TNCs, such as ethical investment strategies.

cultural rights, it *can* be held responsible for upholding an unjust domestic order.

2.4. The priority of near over remote outcomes

The fourth assumption of common sense morality is that outcomes that occur near to us are of greater moral importance than remote ones. We usually decide that an outcome is the result of *my* own action only if it can be directly related in time and space to what *I* have done. Remote effects that may occur in the future or happen somewhere else in the world are not clearly linked to my action. This is why we feel much less responsible for environmental effects which will, nevertheless, be felt for generations. One could add that this makes sense, as it has become very difficult, if not impossible, to trace the origins of harms. For example, it requires great effort, and is sometimes technically impossible, to single out the source of a hazardous substance that pollutes the air. And sometimes the question arises of whether one could have known that this substance would become toxic when it was released into the air, or whether it would have been possible to avoid the dangerous emission.

Some sociological researchers have made the case that modern technologies have grown so complex, and risks have become so overwhelmingly incalculable, that it is often impossible to attribute responsibilities to single agents or for agents to know how to take sufficient precautions. In a “global risk society”,¹⁸ all human beings are – in a more or less equally manner – exposed to uncontrollable risks which, ironically, have their origin in modern technologies and industries developed in the effort to improve our way of life.¹⁹ Irreversible climate changes and interventions in human genetics cause incalculable effects across space and time. Long functional chains within these complex developments make it difficult to trace both their causes and (harmful) effects. These new global threats undermine the logic of individual responsibility: the more widespread a technical innovation and its related risks (such as toxic emissions or genetic modification), the more difficult it is to assign the origin of an effect to a single originator: When there are many producers, how can we know who is at fault for hazardous emissions? And secondly, it may be impossible for an actor to foresee the negative effects of his or her actions; and if the unwanted effects could not have been foreseen, it would not be right to attribute obligations to the actor.

¹⁸ U. Beck, *Weltrisikogesellschaft*, (Frankfurt aM: Suhrkamp, 2007).

¹⁹ U. Beck, *Weltrisikogesellschaft*, (Frankfurt aM: Suhrkamp, 2007) p. 65; U. Beck, *World Risk Society*, (Cambridge MA; Polity Press, 1999) is a much earlier version of the German edition, which is revised in many parts.

This position is only partly accurate and needs some differentiation. First of all, it, to a certain degree, exaggerates the complexity of circumstances and under-estimates the technical and political potential for tracking down the causes of global or regional harms. We have to distinguish between limited accidents or cases of liability – even though they are not “unintended” accidents as long as a catastrophe is part of the overall calculation – and unlimited catastrophes. The former are restricted geographically and in terms of their possible effects on generations to come. They also include calculable risks such as industrial injuries caused by unsafe machines or regional oil spills by an oil company. Undoubtedly, even if the damage could be localised beforehand, there is a risk that catastrophes are not unlimited in a predictable manner and might happen nevertheless. The scale of the catastrophes can only be determined *ex post* but cannot be anticipated *ex ante* comprehensively.²⁰ As not all catastrophes are unlimited, it is important to track down those who are responsible for the damage as far as this is possible. There are some promising cases. The disposal of the Brent Spar oil storage facility is a prominent example of how responsibility has been legally assigned to a huge corporation, through the auspices of a watchful public.²¹

Secondly, a well-known domestic principle has, indeed, come under pressure, the principle of compensation: What can serve as compensation for something that massively and irreversibly changes the conditions of human life? The idea of compensation is being replaced by the principle of prevention, which includes anticipating and preventing risks that cannot even be proven to exist.²² You may immediately object that the focus on prevention does not take us very far if we have to anticipate harmful effects under conditions of limited knowledge. If there are cases where a lack of knowledge and power makes it difficult to trace the causes of a harm and thereby make an institution liable for what has happened, it makes sense to reconsider the way we usually judge factual dilemmas.

In criminal cases where there are doubts about both the facts and the role of an alleged perpetrator, we are inclined to exonerate the accused from any responsibility or obligations. However, “regular” criminal offences and institutional cases under complex conditions make for an uneasy comparison. It becomes apparent that the obligations of a collective actor are not restricted

²⁰ U. Beck: *Weltrisikogesellschaft*, (Frankfurt aM: Suhrkamp, 2007), p. 243.

²¹ D. McBarnet, “Human Rights, Corporate Responsibility and the New Accountability”, In: T. Campbell & s. Miller, (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organizations*, (Dordrecht: Kluwer, 2004), pp. 63-81.

²² U. Beck: *Weltrisikogesellschaft*, (Frankfurt aM: Suhrkamp, 2007), p. 104.

in the same way as that of an individual actor.²³ Our unease with this comparison stems from the fact that the smallest actions of collective actors can be of an enormous scale, affecting many people, maybe over generations. Given this, it makes sense to pursue a new line of argument and examine the third reason for collective obligations. In situations where our knowledge is limited and conclusive evidence is unlikely, but the harm is enormous, it makes sense to reverse the burden of proof. When the evidence of direct culpability is in doubt, we can still often speak of a co-responsibility.²⁴

One may still reply here that, if the situation is not transparent, this may be an indication that it was impossible for the collective actor to foresee the negative effects of his or her actions. However, this is an untenable assumption. A major difference between collective actors and individual actors concerns knowledge, and the ability to apply it in practice. Collective actors, and especially corporations, are able to gather data, conduct their own research, work through information, and use this knowledge for their purposes through competent agents.²⁵ Corporations have become powerful actors because they possess highly specialised and differentiated knowledge across many fields, which they can also effectively use in politics: they sometimes impose an entire package of labour and tax rights before making an investment and settling in a country. They are well-prepared to respond to the challenges of an international information society and are very capable of contributing towards the upholding of human rights.

By addressing the capacities of collective actors, we cross a theoretical watershed. The collective actor's obligation becomes less dependent on their role in causing harm and it becomes sufficient to show that the collective actor had the means to prevent harm and respect human rights. This discussion of capacities also reveals that the collective actor is not affected by the distinction between action and omission in the same way as the individual actor. While it may be excessively burdensome for an individual to figure out what to do to prevent a third party from harm, large corporations and other

²³ M. Green, "Institutional Responsibility for Moral Problems", in: A. Kuper (ed): *Global Responsibilities. Who must deliver on human rights?*, (New York, Oxford: Routledge, 2005), pp. 117-135.

²⁴ See, for this, C. Barry, Applying the Contribution Principle, in: A. Kuper (ed): *Global Responsibilities. Who must deliver on human rights?*, (New York, Oxford: Routledge, 2005), pp. 135-155.

²⁵ See P. Zumbansen, "The Conundrum of Corporate Social Responsibility: Reflections on the Changing Nature of Forms and States", in: R. Miller & R. Bratspies, (eds), *Transboundary Harms: Lessons from the Trail Smelter Arbitration*, (Cambridge: Cambridge University Press, 2005), pp. 245-254.

collective actors are, in fact, very capable of addressing these kinds of challenges.

To sum up, we have four arguments for why transnational corporations have human rights obligations: they react to external demands through various moves, so that corporations can be said to act intentionally; they have broad, potentially negative influence on people's life-worlds; they profit from the disadvantages of those who are much worse off; and they have the competencies and power to influence and address complex problems. The last point switches the focus from the cause of harm to the capacity to act otherwise on a global scale. As powerful entities, corporations seem to be very capable of shaping their social and political surroundings according to human rights standards.

What does this mean for the widespread trend in sub-contracting? Sub-contractors are often small, with less influence and capacities than the primary contractors. It is not possible for an individual to dissolve his or her moral obligations by simply delegating a morally reprehensible task to another party. For this case, of collective entities, it is sufficient to state that if we have agreed that a collective actor has human rights obligations, then, those obligations must entail ensuring that any sub-contractors meet those same obligations.²⁶

2.5. The content of the obligations

This justification of collective actor obligations/the obligations of collective actors sets the stage for specifying the content of the obligations. We can begin by identifying “*sphere-specific*” obligations,²⁷ intrinsically linked to the influence and the capacity of a firm. Within their sphere of conduct, collectives can bring about social and economic rights, for example, by offering adequate wages and leisure-time to their workers, by implementing anti-discrimination rules, guaranteeing security at the workplace, using environmental protection technology, and so on. Manufacturing firms, for example, may specifically violate employee rights which regulate working hours and workplace safety, so their sphere of obligation concerns mainly these aspects. Companies providing security consulting services to a

²⁶ These demands are part of the *Global Compact*. See, also, OECD's Principles of Corporate Governance 2004,

http://www.oecd.org/document/49/0,2340,en_2649_34813_31530865_1_1_1_1,00.html.

²⁷ T. Campbell, “Moral Dimensions of Human Rights”, in: T. Campbell & S. Miller (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations*, (Dordrecht: Kluwer, 2004), pp. 11-31.

government may specifically violate the rights of citizens to physical security, and thus it makes sense to concretise their obligations, accordingly. Obligations may vary in relation to the specific working field, but they also vary with view to the size, influence and capacity of a firm.

This does not mean that sphere-specific obligations are determined once and for all, which would seem too narrow an approach. We also have not answered the question of what this entails, and who decides which obligations belong in which sphere. A major principle of organisation for national affairs, the “*principle of affectedness*”, should be applied to international relations, too. This says that, in a social relationship, those who are affected by the actions of an individual or a collective actor cannot only ask for compensation, they can also *demand the/0? justification* of the conduct of the actors.²⁸ This means that the fact that a person or community is substantially affected by the activities of a transnational actor ethically implies a relation of justification between them.

This is not a new principle in governance theory. It has been interpreted narrowly as “internal justification”,²⁹ in which case the individuals affected are those who, similar to owners and creditors, have delegated power to an agent who manages their affairs. In a globalised economy, this seems insufficient and we can call for a supplementary notion. “External justification” embraces a wider public and would allow us to focus on stakeholders, that is, all those *directly* exposed to the activities of collectives through environmental disasters, unhealthy products, low wages, and so on. The obligations mentioned above have to be concretised among *all* the participants in “value-based networks”³⁰ – business partners, stakeholders, shareholders, NGOs, science and consumer associations – who try to come to an agreement in bargaining processes.

This wider notion leaves room for two interpretations. The first understands justification as “accountability” and assumes that what is required from the actor is a public and transparent justification of the actor’s conduct in the

²⁸ On this topic, see J. Habermas, *Between Facts and Norms. Contribution to a Discourse Theory of Law and Democracy*, (Oxford, Polity Press 1997) and also R. Forst, “The basic right to justification: Towards a constructivist conception of human rights”, (1999) 6 *Constellations*, pp. 35-59.

²⁹ See R. Keohane, “Global Governance and Democratic Accountability”, in: D. Held & M. Koenig-Archibugi (eds), *Taming Globalization. Frontiers of Governance*, (Cambridge: Polity Press, 2003), pp. 130-160, at 144.

³⁰ See D. Wheeler, B. Colbert & R.E. Freeman, “Focusing on Value: Reconciling Corporate Social Responsibility, Sustainability and a Stakeholder Approach in a Network World”, in: (2003) 28 *Journal of General Management*, pp. 1-28.

past.³¹ This notion of accountability is cut off from any idea of reciprocity or participation by stakeholders. It does not, for example, set forth merely rule-setting procedures, such as rules that allow those who have been affected by harmful outcomes to be heard. A second interpretation, therefore, seems necessary. According to this second notion of justification, one should understand the principle of affectedness as being intrinsically linked to reciprocal justification: everyone who has to submit to a norm should also be an author in the process of norm setting. Or, as Rainer Forst has put it, everyone has a basic right to justification, which allows every individual a “veto-right”.³² This includes an anticipatory perspective, addressing future events and its negative or positive effects.

In this form of justification, the prevailing notion of accountability fails to be legitimate if actors who have been or may be importantly affected are not represented in the norm setting process. A collective’s concrete obligations should be determined publicly, with input from all the actors directly affected by the collective. In the context of regional and global governance, this requires transparency in the corporation’s conduct towards the stakeholders and access to both the formal and the informal political arenas in which decisions – which can have tremendous effect on stakeholders – are made.

This approach should not be seen as an attempt to replace common sense ideas of morality; instead, it seeks to supplement common sense notions, and by doing so, open new ways of understanding international obligation. An attempt to overcome the moral common sense idea completely would not only be empirically over-confident, but also problematical from a theoretical point of view. We have seen that the capacities and possible influence of collective entities on the life-world differ fundamentally from those of individuals. The collective is, to a certain extent, much better prepared to deal with the challenges of globalisation. Nevertheless, the collective actor does not turn into a moral person simply because one recognises its human rights obligations. There is one further difference between a collective entity and an individual which makes it clear why it is misleading to talk about the moral obligations of corporations. A moral person who has moral obligations follows his or her moral principles out of the conviction that these are the most reasonable rules possible – at least, for the time-being. In contrast, a legal person – and a corporation is undoubtedly one – might follow a rule for

³¹ See A. Benz & I. Papadopoulis (ed), *Governance and Democracy*, (London: Routledge, 2006).

³² See R. Forst, “The basic right to justification: Towards a constructivist conception of human rights”, (1999) 6 *Constellations*, pp. 35-59, at 44.

a variety of reasons, be it the fear of penalties or loss of prestige, or the realisation that a certain activity and its effects might be wrong.³³ Human rights obligations are not directly deduced from the moral obligations of individuals, because they have distinct characteristics. It is more precise to say that we have good *moral arguments* as to why collective entities have or should have legal human rights obligations. However, it seems undeniable that collectives rely on individuals; without individuals and their participation in internal rule-setting and decision-making procedures, there would be no collective actor.

3. Evaluation of human rights initiatives

What has been said so far provides a setting for the evaluation of the current initiatives which aim, generally speaking, at norm compliance by corporations. These initiatives are, in one way or another, a reaction to the new roles of transnational corporations, which make them the object of human rights obligations. This leads us to the thesis of the second section of this chapter.

Initiatives which aim at the human rights compliance of collective actors are legitimised if they meet three conditions relating to internationally accepted norms, the congruence of subject and authorship of norms, and the sustainable control of power.

Firstly, initiatives should be *compatible with human rights standards*. To be more precise, all non-state agents that affect the essential interests of people have enduring duties to respect, protect, and fulfil social and economic human rights within their functional domain of influence.³⁴

Secondly, initiatives need to respect the above-mentioned *principle of affectedness*. According to this principle, it should be recalled, those who are,

³³ See J. Habermas, *Between Facts and Norms. Contribution to a Discourse Theory of Law and Democracy*, (Oxford: Polity Press, 1997), p. 267.

³⁴ To be more concrete: *Respecting* these rights requires that production sites and business practices should not destroy local, essential living conditions, nor obstruct access to economic and social rights. *Protecting* economic and social human rights means TNCs must prevent third parties – mainly their sub-contractors – from violating these rights. And finally, TNCs should contribute toward *fulfilling* economic and social human rights by, for example, respecting international labour laws and/or participating in voluntary agreements on labour standards. Those agents who have *caused* harm and are capable of offering compensation in accordance with the realisation of these rights have a strong duty to do so – again, within their functional area. If a direct causal involvement cannot be identified, those who *are* capable of realising social and economic human rights have an equally strong duty to comply.

or may be, affected by a rule or an initiative based upon rules can be expected to participate in the rule-setting process.³⁵ This means that, if a person or community is substantially affected by the activities of a transnational actor, a relation of justification is created between them.

A third criterion addresses the concept of sustainable *norm enforcement*. One primary concern in this area is that of guaranteeing norm compliance over a long period of time. Adequate enforcement also requires a transparent process for assigning the responsibility after an accident (both for effects that may extend into the future and in response to accidents that occurred in the past). Furthermore, a positive evaluation of a TNC's initiatives should depend on the presence of effective mechanisms for preventing future violations. This may include institutional incentives that may hinder or support addressing accountability. I will come back to this latter point later (Section 3).

Let me briefly sketch out the implications of these criteria through two examples. One example is a relatively new ILO initiative, which I am including to represent an internationally known public-private initiative. The second is a rather new, private, self-regulation initiative that explicitly aims at maximum compatibility with market regulation processes.

A Private-public initiative: the International Labour Organisation (ILO)

The International Labour Organisation (ILO) is an example of an institution that sets *private-public regulations* on the activities of states, including binding laws and non-binding recommendations. The ILO's norm-setting is indebted to universal norms and explicitly supports some core human rights.³⁶ This was part of its founding ideas set out almost one hundred years ago. But with regard to the principle of affectedness, the ILO has run into problems of representation. One criticism is that the number of organised union members world-wide – unions are a main party of the ILO – is decreasing steadily, which makes it questionable as to whether the ILO is still able to represent employees adequately. At the same time, NGOs are not yet represented in the ILO, and the ILO's first negotiations with them have been difficult because the NGOs are afraid of becoming entrapped in old, encrusted

³⁵ On this topic, see J. Habermas, *Between Facts and Norms. Contribution to a Discourse Theory of Law and Democracy*, (Oxford: Polity Press, 1997), and R. Forst, "The basic right to justification: Towards a constructivist conception of human rights", (1999) 6 *Constellations*, pp. 35-59.

³⁶ R. Blanpain & C. Engels (eds): *The ILO and the Social Challenges of the 21st Century*, (The Hague: Kluwer, 2001).

organisational structures. Furthermore, when it comes to mechanisms for norm enforcement, the ILO reporting systems have been weak, and, as a result, the number of binding conventions has decreased while the number of non-binding recommendations has increased. Some core human rights, such as the prohibition of child labour, have become binding law, not through state consent, but through ILO membership. A new ILO initiative now helps with the implementation of human rights standards. The prohibition of child labour in developing countries, for example, is supported by offering social security payments to very poor families whose income heavily relies on the contribution of their children. So we have here a mixed result concerning the legitimacy of ILO initiatives.

Private self-regulation: 'Cotton made in Africa'

We are currently witnessing a range of market-based initiatives in which firms compete for sales and capital through making a public commitment to human rights. The precursors of these measures are the so-called *Sullivan Principles*, first articulated in 1977, which amounted to a voluntary code of conduct for companies doing business in South Africa under the apartheid regime.³⁷ Despite their uncertain impact in South Africa, the Sullivan Principles have served as a model for similar activities such as social accountability auditing and verification, unilateral Codes of Conduct, and "human rights-sensitive" product lines and brands. Starbucks offers "fair trade coffee" and the World Diamonds Council has developed the "Kimberley Process", which is a protocol for assuring that the profits from the sales of gems do not support governments or paramilitary groups that violate human rights.³⁸ One prominent example of a pact between private actors (TNCs) and a public actor, (in this case the United Nations) is the *Global Compact*, brought to life by Kofi Annan in January 1999. Along with the UN High Commission for Human Rights, the International Labour Organisation (ILO), and representatives of the UN Environmental Programme, about 50 corporations take part, including Nike, Shell, BP, Amoco and Rio Tinto. The agreement is that the corporations must go public on the Global Compact Internet site by describing their progress in implementing human

³⁷ The principles required an integrated workplace, fair employment practices, and affirmative action programmes, J. Braithwaite & P. Drahos, *Global Business Regulation*, (Cambridge: Cambridge University Press, 2000), p. 254; R. G. Steinhardt, "The New Lex Mercatoria", in: P. Alston (ed.): *Non-State-Actors and Human Rights*, (Oxford: Oxford University Press, 2005), pp. 177-227, at 180.

³⁸ See, among others, A. Kuper, "Redistributing Responsibility. The UN Global Compact with Corporations", in: T. Pogge & A. Follesdal (eds), *Real World Justice. Grounds, Principles, Human Rights and Social Institutions*, (Dordrecht: Kluwer, 2005), pp. 359-381.

rights, labour standards and environmental protection. In turn, they are allowed to use a UN logo for their advertising.

The project ‘Cotton made in Africa’ that I will discuss in more detail here, was initiated by Michael Otto, a German mail-order business, in close co-operation with three African cotton-producing and cotton-manufacturing firms in Zambia, Burkina Faso and Benin.³⁹ It is not a case of pure self-regulation, as ‘Cotton made in Africa’ obtains support from the German Ministry of economic co-operation and development, and from some NGOs, such as the World Wide Fund for Nature. Unlike the Fair Trade approach, which tries to implement human rights standards primarily through fixed prices, ‘Cotton made in Africa’ aims to build local capacity so as to make African cotton capable of competing on the world market. By increasing quality, the project tries to stimulate higher demand for African cotton. The project is only indirectly obliged to respect human rights in so far as it increases the income of the local farmers and thus reduces poverty. Within the scope of the project, the participation of those affected seems fairly good; the African farmer is very well-integrated into the process of setting quality standards. But NGOs have complained that economic aims always trump ecological, and sometimes even social, goals. Norm enforcement is based upon a genuine economic principle: profit maximisation, without any further intervention in the chain of value. The market compatibility is a high incentive for integrating the rules of conduct into the on-going process of production. Nevertheless, it turns out that it is difficult to convince other firms to join the initiatives mainly because most of them are busy setting up their own codes of conduct. In the long run, this could mean a competitive disadvantage for Michael Otto’s project. In addition, a survey showed that Otto’s customers are, more or less, uninterested in this initiative and tend not to change their buying behaviour.

Table 1: ILO / ‘Cotton made in Africa’

	ILO	Cotton made in Africa
Human rights compatibility	Yes	Indirect
Principle of Affectedness	Problem of Representation	Difficult position of NGOs
Sustainable human rights compliance	New strategies	High incentive through market compatibility

³⁹ See www.cottonmadein africa.com; This is part of my own empirical research. See, also, the master thesis of N. Barth 2007: “Wie fair ist fairer Handel?” Frankfurt am Main.

To sum up, we can say that the involvement of both states and international government organisations can ensure a focus on human rights standards. But this is far from being a guarantee that states will become actively engaged in implementing human rights standards. Furthermore, norm-enforcement is a major problem for both approaches. Corporations often engage in image-friendly international initiatives that have no influence on their activities. Work conditions have improved in some places in the world, but one cannot overlook the fact that self-imposed restrictions are often no more than mere “human rights rhetoric”.⁴⁰ Moreover, it is the enduring distrust that many NGOs and customers have of the genuineness of corporate activities that sustains public awareness and maintains the pressure on corporations. Paradoxically, if this distrust wears out, the initiatives that aim to create norm compliance will cease to exist.

One crucial aspect concerning self-regulation is the motivation of corporations. A recent study on this topic has identified quite a self-interested reason: the codes are an answer to the risks associated with civil action and consumer boycotts.⁴¹ Economic rationality is not being simply replaced by moral norms or a practical discourse, nor are corporations expected to become agents which are primarily motivated by morality. Instead, a normatively-coloured context creates pressure that becomes a variable in the rational calculation. One way to maintain this pressure is to measure corporations by their promises and publicly to disclose when they fail to comply with norms, for they cannot renege on their promises without losing credibility. They agree on moral codes at first only for tactical reasons, but

⁴⁰ Nike, for example, a prominent member of the “Global Compact”, was sued by an American labor law activist, Mark Kasky, for false or misleading statements in its advertisements. Nike had assumed that work conditions in their subcontracting firms had improved – an assumption Kasky said was untrue. In September 2003, one month after the suit was filed, Nike, which claimed it was engaged in fully protected free speech, agreed to an out-of-court settlement and paid 1.5 million dollars to a fair trade organisation. L. Greenhouse, The Supreme Court: Advertising; Nike Free Speech Case is Unexpectedly Returned to California, in: *New York Times*, June 27, 2003. See, also, the contribution on an evaluation of the “Global Compact”, by A. Kuper, “Redistributing Responsibility. The UN Global Compact with Corporations”, in: T. Pogge & A. Follesdal (eds), *Real World Justice. Grounds, Principles, Human Rights and Social Institutions*, (Dordrecht: Kluwer, 2005), pp. 259-381.

⁴¹ T. Conzelmann & K.D. Wolf, “Normative Entrepreneurs? Accession to and Compliance with Private Codes of Conduct”; in: J-C. Graz & A. Nölke (eds), *Transnational Private Governance in the Global Political Economy*, (London: Routledge, 2007), pp. 98-114.

then “talk themselves into moral obligations” and become entangled in their own moral standards.⁴²

4. The institutional context for implementing corporate obligations

The picture that emerges is that, despite the fragmentary and seemingly weak regulatory structure, there is potential for the slow crystallisation of new comprehensive international human rights norms that specifically bind transnational corporations and other business entities. Its realisation has a realistic chance only if the moral codes are embedded in a legal surrounding that puts some pressure on the participating actors to obtain compliance. There are developments both in transnational and in European governance as well as in international law that can be interpreted as an *institutional context* that, by creating pressure for justification and control, promotes the implementation of collective actors’ obligations. One can distinguish at least three trends in this direction, which could be expanded and further developed:

Liability. In international labour law, we find a perspective that focuses on the effects of economic exchange processes when it comes to civil liability. A corporation, for example, can be held liable for damages that have been caused “intentionally” or through the negligence of its employees. Domestic courts have a history of ordering corporations to pay for damages that occur as a result of their complicity in abuses perpetrated by governments. Since World War II, for example, survivors have successfully sued companies that relied on slave labour or benefited from the property seized from Jews during the Nazi Holocaust. A wide range of cases is filed under the so-called Alien Tort Statute (ATS) in the United States, which was adopted as part of the First Judiciary Act in 1789, and provides that district courts have jurisdiction over any civil action for a tort committed in violation of US law anywhere in the world. The ATS probably aimed to assure that pirates captured in the US could be sued by their foreign victims in order to recover damages, and that foreign diplomats assaulted in the United States could similarly use the federal

⁴² Thomas Risse shows that argumentation, deliberation and persuasion plays an important role in international negotiations. He speaks of “moral entrapment”: even participants who enter the negotiations in strategic intention at some point have to switch to discursive rules and the attitude oriented towards a common understanding (“Verständigungsorientiertes Handeln”). T. Risse, “Let’s Argue!': Communicative Action in World Politics”, in: (2000) 54 *International Organization*, pp. 1-39; T. Risse, S. Ropp & K. Sikkink (eds), *The Power of Human Rights. International Norms and Domestic Change*, (Cambridge: Cambridge University Press, 1999).

courts. A recent and very prominent case was brought against one of the world's largest pharmaceutical companies, Pfizer, for injuries suffered by Nigerian citizens hurt by an experimental antibiotic administered without their informed consent.⁴³

Complicity. ATS actions have also been filed in US federal courts against some of the largest multinationals for their alleged complicity in human rights violations around the world. In *Doe vs. Unocal*, a group of Burmese villagers sued the US corporation Unocal, and Total S.A., a French company, for their complicity in slavery-like practices and other human rights violations in a joint-venture pipeline project with the government in Burma.⁴⁴ It is interesting that the *Unocal I* case did not place liability on the assertion that the firm maintained business relationships with a state that violates human rights, nor was it claimed that the corporation was liable for the actions of the state that was the joint-venture partner. Instead, the court mentioned the circumstances under which a private actor can, nonetheless, be held responsible: most importantly, the court established *when* the corporation commits one or some of the narrow class of wrongs identified by treaty and custom.⁴⁵

Policy-making. While corporations have historically had to lobby for influence in legislative processes, they have now become an integral part of policy-making, bringing with them much needed expertise and practical knowledge.⁴⁶ This can be observed within the European Union. A main channel for firms had been to lobby effectively at national level in order to influence the consensus in the Council of Ministers, but the European

⁴³ See, among others, P. Zumbansen, "The Conundrum of Corporate Social Responsibility: Reflections on the Changing Nature of Forms and States", in: R. Miller & R. Bratspies (eds): *Transboundary Harms: Lessons from the Trail Smelter Arbitration*, (Cambridge: Cambridge University Press, 2005), pp. 245-254.

⁴⁴ 963 F.Supp. 880 (C.D. Cal.1997) (Unocal I), 110 F. Supp.2d 1294 (C.D. Cal.2000) (Unocal II), on appeal, 2002 WL 31063976 (9th Cir. 2002). It ends with a settlement of the case 2002. Another case: *Abdullahi vs. Pfizer*, F.Supp. 2d, 2002 Dist. Lexis 17436 (17. Sept. 2002). See R.G. Steinhardt, "The New Lex Mercatoria", in: P. Alston (ed): *Non-State-Actors and Human Rights*, (Oxford: Oxford University Press, 2005), pp. 177-227, at 195.

⁴⁵ See R.G. Steinhardt, "The New Lex Mercatoria", in: P. Alston (ed): *Non-State-Actors and Human Rights*, (Oxford: Oxford University Press, 2005), pp. 177-227, at 195.

⁴⁶ For rule-making processes in global regulatory networks, see A-M. Slaughter, *A New World Order*, (Princeton: Princeton University Press, 2004); H. Schepel, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets*, (Oxford: Hart Publishing, 2005).

Commission has introduced a reverse process.⁴⁷ It now seeks to win over firms in order to strengthen the EC's position *vis-à-vis* third countries and EU Member States. Corporations are now intensively involved in decisions on trade and trade policy that affect human rights standards.⁴⁸

But there are also hindering factors that are mainly the responsibility of the state, and these have to do with the *international trade system*. Regulating influences on the international market include the international trade system and the WTO, and various US and EU agriculture policies (for example, the "Common Agricultural Policies"). The northern countries, for example, reduced their tariffs in the Uruguay Round by less than the poor countries did. Subsidies for production in the northern countries are still enormous. Dairy farmers, for example, receive annual subsidies of \$2,700 per cow per year in Japan and \$900 in Europe. Every textile job saved by tariffs and subsidies in an industrialised country costs about 35 jobs in developing countries.

5. The problem of legitimate governance

We have said that the collective actor has enormous capacities to create a tight network of binding rules and controls that would help preserve respect for human rights. Does a right to political participation follow from obligations to respect human rights?

We can currently observe a development that counteracts the previously mentioned four assumptions of common sense morality. In governance theory, we have the widespread presupposition that the individual is no longer the primary political actor internationally, but, if at all, one among many collective actors, such as NGOs, transnational governmental organisations and transnational corporations. While a common sense morality places a great deal of obligations on the individual, a common sense governance theory favours the collective actor as the political agent at the international level.

⁴⁷ See C. Woll, "Trade Policy Lobbying in the European Union: Who Captures Whom?" MPIfG Working Paper 06/7,2006, <http://www.mpifg.de/pu/workpap/wp06-7/wp06-7.html>.

⁴⁸ On the value of advanced modes of administrative co-operative experimentalism that leads to creative problem solutions, see the article by Ch. Joerges & J. Neyer, "From Intergovernmental Bargaining to Deliberative Political Process: The Constitutionalisation of Comitology", in: (1997) 3 *European Law Journal*, pp. 273-299.

Various attempts are under way to expand the restricted legal status of corporations. One example is that recently, the United Nations Sub-Commission for the Promotion and Protection of Human Rights approved “Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with regard to Human Rights”, which can be said to be the first comprehensive international human rights norms that specifically address transnational corporations and other business entities.⁴⁹ They establish the responsibilities of companies to respect, secure, and promote the fulfillment of human rights with a special focus on consumers’ and workers’ rights, environmental protection, and national sovereignty. One result of the Commission’s meetings was to define TNCs as fully-fledged legal persons. This is analogous to the status of natural persons in that these entities have both rights and obligations.⁵⁰ This would be a landmark in Economic Law. But, from a democratic theory perspective, it has been questioned whether the expansion of status for TNCs should go this far.⁵¹ What is the problem with this?

