Conflict of Laws as Constitutional Form:

An Analytical Framework

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These notes summarize an analytical framework which I have started to develop in various publications[1] and which I seek to develop further in ongoing projects.[2] The present summary comprises five steps:

I. "Conflict of Laws" is the legal discipline on which the argument builds; the reasons will be submitted the first section.

II. European law can and should be re-conceptualised in as a new supranational conflict of laws – this is the message of the second section.

III. This supranational conflict of laws constitution needs to be complemented by a "second order conflict of laws" which has to constitutionalise) the manifold mechanisms ("modes of governance") the EU has developed as a response to the needs for continuous and flexible policy coordination. This complex message will be dealt with only very briefly.

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[1] In particular: "Constitutionalism in Postnational Constellations: Contrasting Social Regulation in the EU and in the WTO", in Christian.Joerges & Ernst-Ulrich Petersmann), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, Oxford: Harbt 2006, 491-527; "Rethinking European Law's Supremacy: A Plea for a Supranational Conflict of Laws", in: Beate Kohler Koch/Berthold Rittberger (eds.), *Debating the Democratic Legitimacy of the European Unio*n, Lanham, MD: Rowman & Littlefield, 2007, 311-327.

[2] With Josef Falke: „Trade liberalisation and social regulation in transnational structures" in the context of the Collaborative Research Center 597 "Transformations of the State" in Bremen , see http://www.sfb597.uni-bremen.de/?SPRACHE=en, and, with John E. Fossum, "Global Transnationalisation and Democratisation Compared", in the context of RECON ("Reconstituting Democracy in Europe" , a European Commission financed integrated project organised by ARENA, Oslo, see www.reconproject.eu

IV. WTO law, too, can and should be interpreted in a conflict of laws perspective – this thesis will be defended in the first step of my argument.

V. WTO law cannot accomplish the same type of law-mediated legitimacy which is conceivable under European law. This is the message of the concluding section which will be illustrated in a discussion of the GMO Case.

I. Some remarks on Conflict of Laws

One reason why it is not easy to defend conflict-of-laws perspective at both the European and the international level is the fate of that discipline. It lives a live *à part* and does not belong to the mindset of constitutionalists. This is regrettable because it has been the vocation of conflict to come to terms with diversity – and it is that experience from which constitutionalism in postnational constellation should profit.

The discipline is as diverse in itself as all others. The school of thought on which I primarily rely is the so-called American conflict-of-laws revolution of the late 50s and 60s, led by Brainerd Currie.[3] What looked so revolutionary at that period was the break with the American vested rights tradition. That break was at the same time an assault at the traditions of continental private international law.

- Private international law in the continental von Savigny tradition was truly international in its orientation in that it treated all private law systems alike and favoured the search for unity of decisions regardless of the form in which a case was litigated. This universalism, however, was based upon an understanding of private law as the organiser of strictly private relations in what was, by definition, an apolitical (civil) society, *i.e., Gesellschaft*. The American legal realist opened our eyes for the policy contents of private law and the concerns of a jurisdiction in its application.

[3] Most famously in his *Selected Essays*, (Durham, NC: Duke U P, 1963). No such theory can survive half a century. Important elemts of Currie's thinking form, however, a part of the American legacy. The most constructtive contributions in this tradition I am aware of are by Larry Kramer, in particular his ‚More Notes on Methods and Objectives in Conflict of Laws', (1991) 24 *Cornell International Law Journa*, 245-278, and ‚Rethinking Choice of law, (1990) 90 *Columbia Law Journal*, 277-345. My own first encounter with Currie dates back much further: *Zum Funktionswandel des Kollisionsrechts. Die „Governmental Interest Analysis" und die „Krise des Internationalen Privatrechts"* , (Berlin-Tübingen: deGruyter/ Mohr-Siebeck, 1971).