If international regulations are decided by private (collective) actors who make decisions according to economic rationality, and not by democratic representatives that voice the interests of their constituents, then, a basic democratic principle will be turned upside down: the constitutional and law-giving power of the people to which all other powers, persons, and associations should be subject, will no longer be supreme, and we face the danger that private self-regulation will become an instrument for further self-empowerment of the already powerful.⁵² This will strengthen private soft law and will lead to a pluralisation of labour standards as corporations create their

⁴⁹ D. Weissbrodt & M. Kruger, “Human Rights Responsibilities of Businesses as Non-State Actors”, in: P. Alston, (ed), *Non-State-Actors and Human Rights*, (Oxford: Oxford University Press, 2005), pp.315-351. The full text of the approved ‘Norms’ is also available at: [http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument).

⁵⁰ See D. Weissbrodt & M. Kruger, “Human Rights Responsibilities of Businesses as Non-State Actors”, in: P. Alston, (ed), *Non-State-Actors and Human Rights*, (Oxford: Oxford University Press, 2005), pp. 315-351.

⁵¹ See, for this assumption, the, in other respect, different approaches of J. Habermas, *Between Facts and Norms. Contribution to a Discourse Theory of Law and Democracy*, (Oxford, Polity Press, 1997); Ch. Joerges & E. Vos, (eds), *EU Committees: Social Regulation, Law and Politics*, (Oxford: Hart, 1999).

⁵² H. Brunkhorst: *Solidarität*, (Frankfurt a.M.: Suhrkamp, 2002); for a defence of a “deliberative democratic constitutionalism”, see, also, P. Nanz, “Democratic Legitimacy of Transnational Trade Governance: A View from Political Theory”, in: Ch. Joerges & E-U. Petersmann (eds): *Constitutionalism, Multilevel Trade Governance and Social Regulation*, (Oxford, Portland OR: Hart Publishing, 2006), pp. 59-82.

own normative rule systems. ILO norm-setting, one should keep in mind, is obliged to respect universal norms whereas corporations are not.

At this point, the role of the state comes into play, and, with it, the question of duty allocation between corporations and the state. The state as the representative of its citizens should continue to bear the lion's share of the burden of creating an institutional environment that facilitates the implementation of human rights duties. It is only through the participation of those affected by human rights violations that we can arrive at legitimate international rules that bind collective actors. Through this external pressure, they have to become much more serious participants in the process of accomplishing human rights in their specific fields of competence.

6. Conclusion

What I have defended here were the following four points: first, I think we have good reasons to expand the notion of human rights duties beyond the constraints of the common sense morality approach and to speak about the obligations of collective actors. Collective actors have become so powerful and influential that they, along with states, contribute to human rights violations. They have adapted to the demands of today's information society and are much better prepared to deal with complex problems than the individual. Their capacities mean that we should recognise them as important agents in human rights issues, and doing so has advantages over emphasising the obligations of the individual.

Secondly, I have demonstrated that public norm compliance initiatives have some advantages over private-public self-regulation, even though both are weak when it comes to sustainable norm enforcement.

Therefore, thirdly, the best we can do to fulfil the human rights obligations of collective actors might be - one out of a bundle of strategies - to create a normative legal institutional context that sustains the "pressure for justification" on corporations and promotes the reform of the unjust global order. Finally, I have pointed out that we have, nevertheless, to be cautious, as not all initiatives of private self-regulation are desirable or legitimate.

Section Three

The Legitimacy of Transnational Governance

Chapter 7

Legitimacy through Precaution in European Regulation of GMOs? From the Standpoint of Governance as Analytical Perspective*

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I. Introduction

Biotechnology is variously perceived as the most frightening or most promising scientific development of the twentieth century; agricultural biotechnology has proved an extraordinarily fraught topic for environmental regulators over recent years.¹

The risks and benefits of Genetically Modified Organisms (GMOs) and the commercialisation of this new technology in different economic areas within the EU are subject to ongoing public debate across European societies.² The controversy surrounding this regulatory area refers, above all, to the empirical and epistemological³ problems typical of technological innovations in general:

* For useful comments, many thanks to Sofia De Abreu Ferreira and Alun Gibbs as well as to all the participants of the RECON Workshop in Bremen in March 2008. All errors are mine.

¹ See J. Holder & M. Lee, *Environmental Protection, Law and Policy*, (Cambridge: Cambridge University Press, 2007), 2nd Edition, p. 61.

² On the issues of this debate, see M.I. Kritikos, *Institutions and Science in the Authorization of GMO Releases in the European Union (1990–2007): The False Promise of Proceduralism*, (London School of Economics and Political Science, (PhD Thesis, London School of Economics, 2007), p. 181; The debate within civil society also shows a pan-European dimension, see for example the website of the European networks of gmo free regions: www.gmo-free-regions.org (accessed on 28.04.2008) and www.gmofree-euregions.net (accessed on 28.04.2008).

³ Holder & Lee n. 1 *supra*.

the lack of sufficient scientific knowledge as well as societal experience⁴ with the employment of biotechnology. Given that it is a relatively recent invention,⁵ its long-term consequences for, in particular, our natural environment, are at present unforeseeable. The possibility that these consequences may be irreversible raises further concerns. Thus, GMO regulation in the EU becomes an issue of dealing with complex socio-economic, cultural, ethical and environmental conflicts at national and regional levels across the EU. To put it more dramatically, it becomes a test of the EU's most prominent maxim – *unitas in diversitas*.

The current Community legal framework for GMOs was born out of a regulatory crisis,⁶ during which the political authorities in the EU both failed to resolve such conflicts and to reconcile the expectations and concerns of national constituencies with the objective of the free movement of GM products within the common market. This regulatory failure can be clearly seen in the stalling of EU authorisation for biotech products and the negative verdict of the WTO panel⁷ on the matter of this so-called *de facto* moratorium. The question that I will address in this chapter is, therefore, whether the current legal framework for GMO authorisations in the EU and its implementation can fulfil the promise of a more legitimate regulation of the risks associated with biotechnology.

The challenge for lawyers when dealing with this topic is to develop legitimate prescriptive standards that could guide decision-making, and, in the end, allow us to assess whether its outcome, for instance, the authorisation of a GM maize for human consumption, is a good or a bad decision in a particular case. The lack of sufficient scientific knowledge about biotechnology makes it difficult to develop substantive standards for GMO authorisation.

⁴ On this term, see K-H. Ladeur, *Das Umweltrecht der Wissensgesellschaft: von der Gefahrenabwehr zum Risikomanagement*, (Berlin: Duncker & Humblot, 1995), p. 22 *et seq.*

⁵ Kritikós n. 2 *supra*, p. 16.

⁶ I refer here to the malfunction and subsequently suspension of the previous Community regime because of non-compliance of the Member States; see C. Shaffer & M. Pollack, "Agricultural Biotechnology Policy in the EU: Between National Fears and Global Disciplines", in: H. Wallace, W. Wallace & M. Pollack (eds) *Policy-Making in the European Union*, (Oxford: Oxford University Press, 2005), 5th Edition, p. 339 *et seq.*; G. Skogstad, "Contested Political Authority, Risk Society, and the Transatlantic Divide in the Regulation of Genetic Engineering", in: E. Grande & L.W. Pauly (eds), *Complex Sovereignty: Reconstituting Political Authority in the Twenty-first Century*, (Toronto/Buffalo/London: University of Toronto Press, 2005), p. 246 *et seq.*

⁷ WT/DS291/R (United States), WT/DS292/R (Canada), WT/DS293/R (Argentina).

The fact that the Community legislator lacks information that is scientifically established as to the effects of GMOs makes him unable to ensure the 'substantial rationality' of his decisions concerning these organisms and leads him to concentrate on the decision-making process in order to ensure the existence of 'procedural rationality'.⁸

Following this argument, when analysing the present legal framework on GMOs, I will concentrate on its "procedural legitimacy", that is, on its capacity to install a fair and all-inclusive procedure of decision-making.⁹ The yardstick for my evaluation will be whether EU law and its practice successfully allow for the mediation¹⁰ of the various conflicts surrounding the commercial use of "green" biotechnology in the EU. The approach envisaged by the European legislator in order to improve this type of legitimacy under conditions of "scientific uncertainty" was, as will be shown, to base the new framework upon the precautionary principle.¹¹ This principle establishes the requirement to justify regulatory decisions taken under conditions of scientific uncertainty along two different trajectories – scientific rationality, on the one hand, and the adoption of the final decision by a democratically accountable political institution which could remain detached from the scientific results on the other.¹² The decisive question for the assessment of the legitimacy of the framework will, therefore, be whether it allows for mediation between scientific concerns and "other legitimate factors", such as socio-economic, ethical, cultural and other preferences expressed by national and regional constituencies within the EU Member States.

My hypothesis is that the current legal regime for GMO authorisation in the EU is based upon a particularly narrow notion of precaution, which promotes

⁸ See Z.K. Forsman, "Community Regulation of Genetically Modified Organisms: a Difficult Relationship Between Law and Science", (2004) 10 *European Law Journal*, pp. 580–594, at 583; see, also, U. Beck, *Risk Society: Towards a New Modernity*, (London: Sage, 1992), who argues that technological risks largely escape the traditional institutions of representative democracy, pointing towards more radical and participatory approaches.

⁹ On procedural rationality, see G. Majone, "Foundations of Risk Regulation: Science, Decision-Making, Policy Learning and Institutional Reform", in: G. Majone (ed), *Risk Regulation in the EU: Between Enlargement and Internationalization*, (Florence: EUI, RSCAS, 2003).

¹⁰ See D. Chalmers, "Risk, Anxiety and the European Mediation of the Politics of Life", (2005) 30 *European Law Review*, pp. 649–674, at 649, who argues in favour of mediation between the "politics of hazard" and "politics of anxiety" in European risk regulation of GMOs.

¹¹ See Article 1 Directive 2001/18/EC.

¹² Forsman n. 8 *supra*, p. 580.

the reliance on and belief in “sound science”.¹³ Although the framework contains provisions, which – in theory – allow for the inclusion of other non-scientific factors into the decision-making, and, therefore, for the possibility of departing from scientific results, the authorisation practice itself follows a traditionalist conception of objective science. As a consequence, the current regime fails to create a balance between the two types of legitimacy presupposed by the precautionary principle – the scientific and the political legitimacy. This imbalance, together with the predominance of the “sound science” paradigm, poses, as will be shown, a serious threat to the functioning of the authorisation regime in the future. The continuing non-compliance¹⁴ with the framework on the part of the Member States, which continue to ban biotech products,¹⁵ could be seen as the herald of another crisis of EU GMO regulation in the future. It shows the strong opposition of the majority of the Member States towards the commercialisation of GMOs, which can, in turn, be interpreted as mirroring their dissatisfaction with the current regulatory practice.¹⁶

2. A methodological clarification

To engage in questions of legitimacy and precaution in the European regulation of GMOs is the main, but not the only, purpose that I pursue in this paper. As the subtitle indicates, there is an additional, methodological added value, which is to analyse the legal regime by employing a particular perspective, that of governance, the term being used here in the sense of an analytical concept. With this approach to legal analysis, I distance myself from the common discussion on “European governance” in general, and on “new

¹³ The term “sound science” first emerged in public policy discussions in the US as an antonym to “junk science”, and was used in order to describe the scientific research used to justify a claim or position. It was referred to by both, government agencies and industry representatives; the latter exploited it, however, to discredit public health or environmental concerns underlying public regulation. For an example of this discussion related to the risks of tobacco, see E.K. Ong & S.A. Glantz, “Constructing ‘Sound Science’ and ‘Good Epidemiology’: Tobacco, Lawyers, and Public Relations Firms”, (2001) 91 *American Journal of Public Health*, pp. 1749–1757, at 1749.

¹⁴ On this issue, see Holder & Lee n. 1 *supra*, p. 196–197.

¹⁵ See Article in *La Repubblica* from 31.10.2007, “OGM, l’Italia chiede il bando Ue ‘Basta autorizzazioni facili’.” (“GMOs, Italy asks for EU ban. ‘No more easy authorisations’.”).

¹⁶ The discussion on the next reform of the GMO framework already started. See the proposal submitted by France to the Environmental Council on: <http://register.consilium.europa.eu/pdf/en/08/st07/st07128.en08.pdf> (accessed on 09.07.2008). See also Article on www.euractiv.com from 05.06.2008, “France seeks solution to EU GMO deadlock”, on: <http://www.euractiv.com/en/environment/france-seeks-solution-eu-gmo-deadlock/article-173047> (accessed on 17.07.2008).

governance/new modes of governance in the EU” in particular.¹⁷ Instead, I have chosen to follow a research development that associates the term “governance” with a broader theoretical approach to the analysis of collective political action at national as well as at supranational and global levels.¹⁸ It therefore tries to overcome the “old/new” governance rhetoric, which is, at the moment, predominant in the discussion among legal and political science scholars who deal with European integration. I argue that by trying to distinguish between “old” and “new” governance in the EU’s political processes and by concentrating on those particular practices identified as novel, we are losing the “bird’s-eye view” of the way political co-ordination in the EU takes place. Instead, I suggest understanding the term “governance” not as a particular innovative practice, commonly contrasted with hierarchical regulation, but as an analytical perspective that perceives all political action as de-centralised co-ordination of collective action between interdependent actors, be they national or supranational, private or public.

Analytically, it is more appropriate to understand governance as a generic term for all existent patterns which cope with interdependency^[19] between states as well as between public and private actors, hierarchy as government being only one of these patterns.²⁰

¹⁷ On the ‘new governance’ discussion, see P. Craig & G. de Búrca, *EU Law: Text, Cases, and Materials*, (New York: Oxford University Press, 2008), 4th Edition p. 144 *et seq*; G. de Búrca & J. Scott (eds), *Law and New Governance in the EU and the US*, (Oxford: Hart Publishing, 2006); J. Scott & D. Trubek, “Mind the Gap: Law and New Approaches to Governance in the European Union”, (2002) 8 *European Law Journal*, pp. 1-18, at 1; P. Dabrowska, *Hybrid Solutions for Hybrid Products? EU Governance of GMOs*, (Florence, PhD Thesis at European University Institute, 2006).

¹⁸ On this discussion, see A. Benz, S. Lütz, U. Schimank & G. Simonis (eds), *Handbuch Governance, Theoretische Grundlagen und empirische Anwendungsfelder*, (Wiesbaden, VS Verlag für Sozialwissenschaften, 2007); G.F. Schuppert (ed), *Governance-Forschung*, (Baden-Baden: Nomos, 2005); W. Hoffmann-Riem, “Governance im Gewährleistungsstaat – Vom Nutzen der Governance-Perspektive für die Rechtswissenschaft”, in: G.F. Schuppert, *ibid.*, p. 195; C. Franzius, “Governance und Regelungsstrukturen”, (2006) 97 *Verwaltungsarchiv*, pp. 186–219; H-H. Trute, W. Denkhaus & D. Kühlers, “Governance in der Verwaltungsrechtswissenschaft”, (2004) 37 *Die Verwaltung*, pp. 451–474.

¹⁹ On this term, see J. Coleman, *Foundations of Social Theory*, (Cambridge MA: Belknap Press, 1990), p. 29; referring to him, U. Schimank, “Elementare Mechanismen”, in: Benz *et al.*, n. 18 *supra*, p. 30: “The term ‘coping with interdependency’ refers to the constitutive feature of sociality from the standpoint of actors: ‘actors are not fully in control of the activities that can satisfy their interests, but find some of those activities partially or wholly under the control of others’.”

²⁰ Benz *et al* n. 18 *supra*, p. 13 (translation from German by the author).

In my examination of the GMO framework, it is to this understanding of the term “governance” that I refer and I apply it as an analytical frame. The questions that will guide my consideration of these issues are: How, and through what particular modes, do the actors involved in the authorisation regime co-ordinate themselves? What kind of legal rules and institutions allow for these types of co-ordination? How, if at all, do these processes ensure the legitimacy of the regime? The typical modes of co-ordination that can - so far - be identified from the standpoint of the governance perspective are the market, networks, the hierarchy, and communities.²¹ It should be mentioned, at this point, that the research dealing with governance as an analytical concept in this sense is still evolving,²² and still has to provide clear and elaborate analytical categories. As a consequence, this paper is an attempt to operationalise this concept in the field of GMO regulation in order to contribute to its application in legal regulatory case studies.²³

3. The legislative framework as meta-governance – The institutionalisation of a ‘sound science’ understanding of precaution

3.1. The relevant legal instruments

The legal framework for the authorisation of GMOs in the European Union is composed of several legislative instruments of EU secondary law. I will concentrate on two core measures that are relevant for the questions raised in this paper. The first is a “horizontal” measure, Directive 2001/18 on the Deliberate Release into the Environment of Genetically Modified Organisms (hereinafter the “Deliberate Release Directive”).²⁴ It constituted the first step of the regulatory reform in the area, and has, as its objective, the approximation of the laws, regulations and administrative provisions of the

²¹ These categories are still very coarse and need to be elaborated when being applied to particular analyses in case studies. Their further development will also vary depending on the respective discipline. For further specifications, see A. Benz & S. Lütz & U. Schimank & G. Simonis, “Einleitung”, in: A. Benz *et al.*, n. 18 *supra*, p. 9; for legal perspective, see H-H. Trute, D. Kühlers & A. Pilniok, “Rechtswissenschaftliche Perspektiven”, *ibid.*, p. 240.

²² See Benz *et al.*, *ibid.*

²³ For already existing legal studies employing this concept in other fields, see H-H. Trute, W. Denkhaus, B. Bastian & K. Hoffmann, “Governance Modes in University Reform in Germany – From the Perspective of Law”, in: D. Jansen (ed) *New Forms of Governance in Research Organisations*, (Dordrecht: Springer, 2007), p. 155; H-H. Trute, W. Denkhaus & D. Kühlers, *Regelungsstrukturen der Kreislaufwirtschaft zwischen kooperativem Umweltrecht und Wettbewerbsrecht*, (Baden-Baden: Nomos, 2004).

²⁴ Council Directive 2001/18/EC on the deliberate release into the environment of genetically modified organisms, OJ 2001 L 106/1.

Member States when releasing GMOs into the environment or placing them on the market.²⁵

The second measure is the “vertical” Regulation 1829/2003 on Genetically Modified Food and Feed (hereinafter the “Food and Feed Regulation”)²⁶ that applies only to GMOs used in food or feed products. Both pieces of legislation are based, *inter alia*, upon Article 95 EC, one of the key internal market provisions,²⁷ and they partially overlap in their scope of application. The Directive applies to releases of GMOs into environment (for instance, for experimental purposes, such as field trials) and to placing of them on the market as or in products in general.²⁸ The specific case of the use of GMOs as, or in, food products is covered by the Regulation,²⁹ which leaves, within the scope of the Directive, mainly commercial applications for agricultural cultivation. There are, however, cases in which both pieces of legislation apply, such as the case of a GMO intended for placing on the market (for instance, for agricultural cultivation) *and* for food or feed use. Because of the relevance of the Food and Feed Regulation in these cases of overlapping,³⁰ a stronger emphasis will be placed on the analysis of this “vertical” legal instrument.

Additionally, a third legal instrument will play a role in the following analysis, namely, Regulation 178/2002, which lays down the general principles of food law, and establishes the European Food Safety Authority (hereinafter the “General Food Law Regulation”).³¹ The organisation and activities of the latter, as we will see, are of crucial importance for co-ordination within the GMO regime.

²⁵ Article 1 of Directive 2001/18/EC.

²⁶ Regulation (EC) 1829/2003 on genetically modified food and feed, OJ 2003, L 268/1.

²⁷ Holder & Lee n. 1 *supra*, p. 188.

²⁸ Article 1 of Directive 2001/18/EC.

²⁹ Article 3 (1) of Regulation 1829/2003.

³⁰ In these cases, which are common, a single application can be made under the Food and Feed Regulation, but incorporating the *environmental risk assessment* from the Deliberate Release Directive when there is a ‘deliberate release’ (for example, a crop is planted), see Holder & Lee n. 1 *supra*, p. 189.

³¹ Regulation (EC) laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ 2002, L 31/1.

3.2. The governance perspective

The legislative framework described above needs to be put into the analytical perspective adopted in this paper. Legislative measures that establish the rules and the institutions for a given regulatory area are considered here as a form of “meta-governance”.

[...] legislation [should] be regarded as a form of meta-governance through which, by means of unilateral regulation, a framework for other governance modes is established. In this sense, legislators lay down an institutional framework or a particular governance dimension as well as regulating the interactions between different governance modes.³²

The idea of “meta-governance” expresses a change in the way that we think about how law can effectively regulate societal processes in order to achieve change. It conveys a sceptical position towards the assumption that the legislator can be perceived as being a kind of “ideal observer” who possesses superior knowledge about societal problems and can, therefore, create wise rules and anticipate their impact. “Meta-governance” or governance in general, as defended in this paper, is, therefore, contrasted with the term “steering” (from German: “*Steuerung*”) understood as the intentional “bottom-down” regulation or governing of society through political institutions.³³ The term “governance” aims at overcoming the analytical distinction between legislator as the “steerer” (“*Steuerungssubjekt*”) and society as the “steered object” (“*Steuerungsobjekt*”), which is inherent in the “steering” paradigm. Especially in multi-level systems of governance, such as the EU, in which a plurality of actors is legislating, and the responsibility for setting norms is dispersed, the question of who regulates, or who “steers” whom, becomes unfruitful. The notion of “meta-governance” pre-supposes a legislator whose role is to organise the co-ordination of collective action between various actors through the provision of structures and procedures that would allow for knowledge generation and reflexivity within the very processes of norm implementation.³⁴

³² H-H. Trute, W. Denkhaus, B. Bastian & K. Hoffmann, “Governance Modes in University Reform in Germany – From the Perspective of Law”, in: D. Jansen (ed) *New Forms of Governance in Research Organisations*, (Dordrecht: Springer, 2007), p. 158.

³³ See R. Mayntz, “Governance Theory als fortentwickelte Steuerungstheorie?” in: G.F. Schuppert (ed) *Governance-Forschung. Vergewisserung über Stand und Entwicklungslinien*, (Baden-Baden: Nomos, 2005), p. 12.

³⁴ For further explanation, see Trute *et al.*, n. 21 *supra*, p. 247-248; see, also, H-H. Trute, D. Kühlers & A. Pilniok, “Der Governance-Ansatz als verwaltungsrechtswissenschaftliches Analysekonzept”, in: G.F. Schuppert & M. Zürn (eds), *Governance in einer sich ändernden Welt*,

Stable conventions in the form of experience or the adjustment of conflicting interests cannot be pre-supposed in dynamic and complex regulatory fields and have instead to be generated in the interaction between different actors, while being thought of as ever revisable.³⁵

This perspective seems particularly well-suited to the analysis of the legislative framework for GMOs. As mentioned above, regulation of biotechnology is strongly marked by the difficulty of formulating substantive prescriptive standards to guide the authorisation process due to scientific uncertainty about the risks associated with this technology. The requirements that a GMO food product has to fulfil in order to be authorised are formulated in Article 4 (1) of the Food and Feed Regulation. It states that the product must not:

- (a) have adverse effects on human health, animal health or the environment;
- (b) mislead the consumer;
- (c) differ from the food which it is intended to replace to such an extent that its normal consumption would be nutritionally disadvantageous for the consumer.

It is apparent from this formulation that these substantial requirements provided for by the EU legislator are very indeterminate and need further interpretation.³⁶ To decide whether a product fulfils them, and has, therefore, to be authorised, pre-supposes a set of prior decisions and activities, such as the generation of knowledge about the possible effects of GMOs, of conventions about when these effects will be considered as adverse, of finding definitions regarding what constitutes “misleading” or so-called “substantial equivalence” with conventional food products, *etc.*

In order to organise these processes, the legislator has provided for a “meta-governance” that sets out a framework for the co-ordination of those involved in GMO authorisation. and it is through this “norm production through praxis”³⁷ that the standards for the evaluation of the risks of GM products are developed.

(PVS-Sonderheft), (Wiesbaden, VS Verlag, 2008 (forthcoming)).

³⁵ K-H. Ladeur, “Privatisierung öffentlicher Aufgaben und die Notwendigkeit der Entwicklung eines neuen Informationsverwaltungsrechts”, in: W. Hoffmann-Riem & E. Schmidt-Aßmann (eds), *Verwaltungsrecht in der Informationsgesellschaft*, (Baden-Baden, Nomos, 2000), p. 240.

³⁶ See Forsman n. 8 *supra*, p. 583.

³⁷ Trute *et al.*, “Governance-Ansatz” n. 34 *supra*.

Before identifying the particular modes of governance with which action between the actors is co-ordinated under the current authorisation regime, we should dwell a little on the role of the precautionary principle. The legislative provisions show that the principle has been the guiding idea throughout the establishment of the new framework.³⁸ The Deliberate Release Directive describes its objective in Article 1 as being “in accordance with the precautionary principle”.³⁹ In Recital 8, it also states: “The precautionary principle has been taken into account in the drafting of this directive and must be taken into account when implementing it.” The Food and Feed Regulation is based upon the precautionary principle by its reference to it as a general principle of European food law.⁴⁰ It is not only these provisions, but also a whole set of principles, procedures and institutions established under the new framework, as we will see below, that characterise the authorisation regime for GMOs as an institutionalisation of the precautionary principle.⁴¹

At the level of “meta-governance”, the principle can, therefore, be described as a governance structure that organises action co-ordination within the regime in a specific way. I should, of course, add that the meaning of precaution and its application in risk regulation is a highly disputed subject.⁴² What is, however, important in the context of this examination is to show that the GMO regime institutionalises a particular notion of the term “precaution” – which I call the the notion of “sound science” – which has

³⁸ See Forsman n. 8 *supra*, p. 581.; see, also, Pollack & Shaffer n. 6 *supra*, p. 342.

³⁹ Article 1 Directive 2001/18/EC.

⁴⁰ Article 1 Regulation 1829/2003 refers to the general principles laid down in Regulation 178/2002 amongst which the precautionary principle is defined in Article 7 of the latter.

⁴¹ See H-H. Trute, “Democratizing Science: Expertise and Participation in Administrative Decision-Making”, in: H. Nowotny *et al.*, (eds), *The Public Nature of Science under Assault*, (Tübingen: Springer, 2005), p. 93.

⁴² See E. Vos & F. Wendler, “Food Safety Regulation at the EU Level”, in: E. Vos & F. Wendler (eds), *Food Safety Regulation in Europe. A comparative institutional analysis*, (Antwerpen-Oxford: Intersentia, 2006), p.112 & 126-127, who interview EU officials and stakeholders about their understanding of the principle; For a discussion on the precautionary principle, see E. Fisher, “Precaution, Precaution Everywhere: Developing a ‘Common Understanding’ of the Precautionary Principle in the European Community”, (2002) 9 *Maastricht Journal of European and Comparative Law*, pp. 7-28, at 7; K-H. Ladeur, “The Introduction of the Precautionary Principle into EU Law: A Pyrrhic Victory for Environmental and Public Health? Decision-Making under Conditions of Complexity in Multi-Level Political Systems”, (2003) 40 *Common Market Law Review*, pp. 1455-1479, at 1455; J. Scott, “The Precautionary Principle Before the European Courts”, in: R. Macrory (ed), *Principles of European Environmental Law*, (Groningen: Europa Law Publishing, 2004); T. Christoforou, “The origins and content of the precautionary principle in European Community Law”, in: C. Leben & J. Verhoven (eds) *Le Principe de Precaution – Aspects de Droit International et Communautaire*, (Paris: Editions Panthéon-Assas, 2002), p. 205.

been pre-defined mainly by the European Commission in the run-up to the legislative reform,⁴³ and has been strengthened by the present interpretation of this principle by the European Court of Justice and by the Court of First Instance.⁴⁴

This “sound science” notion of precaution, and its institutionalisation as a “meta-governance” structure, allows for the combination of mainly two modes of governance as modes of action co-ordination in GMO authorisations: hierarchy and networks. We will first look into the elements of hierarchy in the current regime in order to examine its network structures thereafter. I should make it clear, however, that, in regulatory practice, governance modes never appear isolated one from another. Instead, they represent a “mixture” of modes,⁴⁵ interacting with each other and providing a somewhat blurred picture at times.

4. Imperative regulation through prior authorisation – decision-making outcome

A hierarchical mode of co-ordinating action among actors becomes apparent when we look at the effect that the final authorisation decision produces on the actors involved, and thus when we look at the outcome of the decision-making process. At this point, we should distinguish between two structural forms that influence the type of actors involved – the relationship between the public authority at EU level and the private applicant company on the one hand, and the relationship between the central level and the Member States on the other. With regard to the first relationship, Article 4 (2) Food and Feed Regulation states that no person should place a GM food product on the market unless it is covered by a prior authorisation, which is granted by the European Commission and the Council together in the Comitology procedure. The same requirement is formulated in relation to the competent national authorities responsible for the authorisation procedures under the Deliberate Release Directive.⁴⁶ In this way, the legislative framework

⁴³ See Communication from the Commission on the Precautionary Principle COM (2000) 1.

⁴⁴ See Case C-236-1 *Monsanto Agricoltura Italia SpA v. Presidenza del Consiglio dei Ministri* [2003] ECR I-8105; Case E-3/00 *EFTA Surveillance Authority v. Norway* [2001] 2 CMLR 47; Case T-13/99 *Pfizer Animal Health SA v Council* 2002 ECR II-3305; For an overview of this jurisprudence, see E. Fisher, *Risk Regulation and Administrative Constitutionalism*, (Oxford: Hart Publishing, 2007) p. 229 *et seq.*

⁴⁵ See H. de Boer, J. Enders & U. Schimank, “On the Way to New Public Management? The Governance of University Systems in England, the Netherlands, Austria, and Germany”, in: Jansen n. 32 *supra*, p. 138.

⁴⁶ See Articles 6 and 13 of Directive 2001/18.

establishes a principle of prior authorisation for every GMO marketed and/or released in the EU.⁴⁷ This constitutes a hierarchical,⁴⁸ “command and control” type of regulation, because the decision of the public authority is compulsory for the private applicant. The two parties co-ordinate⁴⁹ their action in relation to each other by the mechanism of “order” set up through a system of enforceable legal norms; thus, the commercialisation of GMOs is regulated not through the mechanisms of the “market” as mode of governance (through price),⁵⁰ but through public authorisation.

Hierarchy is also found in the relationship between the central EU level and the Member States. Under the Food and Feed Regulation, the new framework has centralised the authorisation procedure, thereby establishing the so-called “one door – one key” principle. Unlike under the old regime, the role of the national competent authorities in granting GMO authorisations has been limited, and it is now the Commission and the Council who directly take the decisions regarding the applicant. Once an authorisation has been granted, it is valid and enforceable *vis-à-vis* all the Member States, and the GMO product is able to circulate throughout the entire common market. Although the Deliberate Release Directive has – in principle – preserved the “old” system, whereby national authorities decide upon GMO applications, in practice, at least in the area of commercial releases into the environment,⁵¹ the decision-making is carried out at the central level as well. The reason for this is that, in cases where objections to an application are raised and upheld by a national authority from other Member States or the Commission, the application procedure is elevated to the Community level,⁵² and is, in this case, equivalent to the procedure under the Food and Feed Regulation. So far, and since the new framework came into force, such objections have been the case in every single application for commercial release;⁵³ bearing in mind the contestations regarding GMOs, this

⁴⁷ See Holder & Lee n. 1 *supra*, p. 187.; for an example of the opposite model of regulation, see the US system in D. Vogel, “The Politics of Risk Regulation in Europe and the United States”, in: H. Somsen, T. Etty, J. Scott & L. Krämer, *Yearbook of European Environmental Law*, Volume 3, (Oxford: Oxford University Press, 2004) 1; see, also, Skogstad n. 6 *supra*, p. 249 *et seq.*

⁴⁸ For ‘hierarchy’ as governance mode, see Schimank n. 19 *supra*, p. 29; M. Döhler, “Hierarchie”, in: Benz *et al.*, n. 18 *supra*, p. 46.

⁴⁹ In the governance perspective employed here, hierarchy is also considered as a mode of co-ordination. See Benz *et al.*, n. 18 *supra*.

⁵⁰ For “market” as governance mode, see Schimank n. 19 *supra*, and R. Czada, “Markt”, in: Benz *et al.*, n. 18 *supra*, p. 68.

⁵¹ Covered by Part C of Directive 2001/18.

⁵² See Articles 18 and 28 (1) of Directive 2001/18.

⁵³ See Kritikos, n. 2 *supra*, p. 166.

comes as no surprise. It should also be mentioned that the Deliberate Release Directive achieves a degree of harmonisation in the field of GMO releases that is almost exhaustive and therefore leaves little scope for variations in national implementation.⁵⁴ Moreover, due to the principle of the pre-emption of national power because of the occupation of the field,⁵⁵ national unilateral derogations from the harmonised GMO regime are subject to strict justificatory requirements.⁵⁶

All this shows, at first glance, that the legislative framework for GMO authorisation establishes a hierarchical relationship between the EU public authority and the private applicant on the one hand, and between the central level and the Member States on the other. The hierarchy in the public-private relationship can be seen as a first consequence of the precautionary principle, as applied to this framework. The intervention of the EU legislator in the realm of the private freedom of enterprise by means of the prior authorisation requirement is justified by the uncertainty of the existence and scope of the potential risk of the GMOs. Thus, it is an expression of the precautionary principle.⁵⁷

5. Co-ordination through networks – the process of decision-making

If we now turn to the *process* that leads to the adoption of the final decision – the authorisation or the refusal of marketing – a fairly different picture comes to light, which modifies the findings of the “command and control” regulation described above. The emergence of networks as a governance mode within the regime comes from another principle set out in the legislative framework – the principle of risk analysis as defined in Articles 3 and 6 of the General Food Law Regulation.⁵⁸ Every authorisation decision

⁵⁴ See T. Christoforou, “The regulation of Genetically Modified Organisms in the European Union: The Interplay of Science, Law and Politics”, (2004) 41 *CMLRev*, pp. 637–709, at 671–672, who refers to Articles 1 (1) and 22 of the Directive 2001/18. An exception to the complete harmonisation is the matter of so-called “co-existence” between GM and conventional crops, which remains, at least partially, under the competence of the Member States. See Article 26a as inserted into Directive 2001/18 by Regulation 1829/2003; see, also, Holder & Lee n. 1 *supra*, p. 202.

⁵⁵ See Christoforou, n. 54 *supra*, p. 671, with further references.

⁵⁶ Either through the so-called “safeguard-clauses” foreseen in the secondary acts, such as Article 23 of Directive 2001/18, or by virtue of Article 95 EC. On the latter, see Holder & Lee n. 1 *supra*, p. 206.

⁵⁷ See Forsman, n. 8 *supra*, pp. 582–583.

⁵⁸ Although not mentioned explicitly in Directive 2001/18, its provisions follow the logics of this principle in the same way as the provisions of Regulation 1829/2003, especially when

has to be preceded by a risk analysis of the product in question. This process serves the purpose of evaluating whether the substantive requirements for authorisation have been fulfilled, and consists of “three interconnected components: risk assessment, risk management and risk communication”.⁵⁹ The institutional embodiment of this definition is the creation of two main arenas of authorisation decision-making.⁶⁰ The first one is the arena of *risk assessment*, in which actors, such as scientific and administrative experts from all over the European Union, the applicant company and civil society co-ordinate their action under the auspices of the European Food Safety Authority (hereinafter the EFSA). The second arena is that of *risk management*, in which the responsibility for taking the final decision is assigned to the Commission, a regulatory committee,⁶¹ and the Council co-ordinating among themselves in the framework of the Comitology procedure.

It is in this division of the risk analysis process into two phases of risk assessment and risk management that the “sound science” notion of the precautionary principle comes to the fore in this framework. Risk assessment is defined in Article 6 (2) of General Food Law Regulation as based upon “the available scientific evidence and undertaken in an independent, objective and transparent manner”. This extract from the relevant regulation reveals that it is the *risk assessment* that is supposed to provide for the scientific legitimacy of the decision-making, and that this legitimacy is based upon reliance on an objective and independent source of scientific knowledge. At the same time, the political legitimacy has to be ensured in the phase of risk management. The risk managers of the European Union should take the results of scientific assessment of EFSA into account, but should also consider other legitimate factors as well as the precautionary principle when making the final decision (Article 6 (3) of General Food Law Regulation). It becomes clear, at this point, that the procedural legitimacy, as referred to above,⁶² of the new framework derives from this separation between the two kinds of legitimacy. It is now time to consider some of the background assumptions and implications of this concept of precaution in more detail in order to see that its realisation within the “norm production through praxis”⁶³ of the

authorisation procedure under the Directive is elevated to Community level.

⁵⁹ Article 3 (10) of Regulation 178/2002.

⁶⁰ The phase of risk communication will not be considered closer here because it does not directly refer to the decision-making process on market authorisations.

⁶¹ In the case of a GM food product, it is the Standing Committee on Animal Health and Food Chain, see Article 35 of Regulation 1829/2003; in the case of an application under Directive 2001/18, see Article 30.

⁶² See, above, at 1. “Introduction”.

⁶³ See, above, at 3.2. “The governance perspective”.

authorisation regime creates a bias in favour of the scientific justification of the decisions taken.

5.1 The “sound science” notion of the precautionary principle and its foundations

The “sound science” notion of the precautionary principle chosen by the EU legislator in the GMO framework mirrors the approach towards precaution that has already been taken by the Community institutions in the run-up to the legislative reform. The Commission Communication on the Precautionary Principle from the year 2000 can be considered as the main foundation and the most influential reflection of this approach.⁶⁴ According to this Communication, environmental and public health decision-making in the EU is characterised as a three-step process: the scientific process of risk assessment; the political process of risk management; and the process of risk communication.⁶⁵ The precautionary principle is considered to be applicable only at the stage of risk-management, where “an eminently political decision” about the risk level that is “acceptable” to the society that has to bear it,⁶⁶ is taken. Another condition for the application of the principle is that the precedent risk assessment has identified a “potential risk”.⁶⁷

Recourse to the precautionary principle pre-supposes that potentially dangerous effects deriving from a phenomenon, product or process have been identified, and that scientific evaluation does not allow the risk to be determined with sufficient certainty. The implementation of an approach based on the precautionary principle should start with a scientific evaluation, as complete as possible, and where possible, identifying at each stage the degree of scientific uncertainty.⁶⁸

By assuming that a separation between *risk assessment* as the identification of “potential risk”, and *risk management* as the political decision about the “acceptable” level of risk is possible, the Commission creates antagonism⁶⁹

⁶⁴ Communication from the Commission on the Precautionary Principle COM (2000) 1 final.

⁶⁵ Commission Communication at 2.

⁶⁶ Commission Communication at 15.

⁶⁷ See E. Fisher, *Risk Regulation and Administrative Constitutionalism*, (Oxford: Hart Publishing, 2007), p. 226.

⁶⁸ Commission Communication n. 64 *supra*, p. 3.

⁶⁹ See, in favour of such an antagonism, Vogel n. 47 *supra*; critical comments in: P. von Zwanenberg & A. Stirling, “Risk and Precaution in the US and Europe: a response to Vogel”, in: H. Somsen, T. Etty, J. Scott & L. Krämer, *Yearbook of European Environmental Law*, Volume 3, (Oxford: Oxford University Press, 2004), p. 47; see, also, L. Levidow & C. Marris, “Science and Governance in Europe: Lessons from the Case of Agricultural Biotechnology”, (2001) 28

between science as an objective source of knowledge and the non-scientific elements of decision-making, especially with regard to value judgements. Although it states that decision-makers need to be aware of the degree of uncertainty attached to scientific results,⁷⁰ in reality, it reveals a very limited understanding of “scientific uncertainty”⁷¹ as the pre-condition for the application of the precautionary principle.⁷² The risk assessment accomplished by scientists has to provide for some proof of the possibility and probability of potential risk or negative effects. Risk assessment is, therefore, defined as consisting of hazard identification, hazard characterisation, appraisal of exposure, and risk characterisation.⁷³

There are two kinds of problems with this approach to precaution that are worth considering in further detail here.⁷⁴ Firstly, the understanding of concepts such as “scientific uncertainty”, “risk” and “science” which underlie this approach can be considered as being flawed.⁷⁵ The reliance upon science as an objective source of knowledge disguises the complexity of scientific evaluation under conditions of “scientific uncertainty” as well as the “social embedment” of scientific reasoning. Secondly, such a conception of science exercises a strong attraction for decision-makers to justify their actions predominantly by recourse to the authority of *apparently* objective scientific expertise. It, therefore, creates an imbalance between the scientific and the other political considerations when it comes to the decision on the “acceptable” level of risk in risk management.

With regard to the first set of problems, it is in the social science and regulatory literature on risk research that we find inconsistencies with the approach to precaution as expressed in the Commission’s Communication (and perpetuated in the GMO framework). When risk assessors are required to identify the probability of a risk, then, it is pre-supposed that they have

Science and Public Policy, pp. 345–360, at 349.

⁷⁰ Commission Communication n. 64 *supra*, p. 3.

⁷¹ See Fisher n. 67 *supra*, p. 227.

⁷² See Case C-236-1 *Monsanto Agricoltura Italia SpA v. Presidenza del Consiglio dei Ministri*, [2003] ECR I-8105.

⁷³ Commission Communication n. 64 *supra*, p. 13.

⁷⁴ For further discussion, see Fisher n. 67 *supra*; Forsman n. 8 *supra*; Holder & Lee n. 1 *supra*; see, also, Kritikos n. 2 *supra*, Chapters 6 and 7, who, however, does not discuss it from the perspective of the precautionary principle.

⁷⁵ For a discussion of these concepts, see von Zwanenberg & Stirling n. 69 *supra*; B. Wynne, “Uncertainty and Environmental Learning: Reconceiving Science in the Preventive Paradigm”, (1992) 2 *Global Environmental Change*, pp. 111–127, at 111; A. Stirling, “Risk, Uncertainty and Precaution”, in: F. Berkhout, F. Leach & M. Scoones (eds), *Negotiating Environmental Change*, (Cheltenham: Edward Elgar, 2003).

scientific knowledge about the risks of a form of technology. However, this knowledge is usually not available in the situation of “scientific uncertainty”. Given that it is an inherent condition of new technological innovations, “scientific uncertainty” is “a condition under which there exists an insufficient empirical or theoretical basis for the assigning of probabilities to reflect likelihoods”.⁷⁶ In other words, uncertainty precludes *precisely* the activity that is expected from the risk assessors in the GMO framework.⁷⁷

Apart from adopting a notion of risk assessment in the narrow sense of “hazard characterisation”,⁷⁸ the current framework also departs from a traditional positivist conception of the relationship between law and science, in which “science is the infallible reflection of the objective world”.⁷⁹ It, therefore, misconceives the fact that scientific reasoning and knowledge is not something that is purely objective, but is value-laden and socially embedded, instead.

Knowledge inevitably carries with it, [...], not just technical elements concerned with representing processes in an objective manner. It will also carry with it assumptions about how social interaction should take place and be understood, and also assumptions about questions of personal and collective identity in that these are necessarily informed or challenged by new forms of knowledge.⁸⁰

The traditional “scientific paradigm”⁸¹ refers to the possibility of establishing a purely rational basis for legal decision-making, which aims at avoiding arbitrary decisions. Scientific expertise, under this condition, works with principles of the laws of nature, upon which it bases its objective knowledge in order, for instance, to predict certain casual effects between different processes or events and their probabilities. In addition, a societal experience with the product or technology in question is available and can serve as a stable orientation for decision-making.⁸² In fact, it is argued that this

⁷⁶ See von Zwanenberg & Stirling n. 69 *supra*, p. 44.

⁷⁷ See von Zwanenberg & Stirling, *ibid.*, who state that the requirement of identifying the likelihood and magnitude of a risk only considers numerical estimates of risk and, therefore, pre-supposes a rather narrow, numerical notion of risk assessment. Other dimensions of risk that cannot be estimated numerically are likely to be neglected.

⁷⁸ Further explanation on the difference in von Zwanenberg & Stirling n. 69 *supra*, p. 48.

⁷⁹ See Forsman n. 8 *supra*, p. 580.

⁸⁰ See D. Chalmers, “‘Food For Thought’: Reconciling European Risk and Traditional Ways of Life”, (2003) 66 *Modern Law Review*, pp. 532-566, at 544.

⁸¹ See Holder & Lee n. 1 *supra*, p. 12 *et seq.*

⁸² See K-H. Ladeur n. 4 *supra*, p. 22 *et seq.*

conception of pre-existent and stable knowledge becomes obsolete, at least in areas of technological innovations characterised by “scientific uncertainty”. Instead, we are faced with a transformation of knowledge, in which:

[...] knowledge is no longer ‘given’ and made accessible by the mechanisms of elected representation or by the concentration of specialist expertise, but is, instead, thought to be ‘constructed’ and renewed in a process of collective learning that draws support from social pluralism.⁸³

In this sense, scientific risk assessment constitutes what is ultimately a *subjective* process that can lead to different outcomes, depending on the particular framing assumptions adopted at the beginning of an analysis. These assumptions, in turn, are not determined by the scientists, but by those who query them, the political risk-managers. To give an example, the European Commission, as the risk manager of GMO authorisations, can formulate the questions to be addressed by the EFSA in a particular risk assessment opinion, and can prioritise certain dimensions of the risk over others. It can, for instance, remove from its mandate the consideration by the EFSA of the question of the so-called “co-existence” between conventional and GM crops; whether this question belongs to risk assessment or to risk management is, however, highly disputed, because of the complex interconnection of socio-economic problems of “co-existence” (for conventional and organic farming) with environmental concerns (the effects on biodiversity).⁸⁴ The framing assumptions of scientific reasoning are, therefore, an expression of *subjective* value judgements and interests,⁸⁵ which, in the narrow understanding of risk assessment as a purely *objective* scientific matter, remain concealed.

Bearing in mind this kind of “sound science” understanding of the risk assessment underlying the GMO authorisation regime, it comes as no surprise that risk managers tend to privilege the scientific factors of decision-making over those of political or socio-economic nature. In fact, the latter are perceived as bringing the danger of arbitrariness and/or protectionism to bear on the decision-making. The Commission Communication states that “[...] the precautionary principle can under no circumstances be used to justify the

⁸³ See J. Vignon, “Governance and collective adventure”, in: O. de Schutter, N. Lebessis & J. Paterson (eds) *Governance in the European Union*, (Luxembourg, Office for Official Publications, 2001).

⁸⁴ See Chalmers n. 10 *supra*, p. 662; see, also, Holder & Lee n. 1 *supra*, p. 202 *et seq.*

⁸⁵ See von Zwanenberg & Stirling n. 69 *supra*.

adoption of arbitrary decisions”.⁸⁶ The best way to avoid any suspicion of protectionism would, therefore, seem to be to base oneself on the authority of scientific “facts”.

Science has a central role in legitimising environmental law and policy: an appeal to the ‘facts’, as established by science, is used to pre-empt and undermine criticism. Although, [...], there are inherent difficulties with relying on science in this area, the apparent objectivity and testability of science, seemingly above the fray of divided interest and political advantage, can be extremely attractive to politicians and to lawyers.⁸⁷

The consequence of the “sound science” approach is that the political factors in the risk management decision-making are neglected⁸⁸ – a conduct that is contrary to the wording of the legislative provisions in the GMO framework, which define risk management as political decision-making. The imbalance between scientific and other legitimate factors is, however, immanent upon the strict distinction between risk assessment and risk management, at least when it creates a tension between a supposedly objective science and political factors or value judgements.

In order to illustrate and back up these findings further, in the following sections, I will explore, in more detail, how the “sound science” notion of the precautionary principle is implemented in the different arenas of decision-making of GMO authorisation and how it influences the interplay of different governance modes in the regime.

5.2. Risk assessment – scientific self-governance through expert networks

The main institutional innovation of the EU legislative reform in the area of food law in general, and in that of GMO regulation in particular, has been the establishment of the EFSA as the main actor responsible for risk assessment for GMO authorisations. At first sight, the creation of this authority suggests a centralisation of risk assessment practices and, more generally, a tendency towards the harmonisation of regulatory practices to the detriment of national competences in the GMO area. To a certain degree, this is true for GMO releases under the Deliberate Release Directive, where a

⁸⁶ Commission Communication n. 64 *supra*, p. 13.

⁸⁷ Holder & Lee n. 1 *supra*, p. 12.

⁸⁸ See Kritikos n. 2 *supra*, p. 159 *et seq.*, who arrives at similar conclusions in his evaluation of the Deliberate Release Directive authorisation regime.

diversity of national safety assessments is now usually replaced by a single risk assessment by the EFSA.⁸⁹ A closer look at the legislative provisions of the General Food Law Regulation reveals, nonetheless, a somewhat different picture. We will see that the mission of the EFSA can, in principle, be characterised as the “decentralised integration”⁹⁰ of the national scientific authorities and the other organisations which carry out similar tasks in the area of food safety and GMOs. Furthermore, it can be described as the integration of expert networks through which the different actors of the GMO regime from the different societal spheres are linked together and co-operate in order to generate knowledge and safety standards. By integrating these networks, the EFSA itself constitutes a network of experts which provides for structures of scientific co-ordination within this area in the EU.⁹¹ It is granted a certain independence⁹² from the risk managers in the way it performs its work and can, therefore, be perceived as a network of scientific self-governance.

5.2.1. Decentralised integration of national scientific authorities

With regard to the integration of national authorities, Article 22 (7) of the General Food Law Regulation, after mentioning that the EFSA should be a point of reference for risk assessment in the European Union, also states, “*It shall act in close co-operation with the competent bodies of the Member States carrying out similar tasks to these of the Authority.*” The EFSA’s tasks, as described in Article 23 of the same Regulation, include the establishment of “*a system of networks of organisations operating in the fields within its mission*” and the

⁸⁹ For regulation of GMO as food products a centralised risk assessment in scientific committees of the Commission already took place under the Novel Food Regulation 285/97 that has been applicable to them before the reform.

⁹⁰ E. Chiti, “Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies”, (2004) 10 *European Law Journal*, pp. 402–438, at 402; see, also, T. Groß, “Kooperation zwischen Europäischen Agenturen und nationalen Behörden”, (2005), *Europarecht*, pp. 54–68, at 54.

⁹¹ The term network is understood as an analytical category in the sense of “an entity in which different parts are loosely linked, but not fixed together. The single elements are autonomous from, yet not necessarily equal to each other.” See H. Türk & H. Hofmann, “An Introduction to EU Administrative Governance”, in: H. Hofmann & H. Türk (eds) *EU Administrative Governance*, (Cheltenham: Edward Elgar, 2006); see, also, G. Sydow, *Verwaltungskooperation in der Europäischen Union*, (Tübingen: Mohr Siebeck, 2004), p. 79: “In network structures, the organisational entities which constitute the network are not dissolved. Networks are composed of the representatives of these organisational entities and are internally structured. Being flexible and yet not only spontaneous, but rather relatively permanent and institutionalised co-operation structures, networks themselves become administrative structures, the quality of which cannot be understood through reasoning in hierarchies.” (Translation from German by the author).

⁹² See Article 37 of Regulation 178/2002.

organisation of their operation as formulated in paragraph (g). Finally, Article 36 also describes the “*Networking of organisations operating in the fields within the Authority's mission*” as a basic principle of its operation. Its first paragraph describes the aim of such networking:

The Authority shall promote the European networking of organisations operating in the fields within the Authority's mission. The aim of such networking is, in particular, to facilitate a scientific *co-operation*⁹³ framework by the co-ordination of activities, the exchange of information, the development and implementation of joint projects, the exchange of expertise and best practices in the fields within the Authority's mission.

The emphasis put on the terms “networking” and “co-operation” suggests a heterarchical, rather than hierarchical, relationship between the EFSA and the national scientific authorities. The legislative framework provides for a conception of the EFSA, not as a centralised body whose authority would exceed that of the national risk assessors, but as a co-ordinator and mediator “at the heart” of the European scientific food safety network. The activities of the EFSA show that it puts a strong emphasis on this co-operation. It has, for instance, established so-called “focal points” in several Member States, which are “national networks composed of risk managers, national authorities, research institutes, stakeholders and consumers”, and which are responsible for ensuring co-operation in risk assessment between the central and national levels.⁹⁴ There is also the direct sharing of tasks with certain appointed national bodies and the provision of the EFSA with technical and scientific support.⁹⁵ The strongest expression of the absence of, at least, formal hierarchy between the opinion expressed by EFSA and that of another scientific authority is the provision in Article 30 of General Food Law Regulation. It provides for a mechanism of mediation between diverging

⁹³ Author's emphasis.

⁹⁴ See Strategy for Co-operation and Networking between the EU Member States and the EFSA adopted by the Management Board on the 19.12.2006 to find on: http://www.efsa.europa.eu/EFSA/PartnersNetworks/efsa_locale-1178620753812_National_Focal_Points.htm (accessed on 24.04.2008).

⁹⁵ See Article 36 (2) of Regulation 178/2002 together with its implementing Commission Regulation 2230/2004, OJ 2004 L379/64. See, also, EFSA webpage on: http://www.efsa.europa.eu/EFSA/1178620777517/efsa_locale-1178620753812_article_36_cooperation.htm (accessed on 24.04.2008). Another involvement of national competent authorities is through the requirement for them to provide EFSA with an environmental risk assessment in the case of the authorisation of GMOs to be used in seeds, see Article 6 (3) (c) of Regulation 1829/2003; for further reading, see Dabrowska n. 17 *supra*, p. 186 *et seq.*

scientific opinions by stating that the conflicting bodies are obliged to co-operate and *either* resolve the divergence *or* present a joint document which clarifies the contentious issues and which will be made public.⁹⁶

This system of co-operation and networking has led some authors to characterise it as establishing multiple accountability and mutual justification between the different risk assessors in the European Union, and thus as also providing for reflexivity.⁹⁷ Bearing in mind that, factually, it is the opinion of the EFSA that will probably have more weight for the Commission as the final decision-maker, which decreases the incentive for the EFSA to justify itself in front of other risk assessors, such a characterisation might appear to be slightly too optimistic. Nevertheless, a heterarchical form of co-ordination and co-operation between the EFSA and the national authorities can be regarded as the “ideal” mode of governance as envisaged by the legislator.

5.2.2. *Integration of actors from different societal spheres*

Apart from the integration of national risk assessors, the institutional design of the EFSA more broadly provides for the creation of networks, which link and integrate actors from different societal spheres. The Authority is, therefore, described as:

[...] a transnational governance regime which cuts across national/supranational and public/private distinctions, and which both guides and is accountable to scientific communities, national food authorities and civic society. As these networks inform its constitution, it cannot be seen as something starkly autonomous from them, but something that both contributes to their constitution and is constituted by them.⁹⁸

This can be illustrated by looking at the composition of the organs of the EFSA. The General Food Law Regulation establishes four bodies which constitute the internal structure of the Authority: the Management Board, the Executive Director, the Advisory Forum, a Scientific Committee, and Scientific Panels.⁹⁹ This legislative set up, together with the EFSA’s own initiatives in relation to civil society stakeholders, enables a co-ordination of actors through networks, at which we will take a closer look in the following.

⁹⁶ For more on the “divergent opinion clause”, see Vos & Wendler n. 42 *supra*, p. 111.

⁹⁷ See Chalmers n. 10 *supra*, p. 6.

⁹⁸ See Chalmers n. 80 *supra*, p. 538.

⁹⁹ Article 24 of Regulation 178/2002.

The Management Board

This organ of the EFSA, which is the main operational and control body, can be characterised as a network which brings different societal interests together.¹⁰⁰ In contrast to many other European agencies, it is not composed of national representatives, but of 14 independent experts and one member from the Commission. Four of the experts must represent consumer organisations or other interests in the food chain.¹⁰¹ In fact, the EFSA's current composition of the Management Board includes only technical experts of food safety, mainly with a regulatory or academic background, and only one person who represents a European consumer body.¹⁰² This practice narrows down the Board's function to the representation of the different scientific or technical aspects of food safety.¹⁰³

The Advisory Forum

This body is a relatively new organ in the institutional structure of European Agencies. It is composed of the national representatives of competent bodies that undertake similar tasks to that of the EFSA.¹⁰⁴ It is the core of a network which links national risk assessors with the EFSA,¹⁰⁵ and thus accomplishes the above-described function of the "decentralised integration" of national authorities in the framework of European risk assessment. One of the tasks of the Advisory Forum is to "constitute a mechanism for an exchange of information on potential risks and the pooling of knowledge".¹⁰⁶

¹⁰⁰ See Chalmers n. 80 *supra*, p. 538; K. Kanska, "Wolves in the clothing of sheep? The case of the European Food Safety Authority", (2004) 29 *European Law Review*, pp. 711-727, at 715.

¹⁰¹ See Article 25 (1) Regulation 178/2002; For more about the composition, tasks and appointment of the Management Board, see Vos & Wendler n. 42 *supra*, p. 77.

¹⁰² See the list of members on:

http://efsa.europa.eu/EFSA/AboutEfsa/WhoWeAre/ManagementBoard/efsa_locale-1178620753812_Members.htm (access on 24.04.2008).

¹⁰³ The provision of Art. 25 (1) Regulation 178/2002 seems to be open though to the appointment of experts in other than technical domain of food safety, such as for instance, social scientists or experts in socio-economic evaluation of risk. The legal formulation is rather vague: "The members of the Board shall be appointed in such a way as to secure the highest standards of competence, a broad range of relevant expertise ..." It does not specify what kind of expertise is required.

¹⁰⁴ Article 27 of Regulation 178/2002.

¹⁰⁵ Similarly K. Szawlowska, "Risk Assessment in the European Safety Regulation: Who is to Decide Whose Science is Better? *Commission v. France and Beyond* [...]", (2004) 5 *German Law Journal*, pp. 1259-1279, at 1263.

¹⁰⁶ Article 27 (4) Regulation 178/2002.

The GMO Panel

The scientific panel on GMOs is one of the EFSA's current nine scientific panels and is the main scientific actor which provides opinions on risk assessment in the GMO authorisation procedures.¹⁰⁷ It can be considered as a scientific network that gathers independent experts with different qualifications and backgrounds. The Panel is composed of independent scientists, who are appointed by the Management Board upon a proposal from the Executive Director following the publication of an open competition. Their term of office is three years, and is renewable.¹⁰⁸ The current Panel, established in June 2006, comprises twenty scientists of various nationalities as well as *ad hoc* working groups that can be set up to deal with specific matters and involve external scientists in the work of the Panel. It is specified that the scientific experts "shall undertake to act independently of any external influence".¹⁰⁹ The main mechanisms for securing this are annual written declarations of commitments and interests.¹¹⁰

Moreover, all the experts, including the external ones, are obliged to make declarations of interests at the start of every meeting in which they participate.¹¹¹ Although the meetings of the Panels are not open to the public, they can organise public hearings on matters of risk assessment. There has, for example, been a stakeholder consultation in relation to a draft guidance document for the risk assessment of GMOs¹¹² as well as a technical meeting with different environmental NGOs on the risk assessment of GMOs.¹¹³ The scope of the issues discussed in these consultations was, however, limited to technical issues.

The Stakeholder Consultative Platform

The main¹¹⁴ embodiment of public participation in the process of risk assessment is the establishment by the EFSA of a Stakeholder Consultative

¹⁰⁷ For more about the work of the Panel, see Dabrowska n. 17 *supra*, p. 179 *et seq.*

¹⁰⁸ Article 28 (5) Regulation 178/2002.

¹⁰⁹ Article 37 (2) Regulation 178/2002.

¹¹⁰ Article 37 (2).

¹¹¹ Article 37 (3).

¹¹² See, on EFSA website: http://efsa.europa.eu/EFSA/efsa_locale-1178620753812_1178620771347.htm (accessed on 24.04.2008).

¹¹³ See, on EFSA website: http://efsa.europa.eu/EFSA/efsa_locale-1178620753812_1178620783103.htm (accessed on 24.04.2008).

¹¹⁴ Other forms of public involvement in EFSA's work are the EFSA Annual Colloque for stakeholders, the organisation of *ad-hoc* technical meetings, conference or colloquia as well as *ad hoc* consultations of the public on different issues of EFSA's work, see webpage:

http://efsa.europa.eu/EFSA/PartnersNetworks/efsa_locale-1178620753812_StakeholderInitiatives.htm (accessed on 28.04.2008).

Platform as an institutionalised form of stakeholder involvement.¹¹⁵ Its creation is not foreseen in the legislative framework, but follows a general requirement stipulated in Article 42 of the General Food Law Regulation according to which the EFSA shall “develop effective contacts with consumer representatives, producer representatives, processors, and any other interested parties”. It should be mentioned that this is a very vague formulation that leaves considerable scope of discretion to the EFSA. The platform is composed of EU-wide stakeholder organisations operating in the food chain. It is set up to advise the Executive Director on the general issues regarding the work of the EFSA, and, in particular, the impact of its work on stakeholders. It can, *inter alia*, advise on methodologies and provide information and co-operation at technical level.¹¹⁶ The membership of the platform is determined by the EFSA and includes such organisations as, for example, Greenpeace or BEUC (the European Consumers' Organisation).¹¹⁷ The permanent institutionalisation of the platform presents another example of network co-ordination in the arena of risk assessment, this time integrating civil society stakeholders into the overall administrative network of experts.

5.2.3. A strictly technical notion of risk assessment – deliberation failed

The above overview of EFSA's network and co-operation structures presents us with a picture that can be described as that of a transnational expert network. Its function is to provide for a permanent and institutionalised integration of experts and civil society in order to exchange information and generate the knowledge required for the assessment of the risks relating to GMO authorisations. A truly multilevel and transnational risk assessment regime that pools the knowledge of actors from different levels and spheres of society (regulation, science, organised civil society) seems to be installed. Thus, the framework provided by the legislator allows – in principle – for an inclusive structure of governance. At this point, the question arises as to whether the interaction between the actors within this network structure actually presents deliberation¹¹⁸ about the possible risks of GMOs. The term

¹¹⁵ See Management Board of EFSA from 12.09.2006, “Stakeholder Consultative Platform – Terms of Reference” on:

http://efsa.europa.eu/EFSA/PartnersNetworks/StakeholderInitiatives/efsa_locale-1178620753812_EFSAConsultativePlatformAndArchive.htm (accessed on 24.04.2008).

¹¹⁶ *Ibid.*, at 2.

¹¹⁷ See List of Member Organisations on:

http://efsa.europa.eu/EFSA/1178620924692/efsa_locale-1178620753812_membership.htm (accessed on 24.04.2008).