- Differences between legal provisions were now to be interpreted as a conflict of policies. The application of foreign law now meant to accept the policies of a foreign jurisdiction. The acceptance of foreign law became hence more problematic. On the other hand, under the new understanding of the choice-of-law problem it became possible what seemed inconceivable to continental jurists, namely to recognize the validity of foreign public law. They had perceived public law, in particular all administrative law, as an emanation of state sovereignty. Since the very notion of an authority higher than that of the sovereign state seemed simply inconceivable. A state may recognize another sovereign but cannot exercise that state's sovereign power, cannot and should not. As Gerhard Kegel, Germany's *maître penseur*, puts it so succinctly: "Every State is an association of the people (citizens) in its country.... Every State promotes its own common weal in its own country; it is free (master in its own house), accepts no orders from outside, and tolerates no judge over it". Instead, all "international" public and administrative law, all mandatory law, was engaged in the one-sided delineation of the sphere of application of national provisions. In contrast, private international law in the von Savigny tradition was more universalistic in its orientation. This universalism was based upon an understanding of private law as the organiser of strictly private relations in what was, by definition, an apolitical (civil) society, *i.e., Gesellschaft*, and an application of foreign private law was not perceived as a threat to the sovereignty of the forum state. This ensuing type of PIL universalism is fully compatible with the refusal to support foreign regulatory objectives, considering such "political" dimensions ob be beyond the scope of private law. My defence of a conflict-of-laws approach is not meant to revitalize such principles as you can imagine and will be assured in a minute.
- Currie's third memorable query with traditional conflict of laws concerned the judicial function. Here his discovery of the political, the policy dimensions of modern private law inform his position.

> "[C]hoice between the competing interests of co-ordinate states is a political function of a high order, which ought not, in a democracy, to be committed to the

judiciary: … the court is not equipped to perform such a function; and the Constitution specifically confers that function upon Congress".[4]

This is not what I am going to suggest in my plea for a European conflict of laws approach to European law. Curries should nevertheless be taken into account when it comes to the assignment of supervisory functions to transnational bodies.

II. Europe: Conflict of Laws as Constitutional Form

Exactly a decade ago Jürgen Neyer and I have developed the notion of "Deliberative Supranationalism",[5] which was to replace the traditional, in our terminology orthodox notion of suprantionalism. We asserted neither that the deliberative processes we had observed in obscure European committees could, in themselves, be democratic nor ensure the type of legitimacy constitutional democracies can provide; still less, did we suggest a transnational functional bureaucracy as a mode of good European governance. We wanted instead to evade the usual debate about Europe's democratic deficit by inverting the usual perception of Europe's legitimacy dilemma. Rather than complaining that Europe does not meet the standards of democratic constitutional states we suggested that European law could be legitimated because of its potential to cure structural democracy failures of the nation states.

The kernel of the argument may date back to Rousseau and is not as idiosyncratic as our terminology: "The legitimacy of governance within constitutional states is flawed in so far as it remains inevitably one-sided and parochial or selfish. The taming of the nation-state through democratic constitutions has its limits. [If and, indeed, because] democracies presuppose and represent collective identities, they have very few mechanisms to ensure that 'foreign' identities and their interests are taken into account within their decision-making processes".[6] If the legitimacy of supranational institutions can be designed so as to cure these deficiencies – as a

[4] B. Currie, 'The Constitution and the Choice of Law: Governmental Interests and the Judicial Function', (1958), in *idem, Selected Essays*, (Durham NC: Duke U P, 1963), 188-282, at 272. B. Currie, 'The Constitution and the Choice of Law: Governmental Interests and the Judicial Function', (1958), in *idem, Selected Essays*, (Durham NC: Duke U P, 1963), 188-282, at 272.

[5] Ch. Joerges & J. Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes', (1997) 3 *European Law Journal*, 273-299.

[6] *Ibid*; at 293.

correction of 'nation-state failures', as it were – they may then derive their legitimacy from this compensatory function. As I have recently put it: "We must conceptualise supranational constitutionalism as an alternative to the model of the constitutional nation-state which respects that state's constitutional legitimacy but, at the same time, clarifies and sanctions the commitments arising from its interdependence with equally democratically legitimised states and with the supranational prerogatives that an institutionalisation of this interdependence requires".[7]