¹¹⁸ See J. Habermas, *Between Facts and Norms*, (Cambridge MA: MIT Press, 1996); see, also, G. Skogstad, “Legitimacy and/or Policy Effectiveness?: Network governance and GMO Regulation in the European Union”, (2003) 10 *Journal of European Public Policy*, pp. 321–338, at

“deliberation” is used here in the “*Habermasian*” sense of a discursive process based upon persuasion and the exchange of arguments, which provides an opportunity for open debate in which *all* the contending positions and interests in GMO regulation are included.¹¹⁹ It would, therefore, also need to include “other legitimate factors”, such as ethical and socio-economic factors, in the risk evaluation co-ordinated by the EFSA. When thinking about this question, we need to relate it to the notion of the precautionary principle as previously discussed in this paper. The legislative framework institutionalises a “sound science” narrative of precaution that is based upon a strict separation between *risk assessment* and *risk management*, and, on the narrow definition of the former as a purely technical scientific matter pursued by objective science.¹²⁰

In consequence of this narrow interpretation, co-ordination between the actors involved in risk assessment under the auspices of the EFSA is limited to a mutual consultation regarding the technical aspects of risk assessment which is performed by the scientific experts. It does not embrace socio-economic risks or ethical concerns and thus cannot be characterised as deliberation.¹²¹ Experts on the socio-economic dimensions of risk, for example, social scientists or economists, are not included in the composition of the Management Board.¹²² The EFSA’s officials consider their task to be the provision of objective and independent science-based advice grounded in the most up-to-date and reliable scientific information and data available: excellence in science is, to them, the core value of the Authority.¹²³

To conclude, the inclusive governance structure that is – in principle – provided for by the legislative framework comes to be undermined by this narrow definition of risk assessment and the EFSA’s mandate to consider only

325; E.O. Eriksen & J.E. Fossum (eds), *Democracy in the European Union: Integration through Deliberation?* (London: Routledge, 2000).

¹¹⁹ See *ibid.*, and J. Black, “Proceduralizing Regulation: Part I”, (2000) 20 *Oxford Journal of Legal Studies*, pp. 597–614, at 597; with a view on comitology Ch. Joerges & J. Neyer, “Transforming strategic interaction into deliberative problem-solving: European Comitology in the foodstuffs Sector”, (1997) 4 *Journal of European Public Policy*, pp. 609–625, at 609.

¹²⁰ On the problems of the exclusion of other legitimate factors and the bias of the EFSA’s scientific expertise, see Kritikos, n. 2 *supra*, p. 207 *et seq.*

¹²¹ See, also, M.P. Ferretti, “Why public participation in Risk Regulation? The Case of Authorizing GMO Products in the European Union”, (2007) 16 *Science as Culture*, pp. 377–395, at 390.

¹²² Despite the openness of the legal provision towards this possibility, see, above, n. 103 *supra*.

¹²³ See, on EFSA webpage,

http://www.efsa.europa.eu/EFSA/AboutEfsa/HowWeWork/KeyValues/efsa_locale-1178620753812_Cooperation.htm (accessed on 24.04.2008).

the technical aspects of biotechnology risks. Thus, the framing assumptions underlying this *apparently* purely-objective technical process, the value judgements involved, and the possible bias remain concealed. As a result, the lack of deliberation which is already present at this stage brings the quality of the knowledge generated by the risk assessment into question.

5.3. Risk management – transnational administrative governance through the comitology network

5.3.1. The governance structure provided for in the legislative framework

Risk management as the second arena of decision-making in the GMO regime takes place within the structures of Comitology,¹²⁴ and the role and functioning of these institutional structures in EU decision-making has gained considerable attention in academic literature.¹²⁵ Originally perceived merely as a mechanism given to the Member States to control the exercise of the implementing powers conferred to the Commission on the basis of Article 202 EC, a more sophisticated idea of comitology has developed over time, which can be described as an administrative co-ordination network¹²⁶ that transcends the national/supranational boundaries.

Comitology is indicative of a re-orientation of European regulation away from hierarchical policy formulation. The new emphasis is on the development of co-ordination capacities between the Commission and Member State administrations with the aim of establishing a culture of inter-administrative partnership, which relies on persuasion, argument and discursive processes, rather than on command, control and strategic interaction.¹²⁷

Whether such a characterisation normatively tends to over-estimate the deliberative features of comitology or not has been discussed elsewhere.¹²⁸ It is

¹²⁴ See Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 1999, L 184/23.

¹²⁵ See Ch. Joerges & E. Vos (eds), *EU Committees: social regulation, law and politics*, (Oxford: Hart Publishing, 1999); Ch. Joerges & J. Falke (eds), *Das Ausschusswesen der Europäischen Union: Praxis der Risikoregulierung im Binnenmarkt und ihre rechtliche Verfassung*, (Baden-Baden: Nomos, 2000).

¹²⁶ Sydow n. 91 *supra*, p. 80 *et seq.*; On the term, “EU administrative network”, see, also, Türk & Hofmann n. 91 *supra*, p. 3.

¹²⁷ See Ch. Joerges & Neyer, n. 119 *supra*, p. 620.

¹²⁸ See Ch. Joerges, “‘Deliberative Supranationalism’ – A Defence”, (2001) 5 *European Integration online Papers*; “‘Deliberative Supranationalism’ – Two Defences”, (2002) 8 *European Law Journal*, pp.133-151, at 133; for a critical review, see R. Schmalz-Bruns, “Deliberativer Supranationalismus”, (1999) 6 *Zeitschrift für Internationale Beziehungen*, pp. 185-244; lastly, see Ch. Joerges & M. Everson, “Re-conceptualising Europeanisation as a Public Law of

a matter of fact, however, that the comitology procedure has become an indispensable part of the decision-making in the EU, and is considered to provide for the inclusion of “national sensitivities” into the European regulatory process.¹²⁹

In the GMO authorisation regime, the legislative provisions require the Commission to take decisions in accordance with the regulatory committee procedure.¹³⁰ According to this procedure, the Commission prepares a draft authorisation decision and submits it to the relevant comitology committee for deliberation, which, in the case of GM food and feed, is the Standing Committee on the Food Chain and Animal Health (SCFAHC). The Committee can then approve or reject the draft decision by qualified-majority. In the case of approval, the Commission will adopt the measure and will issue a final decision on authorisation. In the event that the Committee either rejects the Commission proposal or fails to deliver an opinion, the matter will be referred to the Council. The Council then has to decide on the draft proposal also by qualified-majority within a period of three months. Only when the Council opposes the proposal within the time-limit and by qualified-majority will the Commission re-examine it. In the event of a split opinion or when no vote is taken, the Commission has the power to adopt its draft decision. One of the consequences of this is that authorisations can be adopted by the Commission, even when the majority of the Member States is opposed to the authorisation.¹³¹

The Comitology committees are composed of the government representatives of the Member States, and are chaired by a member of the Commission, who does not have a voting right. The SCFAHC could, therefore, serve as a forum for the Member States to express their concerns and to raise arguments about the ethical or socio-economic impact of GMO commercialisation on their national economies, agricultures, biodiversity, *etc.* Thus, it could compensate for the loss of national regulatory competences in this area.¹³²

Collisions: Comitology, Agencies and an Interactive Public Adjudication”, in: Hofmann & Türk n. 91 *supra*, p. 512.

¹²⁹ Vos & Wendler n. 42 *supra*, p. 129.

¹³⁰ See Article 58 (1) of Regulation 178/2002, Article 30 of Directive 2001/18, Article 35 of Regulation 1829/2003; For an explanation of the regulatory procedure, see Vos & Wendler, *ibid.*, on p. 89.

¹³¹ Vos & Wendler n. 42 *supra*, p. 89.

¹³² Sydow n. 91 *supra*, p. 221.

In fact, in the phase of risk management, the Commission recognises the possibility, and even the necessity, of including “other legitimate factors” than scientific considerations in the decision-making. Article 7 of the Food and Feed Regulation states that the Commission when issuing its draft decision shall take into account “the opinion of the Authority, any relevant provisions of Community law and *other legitimate factors*”¹³³ relevant to the matter under consideration”. The political character of risk management is also expressed in the definition contained in the General Food Law Regulation:

Risk management’ means the process, distinct from risk assessment, of weighing policy alternatives in consultation with interested parties, considering risk assessment and other legitimate factors [...]

The idea that risk management secures the *political* legitimacy of the GMO authorisation procedure is conveyed in several other official documents and statements by the Commission.¹³⁴ For instance, in its White Paper on Food Safety, it expressed the view that risk management decisions were of a political character and involved “judgements not only based on science, but on a wider application of the wishes and needs of society”,¹³⁵ and referred to the need for the consideration of other legitimate factors relevant to the protection of the health of consumers, such as environmental considerations, animal welfare and sustainable agriculture.¹³⁶

An important source of information required for this “weighing of policy alternatives” and political aspects, is public participation, which should thus permit the direct input of civil society in the decision-making. The GMO framework provides for mainly two channels of public participation in risk management: the public consultation of the Commission’s Advisory Groups which represent interested parties, and the possibility for the public to make comments regarding the risk assessment opinion of the EFSA. With regard to the authorisation of GMOs as food and feed products, the Commission has established the Advisory Group on the Food Chain and Animal and Plant Health, which is made up of representatives of consumer societies, industry, and retailing and farming organisations, and is consulted on food safety issues by the Commission.¹³⁷ Furthermore, in the Food and Feed Regulation,

¹³³ Author’s emphasis.

¹³⁴ For an overview, see Kritikos n. 2 *supra*, p. 178 *et seq.*; see, also, Forsman n. 8 *supra*, p. 584.

¹³⁵ Highlighted by the author.

¹³⁶ White Paper on Food Safety, COM (1999) 719 at p. 9.

¹³⁷ See Commission Decision 2004/613/EC concerning the creation of an advisory group on the food chain and animal and plant health, OJ 2004, L 275/17; The creation of this Group follows the requirement laid down in the General Food Law Regulation that “there shall be

Article 6 (7), provides for the possibility for the general public to make comments to the Commission on the EFSA's risk assessment within 30 days of its publication. Under the scope of the Deliberate Release Directive, public comments can also be submitted, albeit at a different stage. They are submitted to the Commission not with regard to the opinion expressed by the EFSA, but at an earlier stage, with regard to the risk assessment made by the competent national authority,¹³⁸ which is initially in charge of it according to the Directive. There is no provision for public comments on the risk assessment made by the EFSA at the later Community stage, after the EFSA has been asked to re-assess the national opinion and the objections raised against it.

5.3.2. *The practice of risk management – political deadlock and failure of co-operation*

The authorisation practice performed by risk managers reveals quite a different picture. The biggest gap between normative ideal and regulatory reality can be observed in the work of the Comitology system. The voting situation from the beginning of the authorisation procedure under the new regime (and therefore after the ending of the *de facto* moratorium) can be described as a political deadlock, and a lack of not only deliberative co-operation, but also of any kind of strategic bargaining among the actors.¹³⁹ Since the restarting of authorisations in 2004, the Commission approved all new applications for GMO authorisation, basing itself - in every case - upon a positive risk assessment from the EFSA.¹⁴⁰ All the draft decisions to date have been referred to the Council, which indicates the high politicisation of the topic. The Commission's draft decisions passed through the whole procedure without finding approval either in the regulatory committee or in the Council, and, in the end, the authorisation decision was adopted by the Commission itself. Empirical studies on the work of the committees in this field¹⁴¹ reveal that it is usual for no debate to take place among the committee members. A vote is always called for, and the national representatives come to the meetings already with their instructions or a strict mandate from their national ministries.¹⁴² When the matter proceeds to the Council, no qualified-

open and transparent public consultation, directly or through representative bodies, during the preparation, evaluation and revision of food law..." (Article 9).

¹³⁸ See Article 24 (1) of Directive 2001/18; further explanation in Kritikos n. 2 *supra*, p. 171; Ferretti n. 121 *supra*, p. 383.

¹³⁹ On the difference, see Joerges & Neyer n. 119 *supra*.

¹⁴⁰ See Community register on authorisation on:

http://ec.europa.eu/food/dyna/gm_register/index_en.cfm (accessed on 28.04.2008).

¹⁴¹ Vos & Wendler n. 42 *supra*, p. 116 *et seq.*; Chalmers n. 10 *supra*, p. 56 *et seq.*

¹⁴² Vos & Wendler *ibid.*, at p. 89.

majority can be reached either in favour or against the Commission,¹⁴³ although there is always a simple-majority which opposes the authorisation.¹⁴⁴ It has been stated that:

The authorisation of GMOs is precisely the sort of controversial decision in which the Council will find it difficult to muster a qualified-majority vote in either direction, so that national and political involvement in the final decision on GMOs is undermined by disagreement. The restarting of authorisations for GMOs in 2004 depended on the Commission decision in the face of Member State inability to reach a qualified-majority in either direction.¹⁴⁵

This situation clearly shows that the Commission authorisations lack the political acceptance of at least the majority of the Member States.¹⁴⁶

At the same time, there is no indication that the Commission has, before drafting its decision, taken "other legitimate factors" into account, besides those of the risk assessment. The decisions for authorisation taken to date have usually referred to the fact that the EFSA has "concluded that it is unlikely that the placing on the market of the products [...] will have adverse effects on human or animal health or the environment",¹⁴⁷ and that, "taking into account those considerations, authorisation should be granted for the product".¹⁴⁸

Similarly, it is questionable as to whether the channels of public participation mentioned above actually provide for any considerable input into the Commission decision-making. Besides the possibility of comment on the risk assessment by the public, there are no provisions that would oblige the

¹⁴³ In June 2005, the Council, however, reached a qualified-majority against the Commission in a different procedure; It opposed the Commission proposal to lift eight bans invoked by five Member States. See Holder & Lee n. 1 *supra*, p. 197.

¹⁴⁴ Vos & Wendler n. 42 *supra*, p. 129.

¹⁴⁵ Holder & Lee n. 1 *supra*, p.195.

¹⁴⁶ Vos & Wendler n. 42 *supra*, p. 135; See, also, Chalmers n. 10 *supra*, p. 663, who emphasises the ambiguous role Member States play in the comitology voting. Because of the lack of reason-giving for national "no" votes, it is mostly not clear "whether the vote was a fob to domestic public opinion enabling Member States to say that they had opposed a measure when they knew that it would go through anyway by Commission action".

¹⁴⁷ See, for example, Commission Decision 2008/280/EC of 28 March 2008 authorising placing on the market products from maize GA21, Preamble (4); For other GM food and feed authorisations, see Community register on http://ec.europa.eu/food/dyna/gm_register/index_en.cfm (accessed on 26.04.2008).

¹⁴⁸ *Ibid.*, Preamble (6).

Commission to take them into account or to provide for reason-giving as to the manner in which it had considered them. Thus, the official declarations, including the Commission Communication on the Precautionary Principle,¹⁴⁹ that all interested parties should participate in the study of the diverse options in the area of risk assessment appear, to be little more than “lip service”.¹⁵⁰ Public participation seems to work better when the Commission consults stakeholders as organised interest groups, as in the case of the Advisory Group on the Food Chain and Animal and Plant Health mentioned above. However, it is not clear whether this Advisory Group is directly involved in concrete authorisation procedures on GMOs. The formulation of Article 9 of the General Food Law Regulation, which is the legal basis for the establishment of the Advisory Group, states that “there shall be open and transparent public consultation, directly or through representative bodies, during the *preparation, evaluation and revision of food law...*”,¹⁵¹ which indicates that consultation is not foreseen for the implementation of food law, which would be the case for individual administrative procedures. This is confirmed by the fact that the Commission usually convenes two meetings per year in which consultation takes place.¹⁵² It is thus unlikely that the Advisory Group serves as a source of input for “other legitimate factors” in the risk management of GMO authorisations.

To conclude, the practice of risk management in the GMO regime undermines the fulfilment of the claim to political legitimacy as expressed in the precautionary principle and laid down in the legislative framework itself. As far as can be observed, risk management by the Commission is based upon the scientific opinion of the EFSA. In no case has the Authority’s expertise been questioned or departed from. This finding corresponds with the comments made above on the “sound science” notion of precaution and its consequences on the way that risk is regulated.¹⁵³ If science is perceived as objective and neutral, then all the “extra-scientific” considerations will necessarily appear as secondary, because they are interest guided or arbitrary or simply not “fact”.¹⁵⁴ It should be noted that the Commission strongly wishes to be above suspicion with regard to its GMO regulatory practice being guided by protectionism or interest politics. The reasons for this lie,

¹⁴⁹ Commission Communication n. 64 *supra*, p. 16.

¹⁵⁰ On the difficulties and failures of public participation in the GMO regime, see Ferretti n. 121 *supra*.

¹⁵¹ Author’s emphasis.

¹⁵² See Article 4 (1) of Commission Decision 2004/613/EC n. 137 *supra*.

¹⁵³ *Ibid.*, at pp. 22-23.

¹⁵⁴ Similarly, Levidow & Marris n. 69 *supra*, p. 349.

inter alia, in the international arena, especially in the Commission's ambition to comply with the EU's international trade obligations. This context is crucial for the understanding of the EU regulation of GMOs, and, as a consequence, I will briefly elaborate on it in the next section. We will see that scientific legitimacy and "sound science" and their predominance at the cost of political legitimacy in GMO authorisations are very attractive to Community regulators, especially the Commission.

5.3.3. Global guidance through international trade stakeholders

Problems of EU governance in the area of biotechnology are deeply intertwined with the regulation of such problems in international trade law.¹⁵⁵ The European Community is a member of the World Trade Organisation (WTO) and, as such, is obliged to comply with its rules, in particular, with the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement).¹⁵⁶ Another important organisation in this regard is the Codex Alimentarius Commission (CAC), an international standardisation body created under the UN system by the World Health Organisation (WHO) and the Food and Agricultural Organisation of the United Nations (FAO). It sets up international standards with the aim of balancing trade concerns and the protection of consumer health.¹⁵⁷ The compliance with the standards for the trade products developed by the CAC is crucial in the context of international trade law, because they are accepted by the WTO as reference points in the dispute settlement procedure. Compliance with Codex standards now presumes compliance with the obligations under the SPS Agreement. The Community became a member of the CAC in 2003, when it entered the FAO.¹⁵⁸

The WTO system and the food safety standards of the CAC have a preference for scientific proof in evaluating the risks of products, and they leave very little space for the consideration of "other legitimate factors", especially if this could affect the scientific basis for evaluation.¹⁵⁹ Tensions or conflicts between this "external" system and the EU regulatory approach tend to have a significant impact on the way in which the EU system functions "internally". This can be seen in the recent WTO dispute between United

¹⁵⁵ See J. Scott, "European Regulation of GMOs: Thinking about 'Judicial Review' in the WTO", *Jean Monnet Working Paper*, 2004/04.

¹⁵⁶ This Agreement is the relevant instrument of international trade law dealing with trade in food and feedstuffs. See Vos & Wendler n. 42 *supra*, p. 95.

¹⁵⁷ See *ibid.* at p. 94.

¹⁵⁸ Council Decision 2003/822 of 17 November 2003 on the Accession of the European community to the Codex Alimentarius Commission, OJ 2003 L 309/14.

¹⁵⁹ See Forsman n. 8 *supra*, p. 591-592 with further references to CAC rules.

States, Canada and Argentina, on the one hand, and the EC, on the other. On 21 November 2006, the Dispute Settlement Body of the World Trade Organisation (WTO) adopted a decision (Panel Reports) on *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*,¹⁶⁰ in which it condemned the EC and some of its Member States for having adopted a general *de facto* moratorium on biotech products lasting from June 1999 until at least August 2003. This decision referred to the suspension of all applications for GMO authorisation under the “old” legal framework.¹⁶¹ This situation was itself a consequence of a regulatory crisis, in which the Member States and the Community failed to agree on the way in which the GMO authorisation procedures in the EU should function. The opposition against the commercialisation of GMOs within national societies and the lack of political acceptance on the part of the Member States in the comitology procedure finally resulted in a suspension of the GMO regulatory system in the European Union.¹⁶²

The revision of the “old” system and the establishment of new legislative provisions was, therefore, a difficult task, because it had to satisfy the actors of both systems, the international trade arena, and the system within the EU. The fundamental role assigned to the precautionary principle in the new authorisation regime was a tribute to the sceptics towards GMO regulation within the Member States. On the other hand, in its Communication on the precautionary principle, the Commission tried to stress the compliance of its notion of the principle with international law.¹⁶³ This explains the choice of the “sound science” notion in the Communication, where the invocation of the principle is possible only if a scientific risk assessment which is as complete as possible has identified and characterised *both* the risk *and* its probability.¹⁶⁴

The ambivalence caused by the conditions attached to resorting to the precautionary principle cannot be explained other than by the Commission’s concern with aligning Community practice with World Trade Organisation rules. The communication’s wording is in perfect

¹⁶⁰ WT/DS291/R (United States), WT/DS292/R (Canada), WT/DS293/R (Argentina).

¹⁶¹ Directive 90/220, Regulation 258/97 and Directive 2001/18, the former although part of the ‘new’ framework has already been in place at the moment the complainants triggered the dispute settlement procedure (May 13, 2003).

¹⁶² Skogstad n. 6, p. 246 *et seq.*

¹⁶³ Commission Communication n. 64, point 2.

¹⁶⁴ See, above, at 5.1. The “sound science” notion of the precautionary principle and its foundations.

harmony with the approach of the Codex Alimentarius Commission on the application of the precautionary principle.¹⁶⁵

All this shows that there is another “external” input in the risk management decision-making of the Commission when GM products are authorised in the EU. It finds itself under pressure from the international community, especially from the United States, to implement the WTO ruling in the biotech dispute.¹⁶⁶ In governance terms, this type of influence on the decision-making within the EU can be characterised as guidance through the external stakeholders of global trade (not only other governments, but also multi-national global corporations that trade in biotechnology products). The type of co-ordination between these global actors and EU actors cannot be perceived in terms of a direct hierarchy.¹⁶⁷ Instead, the interdependency between the two arenas is dealt with through instruments of mutual political negotiation and persuasion,¹⁶⁸ which have, in their background, the logic of global trade: the mutual distribution of equal trade advantages.

6. Conclusion

The question raised at the beginning of this paper was whether the Community regime for the market authorisation of GM products could ensure the legitimate regulation of risks associated with biotechnology. The examination has shown that legitimacy, as envisaged by the European legislator in this regime, is understood in procedural terms, and refers to the balance between the scientific and the political foundations of the decision-making. According to the precautionary principle that has guided the legislative set up of the new GMO framework, and which also guides its implementation, there must be space for the mediation of the various conflicts surrounding the commercial use of green biotechnology within the authorisation procedure. Legitimacy can, therefore, only be ensured if the authorisation regime, in its interplay between the legislative provisions and their implementation within the “norm production through practice”,

¹⁶⁵ Forsman n. 8 *supra*, p. 591.

¹⁶⁶ On this topic, see S. Poli, “The EC Implementation of the WTO ruling in the Biotech Dispute”, (2007) 32 *European Law Review*, pp. 705–726,.

¹⁶⁷ On the legal effects of WTO law on Community law, see P. Koutrakos, *EU International Relations Law*, (Oxford: Hart Publishing, 2006), p. 253 *et seq.*; P. Craig & G. de Búrca, *EU Law*, 4th edition, p. 206 *et seq.*; See, also, S.G. Griller, “Judicial Enforceability of WTO Law in the EU”, (2001) 3 *JIEL*, pp. 441– 72.

¹⁶⁸ On the subject of current negotiations between the EU and the complainants of the Biotech Dispute on the implementation of the Panel Decisions, see S. Poli n. 166 *supra*, p. 717–718.

provides for mediation of scientific concerns *and* “other legitimate factors” such as ethical and socio-economic concerns with GMOs, for example.

Furthermore, the employment of the “governance” perspective as the analytical frame of the examination has shown that European regulation does not operate out of a hierarchical “centre”, but, instead, includes a variety of actors that provide them with the governance structures in which they can mutually co-ordinate their action. The knowledge required for the evaluation of the risks of GMO is produced within these co-ordination processes. As we have seen, the results achieved are influenced, but never fully foreseen or determined, by the legislator.

In the “governance” perspective, the EU legislator tries to ensure the legitimacy of the authorisation procedure by providing for a combination of mainly two types of governance modes: hierarchy and networks. The hierarchical co-ordination takes place through the imperative regulation expressed in the prior authorisation requirement, the centralised authorisation procedure and the high degree of harmonisation in the field, which severely limits national regulatory competences. With this type of regulation, public control of the risks of GMOs before marketing is ensured. At the same time, it also enables the EU level to control the national systems in order to achieve the objective of the free circulation of GM products on the entire Community market. The second type of co-ordination through networks takes the form of scientific self-governance in the risk assessment on the one hand, and transnational administrative governance through comitology in risk management on the other. These structures play a crucial role in generating the knowledge as well as the standards for the risk analysis, at the same time ensuring the balance between the scientific and political legitimacy of the procedure.

These governance modes, therefore, institutionalise the precautionary principle as the governing principle of the regime. The full implementation of the precautionary idea is, however, hindered by the narrow “sound science” interpretation of this principle. As a consequence, tension can be identified in the framework between the provision of all-inclusive and integrative procedural structures for balancing the two types of legitimacy mentioned above and the “sound science” understanding of precaution. The former is laid down in the provisions which define the risk assessment as a purely technical process based upon “objective” science.

The consequences of this tension on the functioning of the regime are twofold. Firstly, in the phase of risk assessment, no open deliberation about the value judgements and framing assumptions – which are an inherent part of scientific reasoning under conditions of ‘scientific uncertainty’ – takes place. Secondly, the understanding of the opinions of the EFSA as objective and neutral scientific facts creates a strong attraction for the risk managers to prioritise scientific arguments over those of an “extra-scientific”, political nature. It makes it an “easy game” for the Commission to disregard “other legitimate factors” in the risk management, and to align its regulatory practice with the international standards of world trade law. To put it dramatically, the result of the “sound science” approach is, therefore, not the depoliticisation of European GMO regulation, but, on the contrary, the disguised politicisation in favour of only one “extra-scientific” aspect of it: namely, the objective of the free trade of GM products.

The narrow interpretation of the precautionary principle leads to the predominance of scientific legitimacy in the authorisation regime to the detriment of its political legitimacy. It, therefore, fails to provide for the successful mediation of all conflicts and interests involved in this area of European risk regulation.¹⁶⁹

One consequence of this failure is the lack of political acceptability for the Community framework on the part of the Member States and a large part of their populations.¹⁷⁰ Ever since the Commission started approving GMOs after the halt of authorisations under the *de facto* moratorium, new national bans on the marketing and cultivation of biotech products have come into force in several Member States. About a half of all the Member States seem to be opposed to the commercialisation of GMOs in the European Union at the moment.¹⁷¹ Many governments have called for another revision of the current legislation – the main points of criticism relate to the majority requirements with regard to the voting of the Council in the comitology procedure and

¹⁶⁹ On the effects of failed mediation on the functioning of the regime at present, see Chalmers n. 10 *supra*, p. 674.

¹⁷⁰ According to the Eurobarometer *Europeans and Biotechnology in 2005: Patterns and Trends* published in May 2006 only an average of 27 % of the European population encourages the technology of GM food. See, also, *GMO Compass*, “GM Food: Europeans still see more risks than benefits” on: http://209.85.135.104/search?q=cache:URTKd1RW7Xwj:www.gmo-compass.org/eng/news/stories/227.eurobarometer_europeans_biotechnology.html+eurobarometer+gmo&hl=de&ct=clnk&cd=1&client=firefox-a (accessed 29.04.2008).

¹⁷¹ See *La Repubblica* from 31.10.2007, “OGM, l’Italia chiede il bando Ue ‘Basta autorizzazioni facili’ ” (“GMOs, Italy asks for EU ban. ‘No more easy authorisations.’”).

the risk assessment work by the EFSA¹⁷² – and some even suggest another moratorium until the regulatory system is improved.¹⁷³

This situation appears as a “*déjà-vu*”. One should, however, not forget the double role of the Member States in this controversy. They are not only the addressees of the new GMO legislation, but also, at least partially, their authors. A qualified-majority of the Member States was required in order to approve the regime.¹⁷⁴ One could, therefore, criticise national bans as, at the minimum, inconsequent behaviour on the part of the Member States.

At the same time, conflicts between the EU and the national level in the area of GMOs can be interpreted as reflecting the dissatisfaction of both the Member States and their societies with the current interpretation of the precautionary principle at Community level.¹⁷⁵ It is, therefore, worth contemplating the possibilities of a more deliberative approach to precaution within the practice of GMO authorisation in order to increase the political acceptability of this procedure across the European Union. Such an approach, as indicated in this paper, would not mean allowing for protectionism or arbitrary decisions on the part of the Member States. Instead, it would mean making space for both the consideration and the mediation of a broad range of interests and concerns regarding the commercial use of biotechnology in the EU, at least at the stage of risk management.¹⁷⁶ A deliberative approach would also have to distance itself from the conception of science as being objective and neutral, and to recognise the inherent value-laden nature of scientific reasoning under conditions of “scientific uncertainty”. What is, more generally, needed is the disclosure and discussion in the authorisation process of *all* the value judgements involved in this area of regulation, as well

¹⁷² Vos & Wendler n. 42 *supra* p. 109 and p. 131; See, also, article in La Repubblica, *ibid*.

¹⁷³ See article in La Repubblica, *ibid*.

¹⁷⁴ Article 251 EC Treaty.

¹⁷⁵ A crucial role in that interpretation play the Community Courts, see, above, n. 44 *supra*.

¹⁷⁶ A more radical approach would be to broaden also the risk assessment to the evaluation of not only scientific, but also socio-economic risks. As an example see the institutional structure of the new European Chemicals Agency under the REACH framework. Article 85 of Regulation 1907/2006 establishes not only a Committee for Risk Assessment, but also a Committee for Socio-Economic Risk Analysis. On the REACH framework from the perspective of legitimacy, see P. Kjaer, “Rationality within REACH? On Functional Differentiation as the Structural Foundation of Legitimacy in European Chemicals Regulation”, *EUI Working Papers Law* 2007/18; A deliberative approach to precaution would more generally mean the inclusion of a broader range of views, such as for example lay knowledge, into the risk assessment. On the application of the precautionary principle already in the risk assessment, see von Zwanenberg & Stirling n. 69 *supra*.

as mutual reason giving and justification¹⁷⁷ among the actors with regard to *why* they want to prioritise some of them over others.

I admit that finishing this paper with a plea for a more deliberative interpretation of the precautionary principle at Community level raises further questions with regard to the precise institutionalisation and practicability of such an approach. It, therefore, opens up a new discussion that has to be postponed to future research. The regulation of biotechnological products in the EU raises many complex and inter-related questions that could not all be addressed in this paper. Future attempts to define the meaning and role of the precautionary principle in Community law and its applicability in regulatory procedures should consider the influence of the European Courts in this area. Another crucial issue would be to scrutinise the input of private applicants in the decision-making and their power to provide the EFSA with considerable scientific expertise as the basis for its risk assessment. The governance analysis accomplished in this paper is an attempt to provide the basis for addressing these questions in the future.

¹⁷⁷ On justification through arguing and reason-giving as part of deliberative decision-making, see C. Lord, "Assessing democracy in a contested polity", (2001) 39 *Journal of Common Market Studies*, pp. 641-661.

Chapter 8

The Justice Deficit of the EU and other International Organisations

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I. Beyond the democratic deficit¹

The growing relevance of international organisations² has given rise to a broad debate on the so-called “democratic deficit”. The proponents of the democratic deficit thesis hold that the practice of international governance, *i.e.*, the intentional formulation and implementation of binding rules by the member states of international organisations or their bureaucratic agents, suffers from its failure to meet democratic standards. It is pointed out that the establishment of global governance organisations such as the WTO or, at regional level, the EU, has led to an empowerment of the national executives and a corresponding loss of the legislative and oversight powers of national

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² In this article, I define international organisations as those organisations which are financed by two or more member states. They are called “global” organisations if their membership includes nearly all or all nation-states (*i.e.*, the UN or the WTO). Supranational organisations such as the EU and WTO are treated as special cases of international organisations. This definition of international organisation excludes international non-governmental organisations such as Greenpeace or Amnesty International.

parliaments.³ International organisations, such as the World Bank, the IMF or the WTO, are criticised for being non-transparent, unaccountable and dominated by the political agenda of powerful states.⁴ On the other side of the debate, the very existence of a democratic deficit of international organisations is disputed. Whilst some argue that advanced international organisations such as the EU do not score that badly when compared to an average nation-state,⁵ others point out that the non-democratic character of international organisations can be a major normative strength. Democratic governments can serve the preferences of the median voter far better if they have access to policy-making bodies such as the WTO, which give no, or only limited, access to special interest groups.⁶ A third prominent argument holds that the nation-state is inescapably caught in a “democratic dilemma” between citizen participation and system effectiveness: one can either have effective international organisations or democratic governance.⁷ To have both at the same time is, however, impossible. If we want effective global governance, we will have to live with a limited influence of individual preferences on policy outcomes.