That is of course not the way the supranational validity of European law was originally understood and justified. But, so we argued, the cunning of reason is stronger than legal doctrines. So many methodologically and theoretically bold and practically successful ECJ decision can be rationalised in this way. The European "federation" thus found a legal constitution that did not have to aim at Europe's becoming a state but is able to derive its legitimacy from the fact that it compensates for the democratic deficits of the nation states. This is precisely the point of Deliberative Supranationalism. Existing European law had, we argued, brought into validity principles and rules that meet with and deserve supranational recognition because they constitute a palpable community project. All one has to do is look: Community members cannot implement their interests or laws unconstrained, they are obliged to respect the European freedoms, are not allowed to discriminate, they can pursue only legitimate regulatory policies blessed by the Community; they must, in relation to the objectives they wish to pursue through regulation, harmonise with each other and they must shape their national systems in the most community-friendly way possible. This kind of law, we said, was not undemocratic but was compensating for the nation state's democratic deficits. In this sense, conflict of laws is the proper form of European constitutionalism. This conflict of laws viewpoint retains the supranationality of European law, but gives it a different meaning. It takes away from European law the practical and legitimatory expectations it cannot reasonably hope to fulfil. At the same time, it opens a window on the manifold vertical, horizontal, and diagonal[8] conflict situations in the European multilevel system. It promotes the insight that the Europeanisation process should

[7] Ch. Joerges, 'Deliberative Political Processes' Revisited: What Have we Learnt About the Legitimacy of Supranational Decision-Making (2006) 44 *Journal of Common Market Studies* 779-802, at 790.

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

seek on flexible, varied solutions to conflicts rather than strive for the perfecting of an ever more comprehensive body of law. [9]

To summarize: The conflict of laws approach envisages a horizontal constitutionalism. It seeks to overcome the orthodoxy of PIL in the Savigny tradition and of International Administrative Law as established by Neumeyer. It is committed to mutual tolerance and recognition, the very principles cited above.[10]

III. Organising Interdependence: A Second Order Conflict of Laws

The conflict-of laws approach can be brought to WTO law, I will argue in the next section. But I will add an important proviso: The EU can organise legitimate decision-making in spheres which WTO cannot "juridify" adequately. This contrast concerns the developments of modes of transnational governance long before that notion became so fashionable. The central features of "new" governance are informality, softness, and the inclusion of non-governmental actors. The phenomenon is by no means specifically European but present at all levels of governance. Its rise is explained and justified by the critique of command and control regulation, interventionist law. Again, this is not just a transnational phenomenon. We lawyers have heard about complex conflict situations that cannot be coped with centralistically or hierarchically; where the law can only provide a framework within which solutions to problems may be sought. However, transnational constellations are more intriguing than national governance arrangements. Two differences stand out: Even where the nation state is not capable of programming solutions to problems and implementing its legislation through an administrative vertically stratified administration, nonetheless its integrative power, a requisite for consistent problem-solving is

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

[10] For an elaboration of this argument cf. Ch. Joerges, ‚Rethinking European Law's Supremacy: A Plea for a Supranational Conflict of Laws', in: Beate Kohler Koch/Berthold Rittberger (eds.), *Debating the Democratic Legitimacy of the European Unio*n, (Lanham, MD: Rowman & Littlefield, 2007), 311-327. For critical comments cf. D. Chalmers, R. Nickel, F. Rödl, R. Wai, all in ‚Rethinking European Law's Supremacy: A Plea for a Supranational Conflict of Laws', EUI Working Paper Law no. 12/2005, available at http://cadmus.iue.it/dspace/bitstream/1814/3332/1/law05-12.pdf and D. Chalmers. ‚Deliberative Suprantionalism and the Retoerritorilaisation of Authority', in: Beate Kohler Koch/Berthold Rittberger (eds.), *Debating the Democratic Legitimacy of the European Unio*n, (Lanham, MD: Rowman & Littlefield, 2007), 329-343.

stronger than that of the European multilevel system. And second, there is no *Kompetenz-Kompetenz* available at European, let alone at international level. To mention the infamous European committee system with comitology at its core: comitology procedures were developed in the course of the "completion" of the internal market in order to keep the internal market project compatible with concerns of "social regulation" (safety at work, consumer and environmental protection). Typically, the problem situations concerned are ones in which expert knowledge has to be taken into account. It is the involvement of member states through their representatives on the regulatory committees combined with discussion by a plural expert community that should guarantee both political legitimacy and the objective viability of the regulations developed. Safeguard clause procedures employed when new knowledge is acquired or a regulation proves insufficient strengthen their normative and procedural qualities. A conflict of laws interpretation of this form of governance is appropriate because the coordination effort aim at a solution which is acceptable to a Union of relatively autonomous states that have to get by without any hierarchically ordered or at least uniformly structured administrative apparatus. Admittedly, a "constitutionalisation" of this machinery ensuring that it "deserves recognition" has to find answers to a series of further questions: the appointment and function of the expert circles to be included in the decision-making process; ties with parliamentary bodies on the one hand and with civil society on the other; reversibility of decisions taken in the light of new knowledge or changes in social preferences. Last but not least, one has to remain aware that these coordination media are hardly the proper modality for ethical concerns nor capable of facilitating decisions with major distributional implications.