The debate on the pitfalls and merits of global governance has been raging for decades and no conclusion is in sight. A major reason for this inconclusiveness, so the argument of this article goes, is that much of the debate uses the wrong normative categories.⁸ International organisations can only be assessed as suffering from a democratic deficit or as complying with the standards of democracy if they have the theoretical chance to become

³ Pertinent literature on this subject is A. Moravcsik: *Why the European Community Strengthens the State: Domestic Politics and International Co-operation*, (Cambridge MA: Harvard University, 1994), *Center for European Studies*, Working Paper Series 52; J.E. Thomson, “State Sovereignty in International Relations: Bridging the Gap Between Theory and Empirical Research”, (1995) 39 *International Studies Quarterly*, pp. 213–234; K.D. Wolf, *Die neue Staatsräson – Zwischenstaatliche Kooperation als Demokratieproblem in der Weltgesellschaft*, (Baden-Baden: Nomos Verlag, 2000).

⁴ See P. Nanz & J. Steffek, “Global Governance, Participation and the Public Sphere”, (2004) 39 *Government and Opposition*, pp. 314–335.

⁵ See A. Moravcsik, “In Defence of the ‘Democratic Deficit’: Reassessing Legitimacy in the European Union”, (2002) 40 *Journal of Common Market Studies*, pp. 603–624.

⁶ See F. McGillivray, “Democratizing the World Trade Organization”, (Stanford: Hoover Institution on War, Revolution, and Peace, Stanford University, 2000); M. Kahler, ‘Defining Accountability Up: The Global Economic Multilaterals’, (2004) 39 *Government and Opposition*, *Special Issue on Global Governance and Public Accountability*, pp. 132–158.

⁷ See R.A. Dahl, “A Democratic Dilemma: System Effectiveness Versus Citizen Participation”, (1994) 109 *Political Science Quarterly*, pp. 23–34.

⁸ See R.O. Keohane, “Accountability in World Politics”, (2006) 29 *Scandinavian Political Studies*, pp. 75–87.

democratic and if that is, indeed, a normatively sound request. Both, however, are disputed for good reasons. Even the most developed of all international organisations, the EU, lacks those political competences which lie at the heart of any state governance, and which have historically been the most prominent resources for the provision of public order: the powers to tax, to enforce sanctions by means of coercion, and to provide security against foreign powers. The EU has none of these competencies. It does not levy taxes, it commands no police, and its defence and security policy is embryonic, if not less.

The EU – or any other international organisation – also has no *demos*. Democratic theory, however, be it in a Rawlsian,⁹ a Habermasian¹⁰ or in a Dahlian¹¹ fashion, emphasises that democracy necessarily entails a *demos* which identifies with a certain authoritative structure (even if it is only understood in the Habermasian term of *Verfassungspatriotismus*). In short, the debate on the democratic deficit of international organisations commits the categorical mistake of interpreting international data with inadequate domestic analytical categories.

An inadequate way of correcting this mistake is to re-interpret international organisations as merely technical bodies that should be judged in accordance with the standards of good technocratic governance.¹² Technocratic reconceptualisations overlook the fact that international organisations can have a significant impact on domestic policies. In a great number of areas, ranging from environmental policy to trade and security policy, international organisations provide the normative frame for domestic action. These frames are only sometimes producing Pareto-optimal outcomes. International environmental and trade policy outcomes are, however, hardly ever without costs for some of the parties involved.

This article proposes the substitution of the discourse on the democratic deficit of international governance with a discourse on its justice deficit. In contrast to democracy, the notion of justice is not tied to the nation-state, but can be applied in all contexts and to all political situations. It is an idea which is not less important than the idea of democracy, but, explains its normative

⁹ See J. Rawls, *A Theory of Justice*, (Cambridge MA: Belknap Press, 1971).

¹⁰ See J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechtes und des demokratischen Rechtsstaats*, (Frankfurt aM: Suhrkamp, 1992).

¹¹ See R.A. Dahl, *On Democracy*, (New Haven - London: Yale University Press, 1998).

¹² See G. Majone, “Europe’s ‘Democratic Deficit’: The Question of Standards”, (1998) 4 *European Law Journal*, pp. 5–28.

thrust. In the next section, the article develops a normative justification of international organisations that is built on the concept of justice as a right to justification. Section Three of the paper elaborates on the difficulties of making the right to justification effective under the conditions of the international system, and identifies three major obstacles. Section Four explains the contribution that supranationalism makes to overcoming these obstacles, and interprets supranationalism as a new chance for transnational justice. The concluding section summarises the argument and discusses its relevance for the debate on the legitimacy of international organisations.

2. Transnational justice as a right to justification

Justice is one of the most central concepts in both political philosophy and politics. It is, in the words of John Rawls, “the prime social virtue, the most important virtue of social institutions”.¹³ No other quality can substitute for a lack of justice. Only conditions that are just, and *never* conditions that are unjust, are acceptable. Everything which is unjust has to be rectified through practical political measures and improved upon. Notwithstanding the fact that most political theorists would subscribe to this statement, it is hard to find any consensus on what justice implies in the abstract, or when applied to international politics.

2.1. Empirical and philosophical concepts of justice

Much of the literature on transnational justice can be classified under the two categories of empirical and philosophical concepts of justice. From the perspective of an empirical concept of justice, justice is often understood as those dominant prevailing normative conceptions that exist in a given society at a given point in time. No claim is advanced that this conception is, more or less, valid than any other conception because, from an empirical point of view, no neutral or superior position exists from where such a claim could be justified. For empiricists, the search for a universal concept of justice is elusive from the very beginning. Meaningful discussions about the proper substance of justice can only be conducted in the context of a specific community, and only give expression to a certain social system of continuing interaction and transaction. According to Franck, “[i]t is only in a community that the bedrock of shared values and developed principles necessary to any assessment of fairness is found”.¹⁴ In very similar terms, Miller claims that nationality has an ethical significance which allows the members of a political community to

¹³ See W. Kersting, *John Rawls zur Einführung*, (Hamburg: Junius, 1993), p. 31.

¹⁴ See T.M. Franck: *The Power of Legitimacy Among Nations*, (New York: Oxford University Press, 1990), p. 10.

discriminate against those who are outside the community. This significance is based upon the reciprocal acceptance of “a loyalty to the community expressed in a willingness to sacrifice personal gain to advance its interests”.¹⁵ It is only in a nation-state that people develop a sense of community and therefore a shared sense of justice.¹⁶ The very idea of justice pre-supposes the existence of an integrated political community which can only be provided by the nation-state and inside the boundaries of a nation-state. By implication, transnational justice is an oxymoron, a contradiction in terms.

The empirical approach is challenged by two arguments. Empirical nationalists find it difficult to explain why most societies share an idea of justice which is expressed in the reciprocity principle of the famous “Golden Rule”. The Golden Rule refers to an intuition which can be found in all major world religions. It holds that only those rules which do not impose more serious restrictions of freedom upon any other person than one would be willing to accept for one’s own self can claim to be just. It is true that every culture and society differs with regard to the specific interpretations that reciprocity entails when applied to specific circumstances. However, this should not redirect our attention from the fact that there is clearly some basic common normative intuition which is shared across most cultures and times.

A second objection to the assertion that any meaningful conception of justice is necessarily confined by national borders, refers to the problem of methodological nationalism.¹⁷ If it is true that we live in a world of increasing transnational exchange, and if it is also true that normative standards are, to some degree, a function of such interaction, then, it is clearly implausible to exclude the possibility of a transnationally shared meaning of justice categorically. In the 1970s, authors such as Bull and Beitz had already shown that the international system can fruitfully be perceived as a social context of its own, in which shared normative ideas guide the actions of governments.¹⁸ Although the international system is anarchic, so Bull argued, it can

¹⁵ See D. Miller, “The Ethical Significance of Nationality”, (1988) 98 *Ethics*, pp. 647–662, at 648; see, also, D. Miller, “In Defence of Nationality”, (1993) 10 *Journal of Applied Philosophy*, pp. 3–16.

¹⁶ See D. Miller, *On Nationality*, (Oxford: Clarendon Press, 1995).

¹⁷ See M. Zürn, “Politik in der postnationalen Konstellation. Über das Elend des methodologischen Nationalismus”, in: C. Landfried (ed), *Politik in einer entgrenzten Welt. 21. Wissenschaftlicher Kongress der Deutschen Vereinigung für Politische Wissenschaft*, pp. 181–203 (Cologne: Verlag Wissenschaft und Politik, 2001).

¹⁸ See H. Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Macmillan, 1977); C.R. Beitz, “Bounded Morality: Justice and the State in World Politics”, (1979) 33 *International Organization*, pp. 405–24.

nevertheless be understood as a kind of “anarchical society” in which certain values, principles and norms are intergovernmentally shared. Similar assessments can be found in more recent contributions. Müller,¹⁹ for example, argues that diplomacy is generally conducted in an “artificial lifeworld, which provides a substantial background of shared rituals” (own translation) that fosters argumentative interaction even under conditions of massive conflicts. Thus, the empirical nationalist’s insight that ethical standards are culturally and historically contingent does not imply that meaningful understandings of justice can only develop within the confines of a nation-state.

In contrast to empirical approaches to justice, philosophical approaches often deal with their subject matter in a manner which is largely independent of empirical questions. John Rawls establishes the *Theory of Justice*²⁰ on the counterfactual idea of an “original position” in which people have no knowledge about personal attributes such as gender, race or wealth. Such purely theoretical reflections are often helpful instruments in identifying real-world problems, and they evaluate reality in a normative fashion. They become problematical, however, if they do not take into account the fact that the applicability of analytical categories is dependent on political and/or social contexts, or if they apply analytical categories indiscriminately.²¹ A perfect example for this problem is the normative concept of a democratic global state. The proponents of this concept argue that a global democratic state is “obligatory in terms of law and ethics” because it is understood to be a necessary condition for the global rule of law. Such a global state requires “a global legislative power which would define rules and put them into force, a global executive power which would implement them and where necessary enforce with the help of a world police, and a global judicative power which would authoritatively settle the disputes”.²² Any such reasoning collides with the fact that a global monopoly of coercion is far beyond anything imaginable.²³ It therefore is a perspective which may be argued to be

¹⁹ H. Müller, “Internationale Verhandlungen, Argumente und Verständigungshandeln. Verteidigung, Befunde, Warnung”, pp. 199–223, in: P. Niesen & B. Herborth (eds) *Anarchie der kommunikativen Freiheit. Jürgen Habermas und die Theorie der internationalen Politik*, (Frankfurt aM: Suhrkamp Verlag, 2007), p. 210.

²⁰ See J. Rawls, *A Theory of Justice*, (Cambridge MA: Belknap Press, 1971).

²¹ See R.O. Keohane, “Accountability in World Politics”, (2006) 29 *Scandinavian Political Studies*, pp. 75–87.

²² See O. Höffe, *Demokratie im Zeitalter der Globalisierung*, (Munich: Beck, 2002), p. 279, own translation.

²³ See V. Rittberger, “Globalisierung und der Wandel der Staatenwelt. Die Welt regieren ohne Weltstaat”, pp. 188–218, in: U. Menzel (d) *Vom Ewigen Frieden und vom Wohlstand der*

attractive in purely normative philosophy, but which lacks any real world significance. It is a utopian perspective which neglects the fact that normative requirements must be practically feasible in order to become politically relevant.

One option in order to avoid such a categorical mistake and to formulate politically significant ideas of justice is to ensure that the analytical categories that we use are both normatively introduced and empirically explained. Normative categories should be formulated with a view to the connection between “ought” and “can” and reflect an awareness that normative requirements will only be convincing to the degree that we provide evidence that they are, indeed, “fit for reality”. It remains true that such evidence is often hard to collect. Any statement about the possibility of transforming normative ideas into real-world conditions must always remain, to some degree, speculative, and can be formulated only hypothetically. Nevertheless, in order to make the criterion operational, we can consider all these normative ideas to be *prima facie* fit-for-reality, which build upon some existing element of the empirical reality and only expand its reach, instead of inventing something completely new. This idea reflects Rawl’s insight²⁴ that a “necessary pre-condition for a realist justice concept” is “that its major principles and instructions are practiced and can be applied to the existing political and social institutions”. Hence, a politically relevant concept of justice expands “the borders of what we usually consider practically-politically possible”²⁵ while, at the same time, remaining on solid empirical ground.

2.2. The right to justification

One understanding of transnational justice that is *both* empirically *and* normatively sound begins with the Kantian idea of reason. According to Kant, only those actions which are based upon principles that we may want to be of universal character can be deemed to be reasonable. One such principle is that we have a right to demand and receive justification on the part of all those individuals or organisations which restrict our freedom.²⁶

Nationen. Festschrift für Dieter Senghaas zum 60. Geburtstag, (Frankfurt aM: Suhrkamp, 2000), p. 204.

²⁴ See J. Rawls, *Law of Peoples*, (Cambridge MA: Harvard University Press, 1999), p. 15.

²⁵ See J. Rawls, *Law of Peoples*, (Cambridge MA: Harvard University Press, 1999), p. 4.

²⁶ For a more elaborate discussion of the right to justification, see R. Forst, “Die Rechtfertigung der Gerechtigkeit”, pp. 125-168, in: H. Brunkhorst & P. Niesen (eds), *Das Recht der Republik*, (Frankfurt aM: Suhrkamp Verlag, 1999); see, also, R. Forst, *Das Recht auf*

This, of course, does not necessarily imply that no limitations of our freedom are legitimate, but only holds that the legitimacy of any such limitations depends on the reasons that are given to justify them.

If, therefore, we concede the basic right to others to be considered in our choice of actions whenever these others might be affected by the consequences of our actions, and if we therefore only regard rules that have taken the concerns of the others into proper consideration as being potentially just, then it is likewise plausible to assume a right to justification as a core element of justice. As a person (or organisation), I therefore have the right to have any restriction of my individual freedom justified by whoever causes that restriction or has the intention of doing so. This argument takes the freedom of the individual from domination as a starting point, and places all restriction of this freedom under the reservation of good reasons. In crafting the argumentative design of a justification, the justifying person or organisation cannot act arbitrarily, but must follow the reservation of good reasons. In doing so, only such types of reason are to be understood as good reasons which fulfil the two minimum conditions of reciprocity and universality. Reciprocity means that nothing more is demanded from anybody than we are willing to concede ourselves. Reciprocity refers to the condition that reasons apply to everybody to the same degree.

Understanding justice as the right to justification gives the notion of justice an intrinsically procedural and discursive character. Any question regarding the specific implication of justice in a specific situation is answered with reference to a normatively demanding discursive procedure. In this way, the search for justice becomes a discursive and always only temporarily concluded project. Though those concerned by a regulation may temporarily agree upon a specific accord, they will only do so with the reservation of possible later changes. The right to justification, with its core idea of an imperative to give reasons for actions which restrict the freedom of others, is a political concept of justice. It is characterised by holding up the link between “ought” and “can” by not only specifying something theoretically desirable, but also by combining this specification with the claim that it is achievable in the sense that some of its elements already exist.

A thus defined right to justification can easily be applied to international relations. It resonates with the idea of self-determination which refers to the

basic right of every society to choose, independently of foreign influence, its own political status, its own form of state and government, and its own economic, social and cultural development. As a matter of principle, restrictions of this freedom are acceptable only when a state either voluntarily complies with an international legal provision or when *ius cogens* is applicable.

It is important to note that self-determination today cannot be equated with autonomy. The global condition of complex interdependence implies that one can neither pursue a successful unilateral money and currency policy nor conduct a sensible unilateral security policy. All these policy areas are characterised by a significantly reduced ability of single states to realise their preferences independently of the actions of other states.

Thus, it is a generally shared insight that complex interdependence among national societies has turned a purely national organisation of politics into a problem for democratic governance itself: in a great number of issues areas, from environmental degradation to security affairs and migration issues, the single nation-states is increasingly inappropriate for the formulation and implementation of effective policies. The normative deficiency of the nation-state is not limited to its capacity as an effective problem-solver, however. It also applies to the related structural phenomenon that the political measures taken by individual interdependent states often have effects for other states. The decision to raise or lower the interest rates of a central bank may have the effect of making neighbouring countries more or less attractive to capital. The easing or restricting of national provisions for immigration will likewise re-orient the decisions of individuals seeking refuge from violence or a better income, and will equally have an effect on the relative attractiveness of other states. The national establishment of certain requirements for legally sold products will likewise make it more or less costly for producers in foreign states to import their products and may lead to losses or gains or to employment opportunities. All these effects are structural phenomena under conditions of interdependence. Without being embedded in an international structure of policy co-ordination, the individual nation-state has little incentive to take the external effects of its actions seriously, *i.e.*, to integrate them systematically as an important calculus into its own decision-making practices.

The basic normative principle that those who are affected by a decision should have a say in its making, is, therefore, systematically violated by almost all interdependent nation-states if they are not embedded in an international structure that fosters the internalisation of the external effects of domestic

decision-making. Thus, international organisations such as the EU, the WTO, the ILO or even the United Nations (UN) derive a significant degree of their legitimacy from their function as a correcting mechanism for this systematical nation-state failure. They make interdependent nation-states systematically aware of one another, help pooling resources that are necessary for tackling pressing cross-border problems, and provide an organisational setting, in which the responsibility to take the concerns of others states seriously is transformed into legal obligations.²⁷ Thus, international organisations carry, first of all, the potential to remedy the structural shortcomings of the nation-state and should be seen as important and necessary devices for adapting the nation-state to the condition of complex interdependence.

Even those close to political realism are aware that national interests “can today, even by the powerful states, only be expressed and exercised in co-operation with other states and within the framework of codified rules of law, taking into consideration universal ethical principles”.²⁸ Chayes and Chayes²⁹ even argue that the need to complement domestic governance with international governance leads to the emergence of a “new sovereignty”, which is conditional on being accepted as a reliable member by the international community:

[F]or all but a few self-isolated nations, sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life.

Today, therefore, insisting on a traditional form of self-determination that emphasises the right and the ability to unilateral action (sovereignty and autonomy) leads not to more freedom, but runs into the paradox of self-

²⁷ Ch. Joerges & J. Neyer, “From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology”, (1997) 3 *European Law Journal*, pp. 273-299; Ch. Joerges, Transnationale “deliberative Demokratie” oder “deliberativer Supranationalismus”? Anmerkungen zur Konzeptualisierung legitimen Regierens jenseits des Nationalstaats bei Rainer Schmalz-Bruns, (2000) 7 *Zeitschrift für Internationale Beziehungen*, pp. 145-161.

²⁸ See R. Burger, “Nationale Ethik: Illusion und Realität”, (2007) 35 *Leviathan*, pp. 4-11, at 5-6, own translation.

²⁹ See A. Chayes & A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, (Cambridge MA: Harvard University Press, 1995); see, also, R. Dehousse, *The European Court of Justice: The Politics of Judicial Integration*, (New York: St. Martin’s Press, 1998), p. 27.

chosen heteronomy. A modern concept of self-determination entails participation in the political discourses and justificatory practices of international organisations and of multilateral co-operation.

3. Obstacles to transnational justice

Despite the centrality of the concept of justice in political philosophy and in international relations, it is hardly ever used in the positive analysis of international relations. The first reason for the limited awareness that the concept had found in the past is probably to be found in the idea that international politics is, at the end of the day, about power and interest, and not about decent normative ideas. This sceptical reasoning follows a long scientific tradition. From Thukydides through Thomas Hobbes to Kenneth Waltz³⁰ and John Mearsheimer,³¹ the mainstream analysis of international relations reflects a conviction which can be fittingly called the “two-worlds theory” of political science: all political structures are either domestic or international; they are characterised either by a state monopoly of legitimate coercion or by anarchy. Anarchy, however, has a structural effect on all actors since it causes insecurity and forces states to maximise relative rather than absolute gains.³² Normatively sound (just) behaviour is only rational if and when it is in accordance with national interests which are, again, pre-defined by the anarchic structure of the international system. Consequently, because of the structural impact of anarchy, justice does not have a viable chance of being a guiding principle of international relations.

The prospects of the two-worlds theory for the possibility of a transnational justificatory discourse are anything but bright. Realists are quick to argue that the idea of a transnational justificatory discourse faces at least three major obstacles, i.e., the power asymmetries among states, the preponderance of the executive branch in international politics, and the non-coercive character of international law. Because of the inexistence of a global ordering power, these obstacles remain unchecked by normative principles and thus prevent the establishment of effective justificatory discourses. We will discuss these three obstacles briefly:

³⁰ K.N. Waltz, *Theory of International Politics*, (New York: McGraw Hill, 1979).

³¹ J. Mearsheimer, *The Tragedy of Great Power Politics*, (New York, Norton, 2001).

³² R. Powell, “Absolute and Relative Gains in International Relations Theory”, (1991) 85 *American Political Science Review*, pp. 1303-1320; J.M. Grieco, *Co-operation Among Nations: Europe, America, and Non-Tariff Barriers to Trade*, (Ithaca NY: Cornell University Press, 1990).

1. The fact of asymmetrically distributed international power resources does indeed pose a major challenge to the idea of a transnational discourse on justification. In spite of the duty to comply with customary international law, and that UN law as well as multilateral treaties apply equally to all states, it can hardly be disputed that some states are more equal than others. The assumption of the equality of states has always been in conflict with the empirical reality of massive power differences. From world trade politics to environmental politics to international security politics, we can observe that the more powerful states dominate the policy-making process, while the smaller states have to subordinate themselves to the policies agreed upon. Due to the unequal ability of states to transform their interest into international norms which are binding for other states, many international regimes strongly reflect the particular interests of a limited number of powerful states. Many international regimes thus produce heteronomy for the weaker states, instead of international justice. Within the World Trade Organisation (WTO), for instance, the big member states had, until recently, negotiated all the important agreements among themselves in a so-called “Green Room Procedure”, and announced their findings to the secretary general. He, then, presented the outcome as a “consensus” to the rest of the member states.³³ Clearly, such a procedure leaves little scope for a justice-oriented discourse of mutual justifications.

2. Power asymmetries exist not only in the horizontal dimension of cross-border politics, but also in its vertical dimension. In international politics, executives have far more leeway to use their discretionary powers than in the domestic realm.³⁴ In democratic domestic politics, governments act as the legislature’s executive organ and are usually delegated the task of implementing its decisions. In contrast, in international politics, executives generally act as gatekeepers for political proposals, and decide which issues are discussed and which are dealt with at all. The legislative branch can only ask its government to put an issue on the international agenda, thereby promoting the involvement of other governments. But, unlike national politics, the legislative branch has no right to set the political agenda of an

³³ A. Kwa, *Power Politics in the WTO. Focus on the Global South*, (Bangkok: Chulalongkorn University, 2003); R.H. Steinberg, “In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO”, (2002) 56 *International Organization*, pp. 339–374. For an analysis on power politics in the EU, see J. Tallberg, *Leadership and Negotiation in the European Union*, (Cambridge: Cambridge University Press, 2006).

³⁴ A. Moravcsik, “Why the European Community Strengthens the State: Domestic Politics and International Co-operation”, *Center for European Studies, Working Paper Series*, 52, (Cambridge MA: Harvard University, 1994).

international organisation or to call on a government, or, in this case, a group of governments, actually to implement a certain legal norm. Instead, governments are – by and large – free to set the international agenda as they wish, and to decide among themselves upon the regulations. It is true that international rules concluded among executives become domestic law only after a national legislature ratifies the legal act, thereby transforming it into its national legislation. Thus, the legislative branches – formally, at least – retain a veto. But, at the same time, a parliamentary veto against a legal act concluded among executives is, for good reasons, very rare. Vetoing a legal act by refusing to ratify it is a massive declaration of mistrust from the parliamentary majority towards the government. This is unlikely to happen in parliamentary systems in which the government can rely on a parliamentary majority.

The problem of executive empowerment through international negotiations is aggravated by the fact that executives do typically possess better information about the positions and scopes of other executives and are, therefore, able to assess what is politically viable with greater accuracy. Through their membership in international organisations, such as the OECD, the World Bank or the IMF, they have access to a kind of specialised expertise that is not – or only with great effort – available to MPs. Thus, a parliament which argues against an internationally-negotiated regulation and which denies its ratification implicitly arrogates to itself a better knowledge of what is politically viable than the executive – even though it is less informed. A denied ratification is also improbable because it is the executives themselves who decide upon which information about the positions and scopes of other executives to pass on to the media and to the parliament. Thereby, the executives not only have the possibility of determining the international agenda, they are also in a strong position to influence the perception of the respective legislative assembly (and the national public) about what is politically viable at all.

3. A third crucial obstacle relates to the non-coercive character of the international system. Justice-oriented discourses pre-suppose that successful justification is a necessary condition for implementing a certain policy, and that any failure to explain and justify incurs costs for a policy entrepreneur. Costs, however, will only incur to a policy entrepreneur if the group towards whom the justificatory effort is directed has some enforcement capacity which it can exert in the event of a failure, *i.e.*, a non-convincing justification. However, because the international system is a self-help system, the power to impose costs on other states is structurally limited to the powerful states. It is for this reason that the limited capacity of the

international community to provide incentives to make powerful states comply with their legal commitment is often described as the *Achilles' heel* of effective global governance.³⁵ Some even dispute that legal rules whose content or application depends on the will of the legal subject for whom they are valid are not proper legal rules at all, but mere apologies for the legal subject's political interests.³⁶ And, indeed, in international relations, it is only too often the case that weaker states have a formal right to some justification, explanation or even compensation, but simply lack any means to enforce that right. Justice-oriented discourses thus pre-suppose that not only strong but also weak states have access to effective enforcement capacities in order to give a significant incentive to powerful actors to take justificatory discourses seriously.

4. Supranationalism as a new context for justice

The considerations above are hardly likely to create much optimism with regard to the probability of a justice-oriented transnational discourse. The transnational polity is a space in which horizontal and vertical power asymmetries, and the inexistence of a global coercive power, are important factors in policy outcomes. The realists' scepticism about the relevance of justice seems, in fact, to be well-founded. International organisations are usually dressed in the clothes of inter-executive multilateralism, and can do little to give the concerns of justice a meaningful chance to withstand the power of self-interested actions. At the same time, however, the realists' scepticism is not fully convincing, since it seems overambitious with regard to its scope. Realism is firmly grounded in the two-worlds theory in which any political order is either national or international, *i.e.*, well-ordered or anarchical. Supranationalism, however, refers to a third type of political order which does not fit into the two-worlds theory. Supranational structures combine a vertical and hierarchical legal order with a horizontal and non-hierarchical coercive order.³⁷ Thus, it is different from a state because it is established not on a monopoly of power but on an oligopoly of power. All member states remain in full command of their legitimate monopoly of

³⁵ See O.R. Young, *Governance in World Affairs*, (Ithaca NY: Cornell University Press, 1999), Chapter 4.

³⁶ See H. Lauterpacht, *The Function of Law in the International Community*, (Oxford: Clarendon, 1933), p. 189.

³⁷ J.H.H. Weiler, "The Community System: The Dual Character of Supranationalism", (1981) 1 *Yearbook of European Law*, pp. 257-306. For a discussion of the *sui generis* character of the EC, see M. Jachtenfuchs, "Die Europäische Union - ein Gebilde *sui generis*?", pp. 15-35, in: K.D. Wolf (ed) *Projekt Europa im Übergang? Probleme, Modelle und Strategien des Regierens in der Europäischen Union*, (Baden-Baden: Nomos, 1997).

coercion, and none of this power is transferred to the supranational level. If such a transference occurs, supranationalism transforms into statehood.

Supranationalism is likewise different if compared with traditional international diplomacy. Vertical legal integration ties individuals, governments and supranational organisations together in a multi-level legal structure in which the legal requirement to justify and give reasons is codified and can be enforced by both supranational and domestic courts.³⁸ Law in a supranational setting is, therefore, similar to national law in that it distinguishes between basic norms (primary or constitutional law) and secondary law (statutory law), the former being more difficult to change than the latter. Individuals are not only subjects and affected parties as they are under international law, but have domestically enforceable rights.

4.1. Transforming bargaining into legal reasoning

A supranational context has important implications for the probability of effective justificatory discourses. In order to understand the difference that supranationalism makes, it is important to recall that power in international relations is most often exerted in the mode of intergovernmental bargaining. The preferences of states are treated as intrinsically legitimate reflections of domestic political processes. International negotiations are not about justifying governmental preferences but about bargaining the differences.³⁹ Under conditions of supranationalism, *i.e.*, in a highly legalised setting, bargaining is – in general – an inappropriate mode of interaction. Highly legalised settings, such as those in the European Community (EC), prescribe both material and procedural norms against which the preferences of actors are to be weighted. Complying with these norms necessitates justifying preferences by explaining how they relate to these norms. Legal integration, therefore, forces actors to abstain from simply issuing threats and promises, and requires them to reformulate their preferences in the language of law (by referring to material and procedural norms). In this way, legal integration aims to transform bargaining into legal reasoning.⁴⁰

³⁸ I. Pernice, ‘Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?’, (1999) 36 *Common Market Law Review*, pp. 703-750.

³⁹ According to Elster, bargaining refers to a mode of *interaction* in which an actor tries to change the behaviour of other actors by promising or threatening consequences for certain actions taken by these actors. See J. Elster, ‘Introduction’, pp. 1-18, in: J. Elster (ed) *Deliberative Democracy*, (Cambridge: Cambridge University Press, 1998).

⁴⁰ On the concept of legal reasoning, see F.V. Kratochwil, *Rules, Norms and Decisions. On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, (Cambridge: Cambridge University Press, 1989).

It is true that legal reasoning is not immune to power asymmetries. Good arguments are often expensive arguments, because they require good lawyers and must often refer to technical expertise and even scientific evidence. It is also true, however, that reformulating preferences in the language of law acts as a filtering mechanism which limits the range of the preferences that can be put on the table exclusively to those which can be justified publicly. In his discussion of the analytical differences between arguing and bargaining, and their effects on political outcomes, Elster refers to this effect as the “civilising force of hypocrisy”.⁴¹ In order to argue, speakers must hide their base motives. Hiding base motives, however, requires proposals to be subjected to a number of constraints which *may* modify them quite substantially. The first constraint is the “imperfection constraint”, which implies that proposals must show less than a perfect coincidence between private interests and impartial arguments in order to be perceived as good arguments. Arguments must also be in accordance with positions that have been formulated at an earlier point in time and must be maintained even if they no longer serve the speaker’s interests (consistency constraint). Otherwise, a speaker will easily be viewed as acting opportunistically and thus lose his or her credibility. And, finally, arguments must abstain from making claims which can easily be shown to be incorrect (plausibility constraint). Together, all three constraints work as a filter against openly selfish claims and thus civilise interaction by forcing the disputants to engage in argumentative interaction. Legal reasoning is, therefore, a deliberative mode of interaction which forces actors to perform in accordance with shared legal norms even if they only have self-minded interests.

By fostering argumentation in cross-border policy-making, supranationalism implies a *de facto* change in the mode of representation. In international relations, states are – in general – represented by governments. International negotiations are, in fact, intergovernmental negotiations in which the weight of an argument depends upon the power resources of the state that is represented by that government. The importance that is attached to good arguments in a supranational context significantly changes this. Under conditions of legal reasoning, it is no longer a state’s vulnerability to the failure of negotiations which decides who gets what, but the quality of the argument which the opposing sides can make. Supranationalism is, therefore, about the representation of arguments, and not about power and preferences.

⁴¹ J. Elster, “Deliberation and Constitution Making”, pp. 97–122 in: J. Elster (ed): *Deliberative Democracy*, (Cambridge: Cambridge University Press, 1998).

Under conditions of anarchy, states bargain. In supranational structures, arguments are balanced.

Although it is hardly possible to observe instances of purely legal reasoning in any real-world organisational context,⁴² it is also true that most political discussions in close-to-supranational entities such as the EC, or (with even less approximation) the WTO, show significant elements of such a justificatory balancing of arguments. Articles 28 and 30 of the European Community Treaty (ECT) describe the prohibition of discriminatory trade practices and list the reasons which can be brought forward in order to justify an exemption. The overwhelming majority of political disputes and decisions of the European Court of Justice (ECJ) in the EC fall under the rubric of these legal provisions. Even more importantly, most legal (and even most political science) scholars agree that the decisions of the ECJ are hardly ever motivated by the difference in size or wealth of the disputing parties.⁴³ It is the arguments and the justification, not preferences and power, which carry the day. Likewise, the Dispute Settlement Body (DSB) and the Appellate Body (AB) of the WTO often have to decide on disputes that take issue with equivalent principles of non-discrimination and reciprocity as well as a multitude of exemptions that define and restrict the normative framework described. As in the EC, most scholars here agree that the DSB/AB's decisions follow the logic of legal reasoning and are - by and large - immune to the concerns of power.⁴⁴

It is important to reflect upon a final *caveat*: even if supranational organisations have the capacity to transform bargaining into legal reasoning, they are, nonetheless, founded on an original bargaining process, and often - to some degree - reflect the outcome of an asymmetrical distribution of power. The founding of WTO, for example, is described by some as reflecting a blackmailing process in which the Northern states threatened to conclude a

⁴² See N. Deitelhoff & H. Müller, "Theoretical Paradise - Empirically Lost? Arguing with Habermas", (2005) 31 *Review of International Studies, special section "Habermas and IR-Theory"*, pp. 167-179.

⁴³ See K.J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, (Oxford: Oxford University Press, 2001); A-M. Burley & W. Mattli, "Europe Before the Court: A Political Theory of Legal Integration", (1993) 47 *International Organization*, pp. 41-76.

⁴⁴ B. Zangl, *Die Internationalisierung der Rechtsstaatlichkeit. Streitbeilegung in GATT und WTO*, (Frankfurt aM: Campus, 2006); R.E. Hudec, "The New WTO Dispute Settlement Procedure: An Overview of the First Three Years", (1999) 8 *Minnesota Journal of Global Trade*, pp. 1-53; Y.D. Park & G.C. Umbricht, "WTO Dispute Settlement 1995-2000: A Statistical Analysis", (2001) 1 *Journal of International Economic Law*, pp. 213-230.

mini-WTO among themselves if the Southern world would not accept the inclusion of trade related intellectual property rights (TRIPS) and a General Agreement on Trade in Services (GATS) into the legal framework of the new WTO.⁴⁵ Thus, one is tempted to assume that even an ideal mode of transnational legal reasoning only applies the procedural and material norms which have been dictated by the powerful actors. If this were true, then legal reasoning would only perform as if it were a neutral and fair language, but would, in fact, express nothing but the hidden dominance of the powerful. It is also the case, however, that the law is a living thing which adopts its own dynamic once it has been established. The practices of the ECJ and the DSB give clear evidence that Courts are, only to a limited degree, under the control of the member states and have some leeway in interpreting the law in a way which is compatible with shared notions of fairness. Burley and Mattli have explained the incomplete political control of the Member States over “their” Court with reference to the argument that the law acts “as a mask and shield” against politics.⁴⁶ It is also worth mentioning that intergovernmental bargaining hardly ever takes place in an environment which is normatively void. International customary law provides a distinct normative environment that encompasses compelling formal and informal norms such as the ideas of reciprocity, sovereignty, *pacta sunt servanda*, and *ius cogens*. International law is thus not only the product of intergovernmental bargaining, but also the normative frame in which negotiations are conducted.

4.2. Safeguarding executive responsiveness

Legal integration in a supranational context is not limited to the horizontal level of intergovernmental relations, but also applies to its vertical dimension. In abstract terms, vertical legal integration can be understood as connecting supranational, national and individual actors by means of legal provisions so that justifications can and must be exchanged. Thus, legal integration is not limited to relations among supranational organisations but covers the whole range of relevant political actors in a multi-level structure. Supranational legal integration is highly relevant for establishing the pre-conditions of transnational justificatory discourses since it has the potential to safeguard the fact that governmental and supranational actors are compelled to comply with the requirement to justify their actions and that their policy discretion is not

⁴⁵ A. Kwa, *Power Politics in the WTO. Focus on the Global South*, (Bangkok: Chulalongkorn University, 2003).

⁴⁶ A-M. Burley & W. Mattli, “Europe Before the Court: A Political Theory of Legal Integration”, (1993) 47 *International Organization*, pp. 41-76.

expanded beyond a degree which can be justified towards their respective principles.

At Member State level, legal integration can tie executive discretion to a mandate formulated by a parliamentary committee. The Danish *Folketing*, for example, exercises its control over the Danish government in European affairs by clearly outlining in advance which positions the governmental delegate may present and which are beyond his or her mandate.⁴⁷ The responsible minister has to present his or her proposal in person to a specialised European Affairs Committee of the *Folketing* and a supportive majority must be obtained. The members of the committee not only vote on the proposal but also have the right to propose amendments. The minister has no right to enter into any negotiations in Brussels if he or she fails to convince the majority of the committee of his proposal. Likewise, if the negotiations in Brussels seem to make it necessary to change the Danish position, and if he or she wants to go beyond the authorisations given by the mandate, he or she must present new suggestions to the committee and wait for new instructions. The integration of the *Folketing* into the daily decision-making in Brussels is an important element which explains the high political awareness in Denmark toward European affairs. European politics is not limited to executive discretion but an essential part of domestic legislative politics. Although this awareness may, from time to time, lead to a critical stance of the public towards the EU, it is obviously highly attractive from the perspective of a justificatory discourse.

The justificatory discipline of supranational legal integration also covers relations between the EC's supranational institutions and its Member States. The delegation of competences to the Commission is - in nearly all cases - only conditional, and is also subject to control mechanisms. The provision of Article 202 ECT is a typical example. It stipulates in its first sentence that the Council delegates all competences to the Commission to implement its legislative acts. The second sentence, however, immediately adds that the Council may establish certain modalities for the execution of these competences. In practice, the second sentence has been a major reason for the huge growth of the European comitology system, which acts as a safeguard

⁴⁷ See S.Z. von Dosenrode, "Danish EU-Policy Making", pp. 281-402, in: H. Branner & M. Kelstrup (eds) *Denmark's Policy towards Europe After 1945: History, Theory and Options*, (Odense: Odense University Press, 2000); N.-J. Nehring, "The Illusory Quest for Legitimacy: Danish Procedures for Policy Making on the EU and the Impact of a Critical Public", pp. 60-81, in: G. Sørensen & H.-H. Holm (eds) *And Now What? International Politics after the Cold War*, (Aarhus: Politica, 1998).

against the Commission becoming a “run-away bureaucracy”.⁴⁸ Even in an area such as external trade, where the Commission has had broad competences already codified in the Treaty of Rome, it must justify its international policies towards the Member States. According to Article 133 ECT, the Commission can act only after it has presented recommendations to the Council of Ministers, and after these recommendations have been authorised. In addition, every international legally-binding agreement that has been concluded by the Commission on the part of the EC is subject to critical scrutiny in the Council.

It is true that all of these mechanisms do not provide any guarantee for the complete lifting of vertical power asymmetries. Organisational procedures never determine action, they merely provide incentives to act according to prescribed rules. It is also true, however, that the list above is far from complete and only presents selected parts of a picture which – in reality – is much more complex and imposes a much more rigid discipline than the three mechanisms imply. In addition, the very existence of these procedures provides evidence that supranational legal integration is not only a means of expanding governmental discretion, but is also one that simultaneously imposes additional needs for justification. Supranationalism, therefore, does not just expand or limit governmental discretion, it also provides an argumentative discipline according to which it is to be exercised.

4.3. Healing the achilles' heel

It is an often cited conclusion that “(a)lmost all nations observe almost all principles of international law and all of their obligations almost all of the time”.⁴⁹ This observation has recently been re-discovered by scholars endeavouring to understand why and when international regulations are complied with.⁵⁰ According to Chayes and Chayes, good legal management of rules is a most important factor for eliciting compliance⁵¹:

⁴⁸ M.A. Pollack, “Delegation, Agency and Agenda-Setting in the European Community”, (1997) 51 *International Organization*, pp. 99-134.

⁴⁹ L. Henkin, *How Nations Behave*, (New York: Columbia University Press, 1979), p. 47.

⁵⁰ For an overview, see R.B. Mitchell, “Compliance Theory: An Overview”, pp. 3–28, in: J. Cameron, J. Werksman & P. Roderick (eds) *Improving Compliance with International Environmental Law*, (London: Earthscan, 1996).

⁵¹ A. Chayes & A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, (Cambridge MA: Harvard University Press, 1995), p. 205.

Enforcement through these interacting measures of assistance and persuasion is less costly and intrusive and is certainly less dramatic than coercive sanctions, the easy and usual policy elixir for non-compliance.

It is the power of the legitimacy of legal norms, the way legal norms work once they are established, and the intelligent management of cases of alleged non-compliance, which leads to compliance.

The reasoning of Henkin and the Chayeses is based upon the insight that a rule which is part of a broader legal system usually has a far stronger compliance-pull than an individuated legal rule, because the former is part of a larger normative design and embodies basic principles which are generally perceived as being legitimate or just. Even in the light of explicitly opposing interests, specific international legal norms have a high probability of being observed because they are perceived by the members of the international community as being part of an encompassing normative superstructure. The blatant, unexcused transgression of rules that are founded on broader ethical principles is thus deemed to be synonymous with a general repudiation of the normative foundations of international co-operation.

It is also important to underline that a well-functioning international legal system is in the interest of both weak and strong states.⁵² For weak states, an international legal order is an important pre-condition for them to have any chance of having their concerns heard and taken seriously. Only when weak states have enforceable rights will they have the possibility of succeeding in international negotiations against more powerful states. Likewise, powerful states are normally those states which have a prime interest in the stability of the international order. Any such stability, however, depends on rules which are accepted by most, if not all, states. Acceptance for rules pre-supposes that they are not the product of purely arbitrary decisions, but that they are based upon commonly agreed ethical standards and form part of an overarching normative superstructure (see above). In short, stability requires law. In this sense, it is, indeed, appropriate to argue that legal rules possess a compliance-pull of their own.⁵³

⁵² A. Hurrell, "International Society and the Study of Regimes. A Reflective Approach", pp. 49–72, in: V. Rittberger (ed): *Regime Theory and International Relations*, (Oxford: Clarendon Press, 1993).

⁵³ See T.M. Franck, *The Power of Legitimacy Among Nations*, (New York: Oxford University Press, 1990).

It follows that the more a rule is considered as being part of a legal system, or, to put it differently, the more an international organisation is legalised, the more likely compliance with the rule becomes. Empirical evidence is highly supportive of the legalisation hypotheses:⁵⁴ The impressive compliance record of the EC is hard to explain without referring to its character as a legal community.⁵⁵ The strongest single procedure with regard to compliance enforcement is the preliminary ruling procedure according to Article 234 ECT. It directly connects governments to the control exerted by their citizens and instrumentalises national courts as agents of supranational law. Article 234 ECT provides that any national legal person may sue his or her government if that government has violated a legal provision of the EU and inflicted damage on that legal person. Governments are thus not only liable to each other by means of an international legal obligation, but have likewise adopted responsibilities towards their citizens.⁵⁶ A supranational legal order is thus categorically different from a merely international legal order because individuals may use their Member State's courts against political decisions taken by the government or parliament of that state. It is not surprising that the direct linkage between the EC's supranational institutions and its citizens is often interpreted as a major constitutional step towards the establishment of a European political order *sui generis*.⁵⁷

5. Multi-level legitimacy: justice and democracy

This article started with the diagnosis of a categorical mistake often made when reflecting upon the adequate normative foundations of international organisations. International organisations have neither the capacity for state-like governance, nor will they acquire the political competences which cover more than narrowly defined policies in the foreseeable future. It is inadequate, therefore, to assess their legitimacy in categories taken from the analysis of democratic statehood and more appropriate to consider their contribution to transnational justice. Although this argument seems to put

⁵⁴ See the contributions in the special issue on "Legalisation", in: (2001) 55 *International Organization*, and M. Zürn & Ch. Joerges (eds) *Governance and Law in Postnational Constellations. Compliance in Europe and Beyond*, (Cambridge, Cambridge University Press, 2005).

⁵⁵ See M. Zürn & J. Neyer, "Conclusions. The Conditions of Compliance", pp. 183–217, in: M. Zürn & Ch. Joerges (eds) *Governance and Law in Postnational Constellations. Compliance in Europe and Beyond*, (Cambridge: Cambridge University Press, 2005).

⁵⁶ See Rs. 26/62, van Gend & Loos (N.V. Algemene Transport- en Expeditie Onderneming van Gend & Loos gegen Niederländische Finanzverwaltung) of 5 February 1963; Slg. 1963, 1, 24.

⁵⁷ See R. Dehousse, *The European Court of Justice: The Politics of Judicial Integration*, (New York: St. Martin's Press, 1998).

primary emphasis on justice and to downplay democracy, it is ultimately oriented at explaining the relationship between national democracy and transnational justice: if the normative promise of national democracy to foster self-governance is to survive globalisation, it must be supplemented by an organisational layer that fosters transnational justice. And, *vice versa*, if transnational justice is to have a realistic chance, it must be established on strengthened domestic procedures of strong democracy, which guarantee that the executives remain closely connected to their constituencies and national parliaments. Legitimacy in the new international system can only be adequately understood if it is explained as a normative multi-level structure in which the domestic and the international level are closely interwoven.

Only if interdependent national democracies are supplemented by a transnational layer of justificatory discourses can we expect them systematically to respect the external effects of their decisions as a relevant factor for domestic decision-making. Democracy entails that those who rule and who take the decisions are identical with those who are addressed by those decisions. If this standard is to be respected in an increasingly debordered world, *i.e.*, if we are not ready to accept the effects of other nation-states' decisions without having had the chance to make our concerns heard in "their" decision-making processes, and if we are not willing to make other citizenries subject to our decisions, then, we have to work for a system of collective multi-level governance, in which national democracies open themselves to the concerns of foreigners. Otherwise, the external effects of the internal practices of our democracy will impose illegitimate costs on foreigners, or, if foreign democracies do so, on us. Under conditions of interdependence, therefore, it is clear that transnational justice and national democracy mutually support and necessitate each other.

The article has shown that an understanding of justice as justification can well be used for analytical purposes. It pinpoints major obstacles for the legitimate conduct of transnational politics, and helps to explain the normative strengths of supranationalism. To be sure, none of the obstacles discussed in this article is foreign to the literature on the democratic deficit of international organisations. Most of the arguments used in this article are even taken from this literature. It is also true, however, that they fit much better into an analysis of the justice deficit of international organisations than to an assessment of their so-called democratic deficit. International organisations are not democratic and – virtually by definition – never will be. Democracy as a form of governance is intrinsically connected to a *demos* and to a monopoly of legitimate coercion.

The good news of this article is that supranationalism can deliver some of the functions that we traditionally attach to democratic procedures. It promotes the cause of justice by providing an effective remedy to horizontal and vertical power asymmetries, as well as to the problem of non-compliance. Legal integration transforms intergovernmental bargaining into transnational deliberations by providing incentives to governments to reformulate preferences in the language of legal reasoning. In doing so, legal integration transforms the mode of representation from preferences and power to arguments and reasons. In addition, legal integration has the capacity to provide mechanisms which safeguard against the impact of vertical power asymmetries on the justificatory discourse. Legal integration, finally, exerts a compliance-pull of its own by increasing the costs of non-compliance to both powerful *and* weak states.

It is true that legal integration has no built-in causal connection to justice. At the end of the day, even the best procedures only provide incentives. In addition, it must be underlined that they will only be effective if the powerful actors realise that it is, indeed, in their best interest to accept the discipline that is imposed upon them by supranational legal norms. If powerful states prefer to go it alone, supranational organisations have nothing but economic and political incentives to change their course of action. Real-world supranational integration must be understood as a long-term learning process which may lead to a constitutionalisation of effective justificatory discourses. It is also true, however, that the two real-world close-to-supranational entities that we know, the EC and the WTO, are moving slowly but steadily toward that goal. Justice, therefore, can no longer be treated as a purely normative category in international relations. Both the EC and the WTO embody some significant elements of justificatory discourses and can well be understood as (imperfect) approximations of this ideal. They are both to be cherished for the degree to which they have walked down the road already, and to be criticised for the long way that still lies ahead of them.

Chapter 9

Towards Normative Legitimacy of the World Trade Order

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I. Introduction¹

When do the rules (and lack thereof) of the world trade order, and the consequences of this order for those affected by it, produce good, that is to say, reciprocally-generalisable grounds to accept the legal-political frame of world trade? What we are concerned with here is a normative question: How should the political-legal frames of world trade be fairly instituted? And we are not concerned with the normative legitimacy of a single institution (such as the World Trade Organisation “WTO”), but with the totality of both the institutions and the policies relevant to world trade, instead. The WTO, with its treaty and its dispute resolution mechanism, is of great significance, but it is not the whole story. The contract generating and modifying rounds of negotiations and their national authorisations and ratifications are also part of the picture, just like the specific fixed processes of routine politics and, not least, their connection to the complementary institutions of global politics.

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Two assumptions motivate this essay. First, there is a wide-ranging, but not terribly interactive, literature on the world trade order, which ranges from descriptive treatments in legal and political science, to diagnoses of contemporary politics, and to philosophical assessments. This, in principle, is a good thing, but what hardly exists, are efforts to combine these treatments and thus gain some additional or even competing insights. Normative theories, which complain about the “hunger in the world” or lament about a legitimacy deficit in the world trade order, but which ignore the actual functioning of the world trade order, and, on this basis, argue for “abstract” (because unencumbered by knowledge of the daily, practically difficult to change, functions of the various institutions) reforms, are, at best, little short of useless. Second, there is a growing feeling, when contemplating some empirical studies, that they would benefit from consideration of suitable standards of assessment, or, *apropos* normative problems, because researchers could build their enquiries around them. Here, we will try to weave together these perspectives in the titular normative perspective.

In this normative context, the second preliminary assumption is created: in political debates, the question of whether the current world trade order is legitimate or not is hotly contested. And in the theories, widely-divergent thought constructions and normative stances jostle for position. If one simply ignores this normative pluralism, one should not expect to arrive at convincing normative conclusions. The plausible examination of the existing normative pluralism in the light of the various disciplines is the central task for the achievement of an acceptable conceptualisation of a legitimate world trade order. And it is to this end that this paper should make a contribution.²

First, we shall make a brief, but apt delimitation of our normative enquiry. On the one hand, a suggestion will be made as to the (normative) purpose of a world trade order. To this will be added two structural (empirical) problems which should be heeded by normative conceptions (Section II). Then, the variety of normative conceptions will be explained, and, dismissing two influential positions, we will try to show why a third, which we call *divided, procedural constitutionalism*, is preferable (Section III). Finally, we will apply the

² In other words, here, two central aspects of Rawls’ conception of justice are upheld: we are concerned with a normative conception of the second order, a political conception of justice, which does not exclude different normative conceptions or their conflicts, but tries to accommodate or reconcile them. And we are concerned with the approximation towards a reflective equilibrium, where the possibility of stable practical implementation (feasibility) is ranked as being lexically subsequent to normative principles, but which, nonetheless, forms a considerable part of, and affects the suasive power of, such a conception.

normative standards discussed to the routine politics of WTO law. In so doing, we are searching, above all, for “particles of reason” (Habermas), which already exist in WTO law. This paper does not systematically assess the extent to which the world trade order fulfils the conditions of normative legitimacy. However, the reflections of this conception of legitimacy in the existing WTO law nevertheless suggest that the world trade order not only has shortcomings of legitimacy but also strengths. Existing WTO law can be considered to be a deliberative extension of domestic democracy, which hinders populist and parochial protectionism. This concerns not only the sanctioning of quasi-constitutional acts, but also important areas of everyday political business, such as the setting of national protective measures and standards, which might become the subjects of WTO dispute resolutions.

2. “Structural” problems of the world trade order

The central methodological problem for any attempt to promote a normative conception against competitors, is to offer normative yardsticks which are not arbitrary, and do not unduly generalise the subjective normative positions of the authors. Our suggestion is to approach the problem by using a sort of pincer movement, from two flanks. Plausible normative conceptions must have more than just certain “internal” or conceptual qualities. To these conceptual qualities belong a list of requirements: first, they must have a justificatory strategy, which is aimed at convincing us. Strategies, which attempt to ground their legitimacy in self-interest, fulfil this criterion just as inadequately as those strategies grounded in unrealistic assumptions about our behaviour and motives. Furthermore, a convincing normative conception should provide plausible principles of application and the core of an institutional design, which re-inforces those principles.

A suitable normative conception also has certain, more or less, enduring empirical, that is, quasi theoretical “external” framing conditions to consider. We are concentrating on two such conditions here: 1. The institutional design should be realistic, and so it should be achievable against the backdrop of the prevalent international relations, at least in principle. 2. Contemporaneously, it should be able to work with the structural problems of its subject (here, the world trade order). Structural problems are such *persistent* context-specific problems which influence international relationships. In such circumstances, the normative conception which offers convincing solutions and results for these problems is preferable.

In summary, normative pluralism and enduring empirical conditions must suitably be considered and the connected expectations must be brought into a “reflective equilibrium” (Rawls). The latter is achieved if the various normative and empirical considerations (only partly explicated here) reciprocally stabilise as a form of lexical priority of the normative dimension. The expression “lexical priority” says something about the standing of certain empirical considerations. They cannot positively promote the suasive capacity of normative aims, but can delimit it. Precisely which empirical considerations are affected by such a fettering is, itself, the subject of debate.

Broadly speaking, three different restrictive usages of the feasibility-problem can be distinguished: The least number of feasibility problems is considered if the strict impossibility of empirical framing conditions is made a condition for their inclusion in a normative conception, so as to affect the normative goals. The greatest restrictions occur if normative goals pertain to concrete reforms in which all immutable empirical framing conditions and all agency deficits – Who actually promotes these desired changes? – lead to a change in the aim. Our feasibility expectations are positioned between these two extremes. The empirical framing conditions will be considered, which we, with good reason, assume will not change in the medium term. Consequently, we will regard the concrete institutional instances of the existing world trade order as largely flexible and malleable (for this reason, we do not discuss it in detail here) and consider ourselves restricted to the question of whether medium term, capable actors can promote a fairer world trade order.

Since we cannot go into all the relevant questions thrown up by a comprehensive and convincingly just international trade order in the space available here, we focus only on the main features of a normative international trade order. First, we want to clarify the point of a world trade order. What expectations do the participants have of corresponding international agreements and institutions (1)? In the introduction, we found fault with the fact that most contributions to this debate about international justice do not systematically take into account the feasibility problems and therefore lack the power to convince. Two such feasibility problems will be taken into account here (2 & 3), although their importance must be inferior to that of the principles of application (discussed later in Section III) in the architecture of this conceptual model.

2.1. The point of a world trade order

It is perhaps, one of the central purposes of a world trade order to facilitate international trade and thereby create benefits for all parties (states) without sacrificing too much of the room in which national political regimes manoeuvre.³

Why do we need a political institution for global trade? One answer suggests itself if one models situations according to game theory (excluding certain important dimensions, like monetary politics). With regard to the distribution of the foreseeable economic benefits, the world trade order corresponds to the prisoners' dilemma, in which all participants ideally profit if trade restrictions play no role. From the viewpoint of the participant, who is not coerced by institutions, it is "rational" to protect the goods of one's own economy from those of another, in order either to maximise one's own advantage (where there is otherwise unrestricted general trade) or, at the very least, to minimise the damage (where there is general protectionism). The sense of a world trade organisation lies in this economically limited view, according to which the exposure and "punishment" of misbehaviour incentivises actors to fulfil the common weal of shared trade.

Correspondingly, one of the goals of the WTO Agreements is the hindrance of illegitimate protectionism, and thus WTO law controls the members, in order to prevent free riding. There is a quasi-natural interest of the state to profit from the fruits of international trade, whilst keeping costs down for its own economy. If everyone behaved in this manner, there would be no fruits of collective trade, because it would be replaced by general protectionism. This assumption about the starting point is shared by at least those actors who advocate such an international organisation. If a state (when consenting to an international trade order) did not at least expect beneficial effects, a rational explanation for the efforts to create international trade would be difficult to obtain.

We called this view an economically limited one above. How can this be understood? Next to the reasonable goal of the promotion and guaranteeing of economic prosperity, societies and states have other political goals that are not in all cases compatible with the maximisation of economic benefits. Such goals include political and cultural self-determination, or various forms of individual and collective security. The main "guarantor" of these societal goals is the nation state (in the case of the EU, also a regional association).

³ Naturally, a normative conception must rank these various goals.

Clearly, they are not all guaranteed on the global plane. Correspondingly, from the point of view of all participants, there are good grounds for resisting the subordination of national political autonomy to economic prosperity.

It is not just a good part of the coveted performance that is produced in the frame of domestic politics. In addition, more demanding conceptions of democracy are possible in the domestic context than in the WTO, so that it seems important not to restrict national legislatures unduly. The law cannot solve such a conflict of interests easily. A strongly-specified law would efficiently prevent protectionism. It would, conversely, be potentially unsuitable for use in a multitude of individual cases and would fetter national autonomy in an exaggerated manner. In contrast, an under-defined and procedural law would heighten the danger of protectionism and perpetuate the control problem for routine politics.

2.2. Dealing with non-democratic members of a world trade order

Many members of central global organisations have no democratic governance structure. According to Freedom House, of the 150 WTO states, about a sixth are “not free”.⁴ They respect neither political nor civil freedoms. In addition, a third of these countries rate as “partly free”.⁵ Furthermore, there is a lack of an educated civil society in some developing countries and in the “not free” states. Normative conceptions, which make high demands on the internal democratic quality of states, have the problem that many of the WTO states do not come close to fulfilling these criteria. A convincing normative conception would either have to show that it remains acceptable for non-democratic WTO states, or it would have to draft a basic model of cosmopolitan democracy, which is achievable in the aforementioned sense. In the case of a conception of democracy with a universal claim to validity, it must be shown (normatively) that, it comprises (a) clearly specifiable democratic values, which (b) are not globally imposed particular (“Western”) values, and (c) to which there is no acceptable alternative of political organisation. Moreover, it would have to be shown that these democratic values would be transposed either from within or from outside these states. In view of the normative aspect of this question, we are unsure. It does not seem to us impossible that there are “well-ordered societies” aside

⁴ For pragmatic reasons, we concentrate on the WTO, although we are not actually concerned with the concrete institutions, but with the relevant institution of a world trade order, and the specific, but lasting, empirical framing conditions. We use the WTO only as an example to explain certain structural problems.

⁵ Freedom House Index 2006, www.freedomhouse.org/template.cfm?page=267&year=2006.

from the liberal democratic basic structures (see, for example, Rawls 1999). But we do exclude the possibility of such a widespread democratisation in the next decades.

If one follows this line, two possibilities remain: non-democracies could generally be excluded from international trade (in so far as democratic states are participants). This would be very difficult to justify. Finally, a considerable element of such a cosmopolitan utopia is the demand for equal individual rights for world citizens. And one would not want to add to the burdens of those citizens who do not enjoy democratic rights, the exclusion from the benefits of an independent economy.⁶ Consequently, one would want to exclude only those regimes in which the fruits of international co-operative commerce certainly will not benefit the population at large. As a consequence, non-democratic states would also be part of the central organisation of a world trade order. Finally, different political structures can be envisaged which aim to preserve domestic opinion and will-building processes, without replicating their typologies at international level. This type is called “segmented” political order.

In principle, there are two (not fully developed) types of global order here; one world trade order structured through democratic institutions, and a strongly segmented, differentiated political order. Is it not purely a normative question, which type of order is preferable on the global plane? As noted above, we do not share this position. Why not?

Let us consider the model of a replication of democratic structures at global level and its use on a plurality of internal democratic and non-democratic states. We should expect from such a replication that it prefers precisely those societies which also have corresponding structures in their internal affairs. So countries with a higher associative activity also have a higher visibility in international processes with their goals than those without such a foundation, and probably have a higher chance of achieving their demands.⁷ A simple replication of national democratic structures could produce unfair and

⁶ That such an expulsion puts pressure on these states to create internal democracy is not evidenced. The benefit also seems too uncertain and there are also costs to be taken into account.

⁷ See, for example, the case of the observing organisations of civil society in relation to the Codex Alimentarius Commission, T. 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 Publishing, 2007), at 267.

undesirable effects, not in the ivory tower of their theoretical inception, but in their application in the real “non-ideal” world. And, in the case of a world trade order, internal democracy portrays such an ideal condition, whose inexistence should be reflected upon in normative conceptions.⁸

2.3. The North-South Divide

Further problems arise out of the great differences in resources and development among the WTO members, which must be dealt with by any normative conception. It cannot realistically be assumed that all WTO members have the same negotiating or veto power. Whilst the consequences of a failure to agree might be tolerable for industrialised states, the same is not true for developing countries. They also do not share the same ability to influence negotiations or to veto outcomes. It is not only the “Green Room” negotiations, but also the great differences in staffing and in the material endowment of the national delegations in the WTO that mean that poorer countries have a peripheral status in the organisation.⁹ Let us take, for example, the case of an open, equal access to political process and enquire how great variations in the resources of national administrations would affect fair access. The assumption is the following: the more results of such negotiations favour “complex argumentation”, the more strongly differences in resources will affect the ability to shape the negotiation according to domestic preferences.

In addition, structural differences in interests result from the differences in resources and development. Scharpf has already made this claim in relation to EU states, with an eye to their relative prosperity. Environment, health and work protection standards have spread over the globe, not only subjectively, but also objectively, in highly variable extents.¹⁰

A normative conception should be able to bridge these differences in interests. The further a compromise is from the vital interests of an individual state, the harder it will be to describe it as substantially just and suitable.

⁸ And this is clearly a very considerable difference to the EU, in which all the Member States are internally democratic.

⁹ See M. Krajewski *Verfassungsperspektiven und Legitimation des Rechts der Welthandelsordnung*, (Berlin: Duncker & Humblot, 2001).

¹⁰ See F.W. Scharpf, *Regieren in Europa. Effektiv und demokratisch?*, (Frankfurt a.M.: Campus, 1999).