Standardisation is s the second example which deserves particular mention: Standardisation in Europe is officially recognized and promoted since the new approach developed in the early eighties and then presented as a core element of Jacques Delors internal market initiative. This was and still is the most successful mode of reconciling market-building objectives and regulatory concerns. Interestingly enough, this mode of governance not only has strong and quite ancient national roots but has also from its inception been predominantly "privately" constituted even before it was adopted the European level. This may seem downright paradoxical; a plausible explanation is that the "juridification" of this "private transnationalism" has taken much more intensive form than that of the traditionally public law areas now dominated by the new forms of

governance. This is, as Harm Schepel has shown in a brilliant analysis,[11] true not only for European but also for international standardisation. Generally recognised and stable procedures have matured that combine legal principles, professional standards and opportunities to participate and keep on leading to consensual solutions to problems. Significantly, European standardisation has taken on many of the features of the comitology. Its non-unitary network structure ensures that national delegations each bring in their own views, *de facto* enabling learning processes. Administrations and the courts are sometimes actually and always latently present in standardisation questions. This "private transnationalism" has broken from national law, but is not delegalised.

Law and politics both remain present. Admittedly, the political processes ordered by the law of private transnationalism are not directly reached by public policy or public law. In other words, their juridification seemingly emanates "from below". This sort of "law-making" takes account of the fact that the modern economy and its markets simply are not executing some economic *Gesetz* but need to address politically sensitive issues. How likely is it that the political processes within economy and society will be socially responsible and that they will constitute themselves in such a way that they "deserve recognition"? A parallel with comitology but also with the emerging law of the new agencies suggests itself: comitology operates reasonably well thanks to the principles and rules it follows, and in the shadow of democratically legitimated institutions and their law. Similarly, the legitimacy that Schepel attributes to standardisation is based on the compatibility of its institutionalisation with the legal institutions that surround it, which are able to see that they cannot themselves achieve what the standardisation process can. Is all this still accessible to conflict of laws patterns of thought? The step to be taken is not too difficult. Conflict of laws deals with the acceptability of laws of "foreign" jurisdictions. Once we are to recognize that our statal law cannot operate autonomously but is dependent upon the norm generation in non-statal spheres, we need to define criteria for their recognition (Schanze 2005). These criteria will primarily concern norm-generation processes and their implementation will have to engage various legal areas such as antitrust and tort law. This, then, is my model for the constitutionalisation of private governance/ordering. I call it a "second order conflict of laws".[12]

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

[12] For an elaboration with resopect to European governance in general and comitology in particular cf. Ch. Joerges, "Integration through de-legislation? An irritated heckler", European Governance Papers (EUROGOV) No. N-07-03.

IV. WTO Law in a Conflict-of-Laws Perspective: Two Cases

WTO law and its development is a confirmation of Polanyi's famous thesis: Markets are always socially embedded. Few WO lawyers would put it this way. But they all have to study international standards, the *Codex Alimentarius*, the tensions between WTO law and other efforts to juridify globalisation.

At the global level, the use of the term constitutionalism, in the sense I set out above in my introductory remarks, seems simply inappropriate. Moreover, the aspirations of democratic constitutionalism seem clearly at odds with the Polanyi thesis. If markets are social institutions and the economy a polity, it does by no means follow that we the people would be the masters of these entities.

Rather than trying to disentangle what has become an enormously intensive and complex debate,[13] I will simply bring my conflict-of-laws perspective to WTO-law, this time with the help of two cases, the "Hormones Case" and the GMO dispute.[14]

IV.1. Hormones in Beef: A Case of Manageable Proportions and Prudently Managed

In *Hormones*, the subject matter was the administration of growth hormones to cattle — illegal in the EU, but a common practice in the US. Which law is applicable? This is the question traditional conflict of laws would pose. But this is not the question the Appellate Body had to answer. The Appellate Body had to look for guidance in the SPS Agreement. Trade restricting measures cannot be "maintained without sufficient scientific evidence" (Article 2.2) and must be based on the risk assessment methods of the relevant international organizations (Article 5). What

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Online available at: http://www.connex-network.org/eurogov/pdf/egp-newgov-N-07-03.pdf, and 'Deliberative Political Processes' Revisited (note 7, above).

[13] For recent pertinent efforts cf., Ch. Joerges, ‚Constitutionalism in Postnational Constellations: Contrasting Social Regulation in the EU and in the WTO', in *id.*/E.-U. Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, (Oxford: Hart, 2006), 491-527; Ch. Joerges, ‚Constitutionalism and Transnational Governance: Exploring a Magic Triangle', in: *id./* I..-J. Sand/G. Teubner, *Transnational Governance and Constitutionalism*, Oxford: Hart Publishing, 2004), 343-375.

[14] At the conference in Kandersteg I have instead illustrated the conflict-of-laws approach with the help of the *Viking* and the *Laval* case; decided by the ECJ in December 2007; cf. Ch. Joerges, ‚Democracy and European Integration: A Legacy of Tensions, a Re-conceptualisation and Recent True Conflicts', EUI Working Paper LAW 27/2007.

I suggest is that these provisions can be interpreted as a search for a transnationally acceptable meta-norm, namely as a recourse to "science" as on objective arbiter.

WTO lawyers know by now about the indeterminacy of scientific authority. Science typically provides no clear answers to the questions politicians and lawyers pose. In addition, science cannot resolve ethical and normative controversies about numerous technologies. Third, consumer *Angst* might be so significant that neither policy-makers nor the economy can ignore it.

All these difficulties, however, do not stand in the way of applying a conflict-of-laws approach to transnational trade governance. The Appellate Body did not "apply" any of the conflicting legal regimes. It equally refrained from delegating to "science" the ultimate authority to resolve the conflict. Remember why Brainerd Currie called true conflicts simply irresolvable. The AB found a response to that dilemma. It channelled the ongoing controversy thus promoting a civilized conduct of the conflict.

4.2. The Example of the GMO Dispute: Are International Markets "Socially Embedded"?[15]

GMOs are the most technologically advanced and most controversial of all foodstuffs, if not of all consumer products. The US and the EU, again the main actors in the dispute, differ in their regulatory approaches to GMOs in two significant respects: whereas the US focuses on health risks posed by food, the EU follows a more comprehensive approach, placing an additional and greater emphasis upon environmental risks.[16] US authorities will approve products *unless* evidence exists confirming a risk. By contrast, the 1992 Treaty on European Union constitutionalized the "precautionary principle", so that all legislative, administrative and judicial decision-making within Europe must respect the notion that *any* indistinct hazard must be guarded against (Article 174(2) EC Treaty).

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[15] For more elaborated versions of the following argument see M. Everson/Ch. Joerges, With Michelle Everson), "Consumer Citizenship in Postnational Constellations?", in Kate Soper and Frank Trentmann (eds.),*Citizenship and Consumption, (*New York: Palgrave Macmillan, 2008), 154-171, and Ch. Joerges, „Conflict of Laws as Constitutional Form. Reflections on the International Trade Law and the *Biotech* Panel Report" *RECON Online Working Paper 2007/03, available at* http://www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers.html

[16] See G.C. Shaffer & M.A. Pollack, 'Reconciling (or Failing to Reconcile) Regulatory Differences: The Ongoing Transatlantic Dispute over the Regulation of Biotechnology', in D. Andrews, M.A. Pollack, G.C. Shaffer and H. Wallace (eds.) *The New Transatlantic Agenda and the Future of Transatlantic Economic Governance*, (Florence: European University Institute 2005), -167–229.