3. Comparisons of normative conceptions for a just international order

In the literature of both legal and political science, a multiplicity of conceptions regarding the normative legitimacy of the world trade order are discussed. The legal literature frequently uses the term “constitutionalisation” to denote the normative legitimacy of the world trade order and does so, both as an empirical description and as a synonym for normative legitimacy.¹¹

In political thought, conversely, normative legitimacy is frequently referred to with the word “justice”.¹² Various conceptions will be illuminated in the next section, and two of these will be discussed in detail. In order to understand the various conceptions of justice, it is worth distinguishing them on the basis of two central distinctions. First, the conceptions can be distinguished upon the basis of which *principles of application* are taken into account. Second, they can be distinguished upon the basis of the level of governance to which they attribute *supremacy*. Through combinations of the various forms, a roster of normative conceptions for the international order can be constructed, and the different existing concepts can be inserted according to their characteristics. (Section III.1). Finally, we will try, by deconstructing the two most prominent alternative conceptions, to show why a third, divided, procedural constitutionalism is preferable (Section III.2).

3.1. A taxonomy of normative conceptions of international order

There is an absence of clearly worked out, comprehensive normative conceptions of the international order.¹³ Frequently, they are limited in their

¹¹ See D. Cass, “The ‘Constitutionalization’ of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade”, (2001) 12 *European Journal of International Law* p. 39; D. Cass, *The Constitutionalization of the World Trade Organization – Legitimacy, Democracy, and Community in the International Trading System*, (Oxford: Oxford University Press, 2005); Ch. Joerges, I.-J. Sand G. Teubner (eds.), *Transnational Governance and Constitutionalism*, (Oxford: Hart Publishing, 2004); Ch. Joerges & E.-U. Petersmann, (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, (Oxford: Hart Publishing, 2006); E.-U. Petersmann „Multilevel Governance Requires Multilevel Constitutionalism“, in: Ch. Joerges & E.-U. Petersmann, (eds), op. cit. n. 7 *supra*.

¹² J. Rawls, *Eine Theorie der Gerechtigkeit*, (Frankfurt a.M.: Suhrkamp, 1975); J. Rawls, *Gerechtigkeit als Fairneß: Ein Neuentwurf*, (Frankfurt a.M.: Suhrkamp, 2003).

¹³ There are many approaches. They are mainly restricted to parts of a just international order. See C. Beitz, *Political Theory and International Relations*, (Princeton: Princeton University Press, 1979/1990); A. Buchanan, *Justice, Legitimacy, and Self-Determination. Moral Foundations for International Law*, (Oxford: Oxford University Press, 2004); O. Höffe, *Demokratie im Zeitalter der Globalisierung*. (Munich: Beck, 1999); T. Pogge, *World Poverty and Human Rights*:

thematics to single themes. And, often, there is a lack of systematic ordering of the normative principles along political planes. In this section, we will attempt to put existing approaches into a roster, with the aid of two central indices, which every conception of international order must include. In so doing, we aim to uncover the normative centres of very different theories. All approaches must have principles of application and must determine the respective priority of levels of governance.

By the term “principles of application”, we understand the criteria which are considered crucial in the respective theories for the normative legitimacy of the world trade order.¹⁴ These principles of application or criteria can be procedural and/or substantive.¹⁵ A conception which emphasises procedural principles of application would base the normative legitimacy of a world trade order upon the rationality or fairness of decision-making procedures. Substantial conceptions of justice, on the other hand, see the quality of law as being decisive for the normative legitimacy of the world trade order.

A normative conception for an international order throws up the question of whether, and, if so, which, governance levels should be included in a ranking of normative supremacy. Under some conceptions, *cosmopolitan* demands for justice are realised and also enforced against the nation states. In such a conception, the global level would enjoy primacy. Other conceptions attribute supremacy to the nation states in the context of the world trade

Cosmopolitan Responsibilities and Reforms, (London: Polity Press, 2002); J. Rawls, *The Law of Peoples*, (Cambridge MA, London: Harvard University Press, 1999). Further approaches, which are critical of the notion of international justice or democracy, are discussed in Sections III.1 and III.2. In the following, we will discuss the more partial approaches to international justice, as if they were comprehensive. This is justified to a certain extent, because normative principles are always in a relationship of tension to other normative precepts, and the statements that certain precepts of justice are valid, implies, at the very least, that other principles offer no competition. There are two variations: either there are no relations of tension, but this seems, in view of the normative principles discussed below, implausible, or there is a clear relationship of hierarchy, in which the actually stated conclusions about justice enjoy a normative superiority and the inclusion of other principles does not change that normative conclusion – and then a full conception of justice is implied.

¹⁴ Justificatory principles have an important function when it comes to the convincing derivation from general principles of justice. They are largely excluded here. In contrast, principles of application should help clear up which normative rules (in which order) are to be used in any given practical context. Only such principles are mentioned in the following discussion.

¹⁵ In philosophy, the terminological pair of intrinsic and instrumental values is frequently used; in political science, reference is usually made (in relation to Scharpf) to the differentiation between input- and output-legitimacy.

order. According to this version, the law of the world trade order must be measured against the extent to which it achieves notions of justice set by the *nation state*. Four solutions to the problem of levels are pursued: the “communitarian” solution advocates the normative supremacy of the national organs,¹⁶ the “cosmopolitan” claims supremacy for the supranational order.¹⁷ In between, we find two sorts of divided primacy. In terms of its content, the realisation of particular principles can be split up, for example, the most fundamental human rights could be represented at world level, in questions of distributive justice, the domestic plane might enjoy priority.¹⁸ Such a shared supremacy can also exist without specifying the proportionate mixture at the outset (subsidiarity).¹⁹

If one combines both of these distinctions between principles of application and levels of supremacy, one sees nine (or 12) possible basic positions of normative international order. In this roster, the conceptions of various orders from different disciplines can be ranked.

Table I: Normative Supremacy - Conceptions of normative legitimacy ordered along the dimensions of democratic participation, substantive justice and normative supremacy – an overview

		Bound to the nation state	Divided	Cosmopolitan
Principles of Application	Procedural	<i>Nation state proceduralism</i>	<i>Divided proceduralism</i>	<i>Cosmopolitan proceduralism</i>
	Procedural + Substantive	<i>Nation state procedural constitutionalism</i>	<i>Divided procedural constitutionalism</i>	<i>Cosmopolitan procedural constitutionalism</i>
	Substantive	<i>Nation state substantialism</i>	<i>Divided substantialism</i>	<i>Cosmopolitan substantialism</i>

The commentators from the legal and political science debates can be placed in the above table.²⁰ Amongst the *proceduralists*, we can find representatives of

¹⁶ D. Miller, *On Nationality*, (Oxford: Clarendon Press, 1995).

¹⁷ B. Barry, *Culture and Equality. An Egalitarian Critique of Multiculturalism*, (Cambridge: Polity Press, 2001); T. Pogge, “Internationale Gerechtigkeit: Ein universalistischer Ansatz”, in: K.G. Ballestrin, (ed), *Internationale Gerechtigkeit*, (Leverkusen: Leske + Budrich, 2001).

¹⁸ J. Rawls, *The Law of Peoples*, n.13 *supra*.

¹⁹ S. Gosepath, *Gleiche Gerechtigkeit. Grundlagen eines liberalen Egalitarismus*, (Frankfurt a.M.: Suhrkamp, 2004); O. Höffe, *Ethik und Politik*, (Frankfurt a.M.: Suhrkamp, 1979).

²⁰ An exception is D. Cass *op. cit.* n. 11 *supra*. Cass’ suggestions for the establishment of a “Trading Democracy” embrace procedural, deliberative (although vague) but predominantly substantial elements (strengthening of the position of developing countries and greater recognition of their concerns). She deals with neither the question of primacy nor does she try

all three variations of normative supremacy. Authors like Bacchus and Hudec represent a *nation state proceduralism*.²¹ The legitimacy of the WTO, so they argue, derives predominantly from the free national vote on the agreements.²² Nanz and Held represent variations of *cosmopolitan proceduralism*. Nanz argues that the WTO could enjoy just decision-making procedures in that it involves NGOs.²³ Shell's and Charnovitz' suggestions go in a similar direction.²⁴ Held's model of a cosmopolitan democracy embraces suggestions for referenda and a parliamentarisation of international organisations.²⁵ Joerges' model of deliberative supranationalism proceeds from a *divided proceduralism* in order to manage the problem of extra-territorial effects of national law.²⁶ Where minimum harmonisation in deliberative international standardising organisations is not available, WTO law should oversee the observance of reasonable national decision-making processes, with the help of procedural rules. Von Bogdandy, too, wishes to strengthen the legislative abilities of the WTO and argues for a procedural law, which forces the members to consider foreign interests in national decision-making.²⁷

to resolve the potential conflict between procedural and substantial elements.

²¹ J. Bacchus, "A Few Thoughts on Legitimacy, Democracy and the WTO", in: E.-U. Petersmann, (ed), *Preparing the Doha Development Round*, (Florence: European University Institute, 2004), p. 112; R.E. Hudec, "Comment", in: R.B. Porter, P. Sauvé, A. Subramanian & A.B. Zampetti, (eds), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium*, (Washington: Brookings Institution Press, 2001), p. 295.

²² *Ibid.*

²³ P. Nanz, "Democratic Legitimacy of Transnational Trade Governance: A View from Political Theory", in: Ch. Joerges & E.-U. Petersmann, (eds), *op. cit.* n. 11 *supra*, p. 59.

²⁴ R. Shell, "Trade Legalism and International Relations Theory – An Analysis of the World Trade Organization", (1995) 44 *Duke Law Journal*, p. 829, at 915; R. Shell, "The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization", (1996) 17 *University of Pennsylvania Journal of International Economic Law*, p. 359; S. Charnovitz, "Participation of Nongovernmental Organizations in the World Trade Organization", (1996) 17 *University of Pennsylvania Journal of International Economic Law*, p. 331; S. Charnovitz, "WTO Cosmopolitanism", (2002) 34 *New York University Journal of International Law and Politics*, p. 299, at 329-344.

²⁵ D. Held, *Democracy and the Global Order*, (Cambridge: Cambridge University Press, 1995), p. 40 *et seq.*, 219 *et seq.*, & 272 *et seq.*

²⁶ Ch. Joerges, "Free Trade with Hazardous Products? The Emergence of Transnational Governance with Eroding State Government", n.50

²⁷ A. von Bogdandy, "Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship", in: J. A. Frowein & R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law*, (The Hague, London & New York: Kluwer Law International, 2001), p. 609, at 632, 658 & 666; "Legitimacy of International Economic Governance: Interpretative Approaches to WTO law and the Prospects of its Proceduralization", in: S. Griller, (ed), *International Economic Governance and Non-Economic Concerns: New Challenges for the International Legal Order*, (Vienna & New York: Springer, 2003), p. 103, at 126 *et seq.*

In Krajewski's discourse theoretical model, the established legitimacy deficit of the WTO should be remedied with a stronger inclusion of national parliaments, a strengthening of deliberative decision-making between the national representatives, the inclusion of NGOs, and an increased transparency in the functioning of the WTO.²⁸ Atik advocates a simultaneous democratisation and parliamentarisation of the WTO and its members.²⁹

Amongst the *substantialists*, we find, first and foremost, representatives who take the position of *cosmopolitan substantialism*. Of the WTO commentators, Petersmann is often interpreted in this way.³⁰ However, as will be shown later, Petersmann's later writings cannot be interpreted in this manner. His earlier work cannot clearly be categorised according to the two elements of the principles of application and normative supremacy. Petersmann argues that WTO law possesses constitutional functions because it augments national constitutional principles of negative freedom and democracy.³¹ This argument can be interpreted as an analysis of the existing state of the law. However, various commentators have highlighted that the constitutions examined by Petersmann contain no right to foreign trade or parliamentary representation in foreign policy, and that WTO rules cannot be understood as basic or individual freedoms.³² Petersmann thus raises legal-political demands which go beyond vouchsafed national constitutional precepts and rights, although it remains unclear upon what basis of normative supremacy these rest. In contrast, Thomas Pogge can be classified much more easily as a *cosmopolitan substantialist*.³³

We can characterise positions which attempt to reconcile procedural and substantive principles of application as procedural constitutionalism. In his more recent writings, Petersmann argues that the WTO should protect

²⁸ M. Krajewski, n. 9 *supra*, p. 261 *et seq.*, & p. 272 *et seq.*

²⁹ J. Attik, "Democratizing the WTO", (2001) 33 *George Washington International Law Review*, p. 451.

³⁰ With regard to the substantial principles of application in Petersmann's theory, see, for example, R. Howse & K. Nicolaïdis, "Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?", (2003) 16 *Governance: An International Journal of Policy, Administration and Institutions*, p. 73, at 81 *et seq.*; M. Krajewski, n. 9, *supra*, p. 204. With regard to the cosmopolitan elements in Petersmann's theory, see Cass, n. 20 *supra*, p. 153 & 164.

³¹ E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law*, (Fribourg: University Press, 1991); "National Constitutions and International Economic Law", in: M. Hilf & E.-U. Petersmann, (eds), *National Constitutions and International Economic Law*, (Boston & Dordrecht: Kluwer Law and Taxation, 1993), p. 3.

³² M. Krajewski, n. 9 *supra*, pp. 166-185; von Bogandy, n. 27 *supra*, p. 429.

³³ T. Pogge, n. 13 and n. 17 *supra*.

human rights.³⁴ These include, so argues Petersmann, civil liberties, social rights but also the right to democracy. He makes corresponding suggestions for the democratisation of the WTO. He is not, however, unequivocally classifiable. On the one hand, his arguments can be interpreted as statements about the existing law, on the other, they go beyond existing law and are thus of a legal-political nature.

Where Petersmann directly addresses the legitimacy of the world trade order, he refers not only to national supremacy and mixed principles of application,³⁵ but also to cosmopolitan supremacy and substantial principles.³⁶ Similarly to Petersmann, Cottier suggests procedural and substantial human rights as

³⁴ E.-U. Petersmann, “Multilevel Governance Requires Multilevel Constitutionalism”, n. 11 *supra*; *idem.*, “Constitutional Primacy and ‘Indivisibility’ of Human Rights in International Law? The Unfinished Human Rights Revolution and the Emerging Global Integration Law”, in: S. Griller (ed), *International Economic Governance and Non-Economic Concerns: New Challenges for the International Legal Order*, (Vienna, New York: Springer, 2003), p. 212.

³⁵ E.-U. Petersmann, “Constitutionalism and International Organizations”, (1996/1997) 17 *Northwestern Journal of International Law and Business*, p. 398, at 439. [“From the perspective of constitutional democracies and their citizens, international organizations [...] derive their legitimacy from promoting the equal liberties and ‘public interest’ of domestic citizens. It is therefore important to ensure that international agreements do not undermine the basic constitutional principles of democracies. For instance, the domestic constitutional principles of parliamentary and direct democracy [...] may require that the rules negotiated among governments in the framework of international organizations [...] be ratified by national parliaments and subjected to popular referenda by domestic citizens.”]; E.-U. Petersmann, “Darf die EG das Völkerrecht ignorieren?”, (1997) 11 *EuZW*, p. 325, at 330. It is, nevertheless, not abundantly clear from this citation whether he is referring to a normative or a legal dogmatic position.

³⁶ E.-U. Petersmann, “Constitutionalism and WTO law: From a State-Centered Approach Towards a Human Rights Approach in International Economic Law” in: D.L.M. Kennedy, & J.D. Southwick, (eds), *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec*, (Cambridge & New York: Cambridge University Press, 2002), p. 32, at 38 [“Human rights are not only universal moral entitlements deriving from respect of the moral autonomy, rationality, and ‘dignity’ of human beings.”]; E.-U. Petersmann, “European and International Constitutional law: Time for Promoting ‘Cosmopolitan Democracy’ in the WTO”, in: G. de Búrca & J. Scott, (eds), *The EU and the WTO: Legal and Constitutional Issues*, (Oxford: Hart Publishing, 2001), p. 81, at 81 *et seq.*: [“Kantian legal theory proceeds from the premise that the rational and moral autonomy and dignity of human beings require them to act in conformity with self-imposed moral and legal rules that respect and protect maximum equal liberty for the personal development of every individual. According to Kant, the legitimacy and ‘justice’ of national international constitutional law depend on a ‘constitution’ allowing the greatest possible human freedom in accordance with laws which ensure that the freedom of each can coexist with the freedom of all others. By protecting human rights, non-discrimination and free movement...as fundamental individual liberties inside the EC and the European Economic Area, EC law offers principles for a just constitutional order to which rational citizens can voluntarily agree because the liberties protect their individual freedom, legal equality, personal development and economic welfare across frontiers.”].

principles of application, but he also advocates a segmented political order in which the principles are realised at different levels of governance.³⁷ To him, the appropriate level of governance should be decided upon through a subsidiarity principle, defined by criteria of efficiency and participation. We will call this position *divided, procedural constitutionalism*.

3.2. For divided, procedural constitutionalism

The taxonomy of the various positions makes the plurality of conceptions of legitimacy clear. In this section, we are concerned with the question of which of these conceptions (or which type of conception) is preferable. In what follows, three of these normative types will be analysed for their capacity to solve problems in the light of the structural problems set out above (See Section II). Unfortunately, the really necessary normative discussion of all the positions cannot be carried out in this short contribution.³⁸ We concentrate here on two prominent extremes, the *nation state proceduralism* and *cosmopolitan substantialism*. On the basis of this analysis, we argue for the comparative advantages of a *divided, procedural constitutionalism*.

a. Nation state proceduralism

For representatives of nation state proceduralism, the legitimacy of international organisations springs from the free, authorising vote for their founding treaty on the part of the nation states.³⁹ Correspondingly, with institutions such as the WTO, they speak not of self-standing supranational form, but of “member driven organisations”. Bacchus argues in this way:

The source of ‘legitimacy’ of the WTO is the Members of the WTO. The ‘legitimacy’ of the WTO is a ‘legitimacy’ that derives from, and is inseparable from, the individual legitimacy of each of the individual ‘nation-states’ that, together, comprise ‘the WTO’. Far from being an effort to subvert the sovereignty of individual states, the WTO is, rather, a mutual effort by individual states to assert and to sustain their

³⁷ T. Cottier & M. Hertig, “The Prospects of 21st Century Constitutionalism”, (2003) 7 *Max Planck Yearbook of United Nations Law*, p. 261.

³⁸ Finally, we accept that the position of procedural constitutionalism can be demonstrated to be normatively superior (see, for a corresponding general position, Rawls 2001, Gutmann/Thompson 1996). Here, we concentrate on the anticipated effects pursuant to the afore-mentioned enduring conditions of a global economic order, because we see in these conditions grounds, which, over and above the principal normative expectations, strengthen the position of a divided, procedural constitutionalism.

³⁹ Bacchus, n. 21 *supra*; Hudec, n. 21 *supra*.

sovereignty in an effective way in confronting the many challenges that face individual states in an increasingly ‘globalised’ economy.⁴⁰

This can undoubtedly result in legitimacy deficits. But, according to Bacchus, these concern not the WTO as an institution, but pertain to the sub-standard quality of the national democratic process.⁴¹

Such a view of higher law-making can be connected to conceptions of everyday supranational politics,⁴² which, for the most part, work through depoliticised, deliberative agencies.⁴³ On the whole, such (transparent) day-to-day politics, such as the setting of individual standards or the settlement of disputes, is subordinate to a double (domestic) reservation, namely, the prospective domestic authorisation and retrospective accountability.

Unlike cosmopolitan proceduralism, national proceduralism does not even have to develop normative principles which are identical across nation states. It is suggested that developing universal principles would be difficult as there are several plausible candidates, among which we can hardly decide unambiguously. Thus, it is also difficult to discuss the related principles directly. Nevertheless, the indirect discussion points to sufficient deficiencies of such a position.

Fundamentally, one can make the objection that nation state proceduralism is *ill-suited to deal with problems of international justice*. Thomas Pogge puts it strongly when he states that the historical and present effects of the global economic institutions create obligations of justice towards the world’s poor, because they are jointly responsible for their position.⁴⁴ Other authors

⁴⁰ Bacchus, n.21.

⁴¹ The argument about the deficiency of nation state vetting of quasi-constitutional international acts (Uruguay Round) is almost irrefutable in the case of Germany’s role: see M. Hilf, “Negotiating and Implementing the Uruguay Round: The Role of EC Member States – the case of Germany”, in: J.H. Jackson & A.O. Sykes, (eds) *Implementing the Uruguay Round*, (Oxford: Clarendon, 1997), p. 121; *idem* “WTO: Organisationsstruktur und Verfahren”, in: M. Hilf & S. Oeter (eds), *WTO Recht: Rechtsordnung des Welthandels*, (Baden-Baden: Nomos, 2005).

⁴² The difference between “higher lawmaking” and “normal politics” was developed by Bruce Ackerman with help of the history of the amendments to the American constitution. B. Ackerman, *We the People. 1. Foundations*, (Cambridge MA: Belknap, 1991). For us, two points combine with this distinction: When evaluating the world trade order, the processes of normal politics and of treaty-making and treaty-alteration must be taken into an integrated account. Prescriptively, there might be different normative criteria for both types of process.

⁴³ Hudec, n. 21 *supra*.

⁴⁴ T. Pogge, n. 17.

propound a weaker (natural) duty of international emergency aid.⁴⁵ As soon as one takes one of these two positions, a pure nation state proceduralism emerges as insufficient to achieve normative legitimacy.

When attention is paid to the structural problems of the world trade order, further points of criticism of nation state proceduralism arise. One objection relates to the missing pre-conditions for fair *proceduralism*, which includes problems of the North-South divide (see above, Section II.3). On the grounds of unequal economic capacity, there is unequal power in the negotiations about international treaties. For instance, the refusal of a WTO-package is not a realistic option for poor, small states.⁴⁶ By way of the “Green-Room” negotiation tactic, these states are shut out of decisive negotiations and have less financial and personnel resources to deploy.⁴⁷ Similar negotiating power would be a pre-condition for agreement on an international treaty to count towards normative legitimacy.⁴⁸ In short: the problems exemplified here and the inequalities that are structurally incorporated in the institutions of global order inhibit the fairness of procedures. It is neither prudent nor possible to hang the legitimacy *only* on the peg of fairness of procedures, when we know of a *persistent* lack of fairness of all realizable procedures.

A further problem for the position of nation state proceduralism is the lack of binding force with regard to subsequent *demoi*.⁴⁹ This problem stems from the principle of general accord to international treaties, which is fundamental to nation state proceduralism. It implies that treaties which create changes must be acceded to by all other states. International accords are, therefore, – and this is uncontentious – difficult to change. It is a central point of democratic proceduralism that the “constitutional” *status quo* is only temporarily valid – it is almost “on call”. The more difficult it is to change such treaties, the less one can consider them as being democratically determined, for the reason that the elected representatives and citizens have not actually voted for them, or that the accords have unforeseen consequences. The fact that the existing international structure, such as the WTO Agreements and its dispute settlement reports, are difficult to change is cause for complaint by several

⁴⁵ J. Rawls, n.13.

⁴⁶ A similar argument is made by M. Krajewski n. 9, pp. 244-246 & p. 272.

⁴⁷ *Ibid.*

⁴⁸ It is not only in an everyday context that threats, coercion and extortion can undermine the fairness of contracts of exchange (“your money or your life”). Bruce Ackerman, looking precisely at the different symmetrical and asymmetrical relationships, has revealed various normative procedural standards. If this is plausible, nation state procedures use insufficient or inadequate normative principles.

⁴⁹ Similarly, see M. Krajewski, n. 9, p. 272.

commentators, and is not, empirically, contentious. Even if there was free and equal voting amongst the participants, there would still be the normative problem that the Agreements also affect successive generations, without their vote. If it turns out that the WTO accords have unintended repercussions, the problem remains that it is hard to alter them.

One way out of this problem would be the creation of a materially under-defined, procedural law which would allow for national exceptions under conditions of reasonable behaviour.⁵⁰ However, such a procedural law would shift much of the normative burden onto every-day politics. For many areas of routine politics, no international organisation which can deal with these tasks is available. Thus, a large part of routine politics would have to take place at national level. In such circumstances, the problem would be one of being able to distinguish reliably between legitimate measures and illegitimate protectionism, and the ability to stop unacceptable distributive effects.

Our central point here is: simply because the already existing structures are much harder to change at international level than at nation state level, and because we must always foresee changing preferences and positions, there must be a practical mechanism for altering these accords. However, such normative basic positions as nation state proceduralism do not admit such a mechanism, and this will – incrementally – lead to a loss of democracy.

The necessarily *central role of the national veto* in nation state proceduralism is also problematical. Representatives of nation state proceduralism must show that even the failure to solve a problem because of a single national veto is an acceptable solution. For “either-or- problems”, for example, the question of whether to trade with a state which persistently violates human rights, this is hardly acceptable. In the light of how the WTO system functions, the veto option can lead to non-decision. This is highlighted in the ministerial rounds since Seattle, which have failed to achieve consensus on new WTO-

⁵⁰ Ch. Joerges, “Free Trade with Hazardous Products? The Emergence of Transnational Governance with Eroding State Government”, (2005) 10 *European Foreign Affairs Review*, p. 553; *idem*. “Constitutionalism in Postnational Constellations: Contrasting Social Regulation in the EU and in the WTO”, in: Ch. Joerges & E.-U. Petersmann, (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, (Oxford: Hart Publishing, 2007); Ch. Joerges, “Freier Handel mit riskanten Produkten? Die Erosion nationalstaatlichen und die Emergenz transnationalen Regierens“, in: M. Zürn & S. Leibfried, (eds), *Transformationen des Staates*, (Frankfurt a. M.: Suhrkamp, 2006); Ch. Joerges & C. Godt, “Free Trade: The Erosion of National and Birth of Transnational Governance”, in: M. Zürn & S. Leibfried, (eds), *Transformation of the State*, (Cambridge: Cambridge University Press, 2005), p. 93.

Agreements. Since WTO members tend to put the brakes on reforms and new rules, it is mistaken to speak of the WTO as a member-driven organisation.⁵¹ The national veto prefers systematic positions which seek to prevent rules and impedes those which wish to create new rules.

With a view to certain legitimate nation state politics, the WTO Agreements are structurally under-determined, and might well remain that way in the light of the central role of the national veto. Nothing is said about some of these “non-trade” themes and their handling. We have already mentioned that, where there is an under-defined accord, routine politics carries the heavy burden of fulfilling the contents of the treaty. The handing over of such questions to national autonomy would undermine the central purpose of the agreements (liberalisation of trade) and, thus, is simply not an option.

Strong judicial oversight through the dispute resolution organs could crystallise the abstract norms in concrete cases, but here, there is the possibility that the members of the system do not agree with judicial norm-adaptation.. The problem of the binding power of the agreements would thus be perpetuated in every-day routine politics.

The handing over to an independent supranational agency as a third possibility for handling routine politics runs aground on other difficulties. Whatever one feels about the normative pull of independent agencies, in view of the problems of WTO politics, there is a hurdle which is hard to vault. The legitimacy of the delegation of political competencies to independent agencies also necessitates that the extent of the delegation is clearly delimited. In view of the shared international goal (the liberalisation of trade), this is also the case. In the light of the possibility of the nation states pursuing different cultural or ethical policies, it is, however, completely unclear what role independent agencies can play or how they can be in the position to accommodate both sets of aims concurrently.

These criticisms of a pure form of proceduralism, and its nation state type in particular, lead us to a discussion of the substantive alternatives.

⁵¹ C.-D. Ehlermann, “WTO Decision-Making Procedures, “Member-Driven” Rule-Making and WTO Consensus-Practices: are they adequate for making, revising and implementing worldwide and “plurilateral” rules?”, <http://www.haledorr.com/de/veroeffentlichungen/whPubsDetail.aspx?publication=83>, 2005.

b. Cosmopolitan substantialism

Thomas Pogge most clearly fits into the category of cosmopolitan substantialism.⁵² Of the WTO commentators, Petersmann is interpreted in this way, too.⁵³ In his earlier writings, he argued that the GATT fulfilled constitutional functions, because it protected individual economic freedoms from disrespectful state encroachments. For the representatives of a libertarian variant of cosmopolitan substantialism, the main problem is the lack of parliamentary and judicial control of nation state foreign trade policy.⁵⁴ Home industry is able to burden native consumers and importers with inefficient, protectionist foreign trade policies. Thus, freedoms are curtailed and poorly-represented consumer interests are lumbered by inefficient politics. WTO law aims towards the protection of these rights and should enjoy both priority over national law and direct effect in the national legal orders.

Next to a libertarian, substantialist position, some derive the legitimacy of the WTO from the protection of a wider catalogue of rights, for instance, because WTO law relates its legitimacy to the protection of human rights and civil liberties. Thomas Pogge represents this position expressly, but the “younger” Petersmann also argues that WTO law must measure itself against existing international human rights conventions, and that these should, conversely, consider the norms of WTO law.⁵⁵ The traditional human rights should have priority over the right to free trade.⁵⁶

⁵² T. Pogge, n. 13 *supra*.

⁵³ See n. 30. In his more recent writings, Petersmann advocates, to the contrary, a body of human rights law, in which procedural principles, such as the right to democracy, would rank higher than the right to free trade. See, for example, E.-U. Petersmann “Multilevel Governance Requires Multilevel Constitutionalism”, n. 11 *supra*; “European and International Constitutional Law: Time for Promoting ‘Cosmopolitan Democracy’ in the WTO”, in: G. de Búrca & J. Scott, (eds), *The EU and the WTO: Legal and Constitutional Issues*, (Oxford: Hart, 2001), p. 81, at 100 & p. 107 *et seq.*; “Constitutional Primacy and ‘Indivisibility’ of Human Rights in International Law? The Unfinished Human Rights Revolution and the Emerging Global Integration Law“, *op. cit.* n. 34, p. 212.

⁵⁴ However, M. Krajewski n. 9, p. 198 *et seq.*, points out that many legislative policies are now reviewed in the WTO dispute resolution mechanism and that parliamentary laws do not guarantee an absence of protectionism. From this, he concludes that Petersmann is concerned not with the strengthening of parliamentary control but with the impeding of protectionism. In fact, a constitutional self-restriction does not seem to be the most obvious way to strengthen parliamentary control over foreign trade policy, given that it comes into being largely without much parliamentary oversight. More conceivable and closer would be a domestic augmentation of the role of parliaments, for example, through veto powers or hearings in international negotiations and trade policy-making.

⁵⁵ It is important to bear in mind that Petersmann also advocates the protection of procedural rights to participation in his more recent writings and therefore does not adopt a purely substantive position. See n. 34 and n. 36 *supra*.

⁵⁶ E.-U. Petersmann, “European and International Constitutional Law: Time for Promoting

The main problem of pure cosmopolitan substantialism, in the way it is represented by Pogge, is that different laws can come into collision with one another.⁵⁷ A convincing conception must, therefore, provide a laudable catalogue and weighting of these rights.⁵⁸ However, we claim that this is not possible. It might well be possible to bring the various rights into an abstract hierarchy but this will be of no avail in countless real cases. On the one hand, the gravity of a right in an individual case depends upon the severity of the violation. One might, therefore, state that, in the abstract, human dignity is the value most worthy of protection. A proportionally small violation of dignity might, however, be justified if the violation occurred in order to avoid a weightier violation of another right, for example, the right to life. On the other hand, new, practical problems might call the hitherto fore acceptable hierarchy into question.

It is also impossible to create a ranking of rights which leads to reasonable outcomes when applied to all of the individual cases that actually arise. A pragmatic solution would be to leave the ranking as open as possible and to make it concrete through political decisions in individual cases. Thus, *procedural rights to participation can play an important role* as a necessary supplement to a substantialist conception of justice.