Can this type of conflict be resolved by "science"? It is of course to be underlined that EU's precautionary principle is not providing much guidance. Small wonder that the AB, in the Hormones Case, had found that the "[precautionary] principle has not been written into the SPS Agreement as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement." But by this rejection of the European enigma it did not empower another emperor without clothes. The GMO panel takes a very different step. Recalling "that, according to the Appellate Body, the precautionary principle has not been written into the *SPS Agreement* as a legitimate ground for justifying SPS measures," the panel proceeds to explain that "even if a member follows a precautionary approach, its SPS measures need to be 'based on' a ('sufficiently warranted' or 'reasonably supported') risk assessment."[17] This is a constitutionalizing move. It seems readily apparent that the WTO panel is not prepared to recognise the constitutional commitment of any of its members to precaution. "Supremacy" of WTO standards over European constitutional commitments – this is the implication and the message.

It is instructive to contrast the European and WTO constellations at this point. Although the ECJ has imposed significant burdens on Member States when invoking their autonomy in risk assessments, the Court has refrained from drawing any rigid lines. Why such self-restraint? Could it be that the ECJ did not want to settle the dispute on GMOs, but respected a framework within which competing positions are continuously discussed and negotiated? Be that as it may The in my view the most problematic aspect of the panel report is that it seeks to de-legitimate even that type of indeterminate response to scientific controversies and political contestation. Exercising prudence of a different kind, the panel decided that the SPS Agreement was applicable to the authorisation of GMOs, and could then point to Article 8 SPS Agreement, whose provisions require that applications must be processed without "undue delay." This, again, is a constitutionalizing manoeuvre, albeit one less plainly visible. The private right of applicants seeking authorisation for their products trumps political sensitivities; it is irrelevant that time may be needed to debate domestic political and ethical issues. The GMO panel found that completion of the approval process had been "unduly delayed" in 24 cases. Accordingly, it requested that the EU bring its measures "into conformity with its obligations under the SPS Agreement," in effect

[17] Para. 7.0365 note 1905.

asking the EU to complete approval procedures for outstanding applications. Does thus type of juridification deserve recognition?

The panel's critique of EU member state autonomy in relation to safeguard measures was equally indirect but effective. France, Germany, Austria, Italy, Luxembourg and Greece were told that their bans on the marketing and import of EU-approved biotech products were incompatible with WTO law. Again the panel arrived at this result in an indirect way. It did not question the validity of the European regulatory framework and its institutional balancing. It nonetheless opined that, since the EU's scientific committee had judged relevant biotech products to be safe, the named states had failed to undertake risk assessments that would "reasonably support [their] prohibitions" under the SPS Agreement. SPS standards overrule Europe's precarious institutional settlement. Recall again Brainerd Curries query. Could it be that no authority (certainly not a WTO panel) is entitled to rewrite European law of constitutional dimensions in the name of sound science? Is there a legal duty not to decide? A positive answer is not incorrect but incomplete. The answer is "hard" law in that it acknowledges that one has, especially at international level, to acknowledge that there are both factual and normative limitations to "legalization" and "judicialization." It is incomplete in that it fails to characterize that non-legalized sphere in any constructive way. The proper characterization of that sphere may be diplomacy (Weiler) or, closer to the traditions of conflict of laws, *comitas*. As Jona Israël recently put it, the *comitas* of the European Member States has mutated into a legal duty of co-operative problem solving. At the WTO level, the wide-ranging general conversion of *comitas* into mandatory commitments is not conceivable.

V. A Concluding Remark

The panel report, it may be noted, favours law over politics, opting for juridification in a very specific sense: restrictions on free trade, on the freedom of producers, exporters and traders can be imposed only where they are supported by "sound science." Sound science, rather than politically accountable regulation, has become the guardian of the common good and of the consumer. In a series of lectures on the "*naissance de la biopolitique*" delivered to the Collège de France in 1979, Michel Foucault warned that neo-liberalism would replace the supervision of markets by the state with the supervision of states by the market – and by sound science, we may

now add.[18] Would this gloomy conclusion take the panel report too seriously? The EU, however, has decided not to appeal the panel report, and a recent, highly detailed comment underlines: the report is "not too difficult for the EC to accept, since the Commission has been trying, and failing, to get the Member States to remove their safeguard measures for some time now." Does this indicate that the EU, or at least its officials, are ready to comply, and will use the report to discipline recalcitrant Member States? Perhaps Foucault captured an element of truth: The GMO market is at any rate "politically embedded." Can one call this constitutionalization? The law of constitutional democracies provides a structuring framework for political processes and decision-making, which ensures their legitimacy. WTO law, in our example, cannot make such claims.

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