At first sight, the problem of conflicts of rights does not seem to trouble the libertarian substantialist position. Nevertheless, it is argued that economic freedoms are not intrinsically valuable, nor are they more important than other rights: they draw their justification from the realisation of other goods, such as well-being and both material and physical security; thus, they are a means to an end.⁵⁹ The extent to which the free trade of goods and services actually serves this end remains, nonetheless, debatable.

‘Cosmopolitan Democracy’ in the WTO”, n. 36, p. 81, at 100.

⁵⁷ See, also, D. Cass n. 20 *supra*, p. 153 & p. 157 [with further references], M. Krajewski, n. 9, p. 204.

⁵⁸ Petersmann’s position seems to oscillate between normative-prescription and a doctrinal analysis of the law. Petersmann argues that since all WTO members have agreed to international human rights obligations, all the WTO should do is uphold these obligations. This reasoning can be seen as empirical. That said, Petersmann also makes normative suggestions. If his position is to be understood as mainly prescriptive, Petersmann must make his catalogue of human rights plausible over and above the positivist justification. Similarly, see the criticism of D. Cass n. 20, p. 152.

⁵⁹ P. Alston, “Resisting the Merger and Acquisition of Human Rights by Trade Law: A reply to Petersmann”, (2002) 13 *European Journal of International Law*, p. 815, at 828.

Exclusively cosmopolitan positions such as cosmopolitan substantialism have another empirical problem, in that international law may not provide a similar, all-embracing balancing of values to that of national law. It has been argued that international law is fragmented into a plethora of different legal orders, which have diverse and sometimes incompatible logic, and are the expression of an inalterable political pluralism; these orders cannot, therefore, be coherently constitutionalised.⁶⁰ In fact, international law has no mechanism to solve the direct collision of norms, and the interpretative canons of *lex posterior* and *lex specialis* only offer unsatisfactory solutions to this collision. Furthermore, international treaties do not bind third parties, so it is always possible for objecting states not to be bound by international rules for which there are good normative grounds. Current international law is, therefore, sometimes at odds with the demanding balancing of human and economic rights and with norm diffusion between different treaty-regimes.

Moreover, substantial conceptions of justice often explain who should be the bearer of rights, and what *institutional consequences* this dictates, only in an unsatisfactory way.⁶¹ In the world trade order, the bearers could all be individuals, exporters, consumers, or importers. The bearers of rights must then have legal tools at their disposal in order to invoke these rights against WTO members as well as against the WTO. If we are concerned with universally applicable human rights, all individuals should have the right to claim against the WTO. Such a world trade order is, however, a long way away from today's regime. On the one hand, the legal interests of individuals cannot be invoked before international courts, and, on the other, in the framework of the WTO, there is no functioning procedure to take positive measures for the protection of rights.⁶²

⁶⁰ M. Koskenniemi & P. Leino, "Fragmentation of International Law: Postmodern Anxieties", (2002) 15 *Leiden Journal of International Law*, p. 553; A. Fischer-Lescano & G. Teubner, "Regime-Collisions: The Vain Search for Unity in the Fragmentation of Global Law", (2004) 25 *Michigan Journal of International Law*, p. 999.

⁶¹ Krajewski argues that Petersmann's position protects the rights of importers and exporters but not all affected individuals Krajewski, Markus, n. 9, p. 204. Nevertheless, this criticism only applies in a qualified manner to the embryonic human rights law, because Petersmann argues, that the WTO must strengthen its human rights protection. That said, Petersmann develops no thought on how to protect affected individuals so that these people can also make claims against the WTO.

⁶² Curiously, Petersmann argues that the beginnings of positive integration endanger, rather than protect, human rights. E.-U. Petersmann "Constitutional Primacy and 'Indivisibility' of Human Rights in International Law? The Unfinished Human Rights Revolution and the Emerging Global Integration Law", in: S. Griller, *op. cit.* n. 34, p.212, at 245 & 259 [with further references].

The question of the enforceability of rights points to another problem; namely, *how to deal with the plurality of the “not free” WTO members*. If the protection of universally applicable rights in the individual states is the deciding factor with regard to the legitimacy of the WTO, the world trade order would have to do something about those of its members who persistently violate human rights. At the very least, it must be left to the WTO members to take all suitable measures to move “not free” members to protect human rights within their states. Trade sanctions or exclusion from WTO membership might be the measures to take. This would produce the result that a great number of the current WTO members would be excluded from trade and the WTO would lose its status as a *world* trade organisation.

Given the WTO’s limited financial resources, and its lack of legislative and executive competence, the primacy of the global trade level seems unsuitable for the handling of problems of distributive justice; the WTO lacks the steering abilities of the nation state.

Moreover, there are other arguments against a cosmopolitan position: there are reasons, for instance, in the realm of cultural politics, to leave nation state competencies intact, because culture and what is worthy of preservation can hardly be regulated internationally. Similarly, the question of what amount of press or religious freedom over a certain minimum threshold is normatively ideal is a matter for the state. This depends on the political and societal background conditions, which are highly variable across diverse cultures. In addition, with regard to problems that require local knowledge, for example, environmental conditions or social needs, nation states are in a better position to find solutions.

c. Divided, procedural constitutionalism

By *democratic* constitutionalism, we understand a political order (generally of nation states) in which the founding principles of application not only testify to fair rules of decision-making, and to the alteration of the existing norms, but also to particular substantive “goods”, which are not disposed of through popular politics. By political order, we intend an order that generates collectively-binding rules for its members and presides over disputes about these rules, and has procedures for the enforcement of these rules. Such an order is democratic if its important decisions are publicly made and a mechanism that effectively and fairly binds its members to them exists. If substantial norms (which cannot meaningfully be reduced to rights to procedural participation), especially basic freedoms and the assurance of minimal material demands are considered on a par, we call the order

democratic constitutionalism. The significant contents of a constitution (Rawls) comprise both procedural or democratic and substantive principles.⁶³

In plural societies democratic constitutionalism can overcome an absence of ideal procedural and substantive order. Pure democracy cannot exist in modern societies, and all practical attempts to achieve such a regulatory ideal fail to avoid illegitimate results (the tyranny of the majority), so that a weak substantive corrective is thoroughly justifiable. A political order which comprises largely substantive principles is either almost empty, or is arbitrary with regard to many of the different conceptions of the good (Rawls) of its members. How can it be legitimately decided which substantive principles should be realised and how these principles should be applied in individual cases?

We now come to the global level: against the backdrop of the aforementioned structural problems (Section II.2-3), it would be naïve to want to extend these normative principles from the nation state to the supranational order. In general, both procedural and substantive principles should be normatively less demanding in order to be able to claim normative legitimacy beyond merely liberal societies.

The people in nation states constitute a general context of obligation. This is not the case at global level, where – at the most – only (weak) natural duties exist. Duties arise as consequences of particular interactions (for example, the conclusion of a contract and the accompanying binding promises for the parties). It is precisely here that the increasing international co-operation creates a normative problem: on the one hand, by virtue of their generally far-reaching social integration, nation state orders should enjoy a certain degree of protection and primacy. On the other hand, it is international treaties and interactions which expand the obligatory nature of international norms.⁶⁴

⁶³ This is not a revolutionary idea. It tallies both with the practice of the constitutional law in liberal democratic societies, and an important branch of political philosophy (see A. Gutmann & D. Thompson, *Democracy and Disagreement*, (Cambridge MA, London: Belknap Press, 1996); “*Why Deliberative Democracy?*”, (Princeton: Princeton University Press, 2004), J. Rawls, *Gerechtigkeit als Fairneß: Ein Neuentwurf*, n. 12; for a discussion of different conceptions in the frame of the nation state order, see, also, T. Hüller, *Deliberative Demokratie: Normen, Probleme und Institutionalisierungsformen*, (Münster: Lit Verlag, 2005).

⁶⁴ Thomas Pogge has, in various publications, attempted empirically to demonstrate a global context of obligation. We do not follow his reasoning. Nevertheless, his texts impressively substantiate that normative demands can no longer stop at the boundaries of states. T. Pogge, “*Internationale Gerechtigkeit: Ein universalistischer Ansatz*”, in: K.G. Ballestrin, (ed), *Internationale Gerechtigkeit*, (Leverkusen: Leske + Budrich, 2001), T. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, (London: Polity Press, 2002).

The world trade order is one of the central generators of obligations. Through the trade relationships, a series of intended and unintended effects are produced, which, in turn, create further reciprocal obligations. They produce, first, the necessity for shared (global) social regulation and, therewith, generally recognised political and juridical decision-making processes.⁶⁵

With the procedural question in view, normative conceptions face a complicated problem: it is hardly gainsaid, that at the very least some relevant political questions should no longer be decided within the national democratic process. The alternative conception of a global or cosmopolitan democracy raises normative questions with respect to the generalizability of democratic values in all parts of the world and particularly the empirical suitability of such an order. It is not only the case that a continuation of national democracy and a vision of cosmopolitan democracy are unusable normative conceptions, but also a refusal to accept the spreading of a global political order, which might also provide a framework for global decisions, is unacceptable.

What could one positively say about a supranational political order, about which we can neither accept that its normative principles are consistent with the afore-mentioned principles, and which cannot plausibly replace the nation state order or lay claim to a normative primacy? The first point, which is nothing new, points out that we need an order divided between political levels. Terms like subsidiarity, complementarity, accommodation or conflict of laws in normative conceptions of international justice aim at some sort of stratification of this nature.

In practical terms, we advocate not a global democracy, but fair procedures at international level, as well as an expansion of democratic practices to the foreign policies of democratic states and, in particular, to the quasi-constitutional acts (for example, the foundation of the WTO, as well as to alterations (or non-alterations in the framework of the various rounds of negotiation)).

⁶⁵ These contexts between market opening and non-discrimination and global/supranational social regulation are being examined in the project "Trade liberalisation and social regulation in transnational constellations" as part of the collaborative research centre on Transformations of the State at the University of Bremen. Information about the research programme and publications are available at: <http://www.staat.uni-bremen.de/pages/forProjektBeschreibung.php?SPRACHE=de&ID=1> and the website of the CRC <http://www.state.uni-bremen.de>.

Even in its basic construction, we are not talking about an ideal proceduralism here, which can be realised in the modern world of states. It is precisely because this is the case, and, by dint of the fact that no clear, binding standards exist in the international order for the working out of many political themes, problems and conflicts, that we cannot avoid the binding nature of global, substantive norms, as delimited, domestic proceduralism would suggest. In particular, Ernst-Ulrich Petersmann has, in the last few years, shown us the starting points that already exist in the emerging international legal order.⁶⁶

Like the positions discussed above, we are concerned here with the representation of a divided, democratic constitutionalism: a normative position. Here, the claim made is only that such an order, were it implemented, would be a just order, not only in comparison to the existing order, but also in comparison to the other normative orders discussed here.

It should not be disputed that we are concerned with a regulative idea. Indeed, our suggestion fulfils the feasibility criterion (should implies could), but it lacks, like all competing blueprints, the necessary power in the international system. This notwithstanding, the various constructions discussed here have, first, a “seat” both in the existing rules of international law and in the world trade order. Second, an important function of regulative ideas is that they provide a type of “compass” for adequate concrete reform efforts. Compared with nation state orders of Western societies, the world trade order is subject to a notable transformation. Different political options and “small steps” can be evaluated (and created) only on the basis of a systematic normative conception.

⁶⁶ E.-U. Petersmann, “Multilevel Governance Requires Multilevel Constitutionalism”, n. 11 *supra*.

4. On the way to a divided, procedural constitutionalism?

As we have shown elsewhere, many traces of a procedural, divided constitutionalism, already exist in WTO law.⁶⁷ These traces show up in both procedural principles of application, civil liberties, material assurances and the solution to the problems of normative supremacy.⁶⁸ In particular, with regard to the procedures for deciding about quasi-constitutional acts and the mutability of the WTO Treaty as well as the substantiation of minimal, material demands, we contend that there is a need for improvement.⁶⁹

In what follows, we discuss only the control of nation state risk regulation, which shows that substantial and procedural principles of application and forms of divided supremacy can be found in WTO law. Our impression is that of a divided, procedural constitutionalism which, to some extent, has already crystallised. Very similar mixtures of supremacy and principles of application can be found in other social-regulatory areas, where the Appellate Body in *US v Shrimp* in addition to the substantial, environmental principles of Article XX(g) GATT, developed procedural principles for the participation of the affected exporters and considered solutions in the form of multilateral environmental treaties not as mandatory, but as desirable.⁷⁰

The Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement) grants members the right, to pass rules for the protection of human, animal and plant life and health, even if these restrict trade. The SPS Agreement recognises the right to life as a substantial principle and strikes a balance between the conflicting goals of free trade and the protection of health.

Notwithstanding this, national health measures must be justified, and measures that are consistent with international standards are deemed to be WTO-consistent (an element of cosmopolitan supremacy).⁷¹ These international standards are based upon a political decision-making process in

⁶⁷ A. Herwig & T. Hüller, “Zur normativen Legitimität der Welthandelsordnung“, in: M. Hilf & T. Niebsch, *Perspektiven des internationalen Wirtschaftsrechts*, (Stuttgart: Boorberg, 2008), p. 117, at 142-153.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, p. 153-157.

⁷⁰ Appellate Body Report, *US-Shrimp*, WT/DS58/AB/R, paras. 122 & 164-166, Appellate Body Report, *US – Shrimp (21.5)*, WT/DS58/AB/RW, paras. 123-134.

⁷¹ SPS Agreement, Articles 3.1, 3.2 & 3.3.

which non-scientific criteria can be considered.⁷² In a departure from international standards, the WTO members can determine higher levels of protection if they base this upon a risk assessment,⁷³ or if they can establish that the available information is not sufficient for a risk assessment.⁷⁴ With regard to the question of what scientific knowledge their measures are based upon, the WTO members enjoy a wide area of discretion (domestic primacy).⁷⁵

In the SPS Agreement, science is used in the sense of an obligation to public justification, in order to make any health measures comprehensible for the affected exporting countries, whilst recognising that there is a plurality of scientific studies upon which measures can be based.. The scientific justification represents a multilateral basic consensus, which can be generated independently of the comprehensive – and unrealistic – participation of the affected exporters in national decision-making procedures. Put differently, the duty of scientific justification opens up the national political decision-making process to the demands of the affected exporters. To this extent, we can speak of a simulated multilateralism through scientific inquiry (a procedural function of science). A decision will, through the consideration of scientific knowledge, also be based upon a sound empirical basis, and is therefore, better suited to produce reasonable political decisions than a decision based upon false empirical assumptions.

The SPS Agreement also takes the fact that the determination of levels of protection touches normative questions and evaluations, which are disputed between the relevant states, into account. Decisions about the legitimacy of corresponding national rules cannot be determined by scientific expertise, and, consequently, member states are free to decide how much risk they wish to tolerate (national supremacy). Nevertheless, they must take the goals of free trade into account. The effects of the measure on trade may not be greater than what is necessary to achieve the appropriate goal and the decision on levels of protection may not be arbitrary or unjustifiably depart from those

⁷² As to the Codex Alimentarius Commission, see T. Hüller and M.L. Maier, “Fixing the Codex? Global Food-Safety Governance Under Review”, in: Ch. Joerges & E.-U. Petersmann, n. 11, p. 267; A. Herwig, “Transnational Governance Regimes for Foods Derived from Biotechnology and their Legitimacy”, in: Ch. Joerges, I.-J. Sand & G. Teubner, n. 11, p. 199.

⁷³ SPS Agreement, Articles 2.2, 5.1.

⁷⁴ SPS Agreement, Articles 2.2, 5.7.

⁷⁵ Appellate Body Report, *EC-Hormones*, paras. 194, 104, 172-173 & 177.

in similar situations if discrimination or obstacles to trade result (consistency of level of protection mentioned as a goal in Article 5.5).⁷⁶

Using these two yardsticks, the SPS Agreement can check whether the given normative grounds for choices in individual cases are taken in earnest and in good faith. Where normatively similar situations are handled in a dissimilar manner, this could mean that the justification is merely fictional. Through the procedural mandate of consistency in Article 5.5, the SPS Agreement can protect national autonomy and diversity, rationalise national decision-making processes and establish trade free of discrimination,⁷⁷ because members must justify the different treatment of like cases. Thus, the SPS Agreement discourages national governments from taking measures on grounds of ill-conceived views, populism or individual interests. The existing WTO law “repays” a deliberative extension of nation state democracy and hinders populist, or particularist protectionism.

A general conclusion can be drawn that the substantial principles of application in WTO law can be recognised when good grounds are given. Multilateral solutions have a special justificatory gravity when it comes to the every-day politics of nation state social regulation. The preference towards international treatment of particular social regulatory problems often seems sensible both in view of the achievement of effective protection and in view of the goal of non-discriminatory trade. In terms of transnational protection requirements, individual national measures are not terribly effective, and the special position of international standards in the SPS Agreement can thereby be understood as a requirement of rationality in finding workable health protection.

Nevertheless, the members remain free to take certain measures in their regulation of social activity if, in their view, multilateral regulations are not effective. This is plausible, since the necessary processes of balancing substantive goals are more likely to be achieved on the domestic level than on the international one. In the case of national measures, further cosmopolitan

⁷⁶ SPS Agreement, Article 5.4, 5.5, 5.6,. It remains unclear whether Article 5.5 relates to a duty to set up similar levels of protection or a duty of consistent justification. A. Herwig “The Precautionary Principle in Support of Practical Reason: An Argument against Formalistic Interpretations of the Precautionary Principle”, in: Ch. Joerges & E.-U. Petersmann, n. 11 supra, p. 301, at 219–323. The consistency of levels of protection has been tested by the Appellate Body in the framework of the necessity test pursuant to Article XX(d). See Appellate Body Report, *Korea - Measures Affecting Import of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, paras. 170–172.

⁷⁷ Similarly, R. Howse & K. Nicolaïdis, n. 30, p. 87.

procedural principles of application are appropriate (the duty to provide reasons, of transparency, and legal protection as well as the control of consistency), which help generate reasonable results, open up decision-making processes for the interests of the affected exporting countries, and cause members to consider the goals of free trade, without predetermining the domestic decision (national supremacy).

5. Conclusion

The world trade order should be ordered after the fashion of a divided, democratic constitutionalism. Only when both the procedural standards of law-making, such as publicity and the duty to give reasons, are guaranteed, and fundamental substantial requirements (the basic freedoms, the securing of basic material needs) are reliably considered, can the international order rely on justified acquiescence. This democratic constitutionalism is divided in many respects. First, we should expect different, possibly complementary, normative orders stretched over the various political levels. And, also in “segmented” differentiation, legitimate procedural and substantive standards between states can deviate from one another. With regard to the procedural standards, this means two things: liberal democracies may not give up their domestic standards of legitimation in international negotiations and agreements, without there being a need to elevate (as in many philosophical treatises) western-style democracy to a universal standard. Instead, the international political processes should have sufficient standards of fairness.

Does it make a difference whether we, to stay on this point, suggest a fairness or democratic yardstick? It does. Today, the opportunities for civil society to participate are celebrated for their democratising effect on the global level, independently of whether this praise is deserved or not. In free countries, the appropriate organisations can come about more easily and numerously. Consequently, we can anticipate that, in the relevant fora, the organisations from the democratic countries will have a perceptible advantage and the demands from the various national societies will not, therefore, be equally represented. In this precise context, a fairness principle would be appropriate.

We have not concentrated on the normative suggestion in the sense of trying to secure a consistent, philosophical justification; instead, we have tried to base it upon certain practical considerations: a divided, democratic constitutionalism would be in a position to resolve some of the structural problems of the international order more satisfactorily (see Section II) than competing blueprints (see Section III).

Finally, we have demonstrated with examples that the conception of a divided procedural constitutionalism is already anchored in world trade law (Section IV). This is not to say that deep reaching reforms are not needed. The processes for the setting of quasi-constitutional rules need an overhaul, so that the members of democratic states can associate the international agreement on binding-standards with the conception of democratic law-making.

Chapter 10

From Utopia to Apology – The Return to Interstate Justice in Normative IR Scholarship: Comments on Neyer and Herwig & Hüller

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I. Introduction

In the normative, or normatively inspired, literature on international relations and global governance, there seems to be an attempt underway at reframing the *problématique*. For many years, political scientists, philosophers and lawyers have all, in a similar way, been in the business of describing, debating, and, at times, denying the “democratic deficit” of international institutions. What we can observe now is a turn away from the democratic deficit as the key *problématique* of international governance, and towards a deficit in justice. Clearly, the reason for this semantic shift can hardly be that the democratic deficit has been resolved in the meantime. Instead, there seems to be a sense of frustration at the prospect that it never will be. This is particularly true for scholars who strive to ground their theoretical reflections in empirical data, or who aspire to deliver “realistic” advice for policy-makers. Both the papers under consideration here clearly belong to this category of scholarship. As Neyer states in his paper, “normative requirements must be practically feasible in order to become politically relevant”. In such a perspective, democratising world politics is, of course, a very demanding and utopian enterprise.

For love of realism and feasibility, the two papers seek to go beyond the established debate over the democratic deficit and to advocate a turn to justice, instead. While Neyer is quite radical in his conceptual move away

from democracy, Herwig and Hüller propose a significant extension of the established focus on democracy, in order to embed it into a wider conception of transnational justice. Thus, both papers strive to open up new avenues for normative research on international governance. This is a very welcome addition to the literature, and is also a timely enterprise. At the same time, I feel a certain sense of puzzlement regarding the semantic shift to justice, which also inspired this critical commentary. To explain this sense of puzzlement a little detour into political theory is necessary.

In normative political theory, theories of justice and theories of democracy form two distinct bodies of literature. The two issues are clearly related, but it is not always apparent exactly how. “Most theories of justice implicitly seem to suppose that some kind of democracy is the preferred political form, but for reasons that are usually not fully worked out.”¹ Theories of justice are usually broader in scope than theories of democracy, and justice is usually thought to be the supreme value, in the sense that democracy is instrumental in realising justice, but not *vice versa*. Democracy provides procedures for collective decision-making in a society, and thus realises the principle of equality. It is evident that not all theories of justice need to be concerned with questions of collective decision-making. In particular, theories of distributive or economic justice might not be required to address them. However, to the extent that questions of collective decision-making and law-making are at issue in any theory of justice, we cannot escape the discourse on institutional design that would normally lead scholars to promote a model of democratic self-governance. Even strenuous supporters of the primacy of justice, such as Philippe Van Parijs, argue that there is no real alternative to global democracy: “If barbarism and chaos are to be avoided, this can only be through the establishment, no doubt laborious and meandering, of true democratic institutions beyond the national level.”² In other words, the empirical difficulties and failures of democracy are not an argument for abandoning the democratic ideal.

¹ K. Dowding, R.E. Goodin & C. Pateman: “Introduction: Between Justice and Democracy”, in: K. Dowding, R.E. Goodin & C. Pateman (eds): *Justice and Democracy: Essays for Brian Barry*, (Cambridge: Cambridge University Press, 2004), p. 5.

² P. Van Parijs: “Justice and Democracy: Are they Incompatible?” (1996) 4 *Journal of Political Philosophy*, pp. 101-117, at 117.

2. Neyer

For Neyer, the main reason to abolish the idea of global democracy does not seem to be a conceptual primacy of justice, but his rejection of the cosmopolitan utopia. Let us scrutinise his argument in more detail. First of all, Neyer debunks the idea that international politics can ever be democratised. To him, the very idea of transnational democracy is a “category mistake”, *i.e.*, the transfer of a term or concept into an inappropriate context. In order to explain why the international context is inappropriate for considerations of democracy, Neyer refers to the well-known “no *demos*”-thesis: international organizations cannot be democratised because there is no transnational *demos*. However, Neyer argues that, notwithstanding this, international organisations can, and, indeed, should, be studied from the perspective of normative concepts, and his candidate is justice. Interestingly, while the discussion of justice in Neyer’s paper places emphasis squarely on questions of collective self-governance, decision-making, law-making and law-enforcement, he nonetheless avoids immediate reference to democracy. Thus, my suspicion is that his turn to justice is not much more than a new rhetoric in which the same old issues of democratic theory are couched: fair procedures of governance, (in)equality of influence, safeguards against abuses of power, *etc.*

Beyond such questions of terminology, I also have some critical remarks regarding the structure of the normative argument that Neyer presents. His starting point is an approach developed by Rainer Forst, according to which our conception of justice should be based upon the basic right to justification. From position, Forst develops a model of deliberative democracy (*sic!*) that suggests a procedure through which a catalogue of rights is determined and political institutions established. To be clear, the right to justification is an *individual* right, upon which a *democratic* polity is founded. Neyer deviates from this conception in two important ways. First, in using the right to justification for a normative defence of international adjudication and deliberative supranationalism he transposes it into an intergovernmental arena. This move needs, at the very least, careful explanation. Why would states, or governments, have a right to justification? There might be a sound way of arguing this, but such an argument would need to be developed step by step, and the problem of non-democratic states would probably need to be discussed in the global context.

Secondly, in his defence of supranationalism, Neyer separates deliberation from democracy. As democracy remains reserved to the domain of the national level where the *demos* reigns, deliberation has to go transnational on its own. However, in the supranational arena, the deliberators, who in

deliberative democracy usually are supposed to be citizens, become professional diplomats and lawyers. And deliberation, originally conceived as an unconstrained exchange of arguments among citizens, which operates under the condition that all initial beliefs and preferences are put to the test, turns into legal reasoning, which is, instead, a way of pursuing one's own interest within the argumentative constraints posed by the law. Again, a consistent defence of deliberative supranationalism in the framework of a theory of transnational justice might be possible, but it needs to be both careful and explicit. In summary, it seems that Neyer's paper suffers from conceptual overload, with argumentative pillars that are not able to sustain the heavy weight of all the expectations raised by the eye-catching appeal to justice. What would be lost if this paper just suggested national democracy plus the legalisation of international relations?

3. Herwig & Hüller

Herwig and Hüller also propose justice instead of democracy as a core category of normative analysis of international relations. The desire for "realism" is an equally strong motivating force here, which may even be stronger than in Neyer's piece. Not only should the envisaged order for the world trade regime be normatively coherent and just, it should also be better-suited to resolve the world trade regime's existing empirical problems than rival approaches. One of the most interesting aspects of this chapter is that it takes issue with the world trade order as a whole, and not with a single institution of governance, such as the WTO. This is, indeed, an aspect which the calls for the democratising of the WTO have, to date, often neglected. Before we ask what specific procedures of decision-making should be applied in the WTO, we critically need to take issue with the enterprise of trade liberalisation and regulation as a whole. Herwig and Hüller do this by resorting to a game-theoretical argument. The underlying assumption is that the liberalisation of world trade would benefit all participants because of the aggregate gains in welfare. Individual parties, however, face an incentive to defect from collective agreements to liberalise and will therefore resort to opportunistic protectionism. Thus, the structure of the situation resembles a prisoners' dilemma, which can be overcome by the foundation of the WTO as an institution that guarantees compliance with free trade agreements. Hence, the thrust of this argument for the liberalising of the world trade regime is a mixture of Ricardo's praise of free trade and some sort of Hobbesian scepticism about the prospects of co-operation under anarchy.

This particular justification of a global trade order has certain limiting implications. First of all, the argument that free trade will benefit all countries

needs at least some critical reflection and probably qualification, in which credit is given to non-orthodox economists who have analysed its effects on underdeveloped countries (such as Dani Rodrik). Second, Herwig and Hüller do not consider any alternative to centralised public rule-making and global multilateralism. One could, however, think of alternative conceptions of a trade order, based upon bilateral treaties or even purely private governance arrangements. These private alternatives, in particular, would deserve serious consideration, because the state, or public power, is as much a part of the problem as it is a part of the solution. In my view, a general philosophical defence of a state-based, multilateral, coercive system of trade governance needs to take such alternatives seriously. In other words, I am not quite happy with the unquestioned Ricardian cum Hobbesian framing of this discussion, which inevitably leads the authors to argue for a global minimum *Leviathan* as a way to overcome collective action problems among states.

The core normative problem that the authors discuss in the remainder of the chapter closely follows from this framing of what the “point” of having a global trade order actually is. They are centrally concerned with the division of labour between the global minimum *Leviathan* (WTO) and the local maximum *Leviathan* (the state), which continues to pursue its own visions of the good life. As there might be conflict between the two, we need a normatively sound strategy to resolve it. There are, as far as I can see, only two pure strategies. We could either resolve all problems of collision globally, thus strengthening the global minimum *Leviathan* at the expense of state autonomy, or we could give precedence to the state and shelter its autonomy against intrusion from the global level. But this, quite clearly, would bring us back to the problem of compliance which the authors set out to resolve in the first place. To avoid such pitfalls, the authors advocate a mixed strategy for dealing with the collision problem, which they call “divided procedural constitutionalism”.

The suggested political order is supposed to generate collectively binding rules for its members (which are states), settle disputes over these rules (among states), and enforce these rules (against defecting states). Such an order qualifies as democratic, “if its important decisions are publicly made and a mechanism obtains that effectively and fairly binds its members to them” (p. 276). Thus, democracy returns, but in a version that has very little to do with a textbook understanding of the concept, which, in some way or the other, always relates back to Lincoln’s famous phrase that democracy is the government of the *people*, by the *people*, for the *people*. What Herwig and Hüller are talking about here are global institutional arrangements for

something which might, in a sympathetic reading, be called inter-*state* democracy: government of states, by states, for states.

4. Conclusion

There is a lot of common ground between the two contributions. Both of them call for some form of inter-state proceduralism as an alternative to democratising world politics in a cosmopolitan direction. By bringing the state back in so prominently, they relegate the individual as the bearer of rights and the subject of political rule to the second rank. This is somewhat ironic, in that the move to *citizens* in discourses about the legitimacy of international governance, which has marked recent decades,³ now seems to be reversed by advancing conceptions of inter-state justice and inter-state democracy. The feasibility argument seems to be the driving force behind this roll-back. In order to remove the utopian element that comes with cosmopolitan conceptions of justice and/or democracy, the authors emphatically re-affirm the legitimacy of intergovernmental politics, including (*nolens volens*) the foreign policies of authoritarian and illiberal regimes. I certainly sympathize with inter- and supranational law as a “gentle civilizer of nations” and with the idea of preventing abuses of power in world politics through appropriate institutional engineering. As a normative vision, however, I find the proposed conceptions of inter-national justice and inter-state democracy deeply apologetic and, indeed, troubling.

³ For an overview of this development, see J. Steffek: “Legitimacy in International Relations: from State Compliance to Citizen Consensus”, in: A. Hurrelmann, S. Schneider & J. Steffek (eds): *Legitimacy in an Age of Global Politics*, (Houndmills, Basingstoke: Palgrave Macmillan, 2007), pp. 175–192.

The inter-disciplinary workshop ‘Transnational Standards of Social Protection: Contrasting European and International Governance’ was jointly organised by RECON Work Package 9 and the Collaborative Research Centre 597 on ‘Transformations of the State’ at the University of Bremen.

The Report presents the proceedings of the cooperational work, which illuminates the intertwinements of European regulatory policies and global governance arrangements. By pinning down the exact nature of the interaction between these two levels, the EU’s dilemma becomes obvious: On the one hand, stronger global governance can be a chance, through which the EU can clarify its own *raison d’être* of increased integration to the wider world. On the other hand, the design of the European project is being challenged by more assertive global structures. This is especially the case in relation to the WTO regime, which is constraining the decisional autonomy of the EU, regarding the appropriateness of its content and its external effects. Thus, the regulation of services in the EU and the WTO are discussed in the first section of this report. Section two focuses on labour standards, which are analysed from different angles in order to clarify the functions of the WTO and the ILO, multinational companies as well as other private actors within this specific field. The final section deals with the legitimacy problematic of transnational governance.

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