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Uses and Misuses of International Economic Law

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Edited by

Gabriele Britz, Martin Eifert, Michael Fehling,
Thorsten Kingreen and Johannes Masing

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Private Standards and Trade in Goods in the WTO and the EU

Mohr Siebeck

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Printed with the support of the Scientific Society of Freiburg

ISBN 978-3-16-161640-2 / eISBN 978-3-16-161679-2
DOI 10.1628/978-3-16-161679-2

ISSN 2191-0464 / eISSN 2569-4448 (Studien zum Regulierungsrecht)

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliographie; detailed bibliographic data are available at *http://dnb.dnb.de*.

The book was printed on non-aging paper and bound by Laupp & Göbel in Gomaringen.

Printed in Germany.

For my beloved wife Lea-Ariane

Preface

Standardization is a classic form of rulemaking. Nonetheless, it is notoriously diffuse and gives rise to questions and debate; in particular over the standards' normativity, legitimacy and nature – whether public or private, national or international. In this book, I apply a policy-oriented approach to international law to comparatively analyze the role of private rulemaking within the context of international economic integration in the WTO and the EU. Thereby, I aim to elucidate the opaque phenomenon of private standardization from a legal perspective and, more profoundly, shed new light on economic integration.

The Faculty of Law at the Albert-Ludwigs-Universität Freiburg i. Br. accepted this work as an inaugural dissertation for the attainment of a doctoral degree in the winter semester of 2021/22. I was engaged in researching and writing from March 2016 to November 2019.

I would especially like to thank my supervisor, Professor Dr. Ulrich Haltern LL.M. (Yale) for having been an excellent teacher. He gave me the freedom to explore the ideas presented here, as well as the tools needed to study the complex vastness I soon realized that I had gotten myself into. I also wish to thank Dr. Björnstjern Baade for the rapid preparation of the second opinion and the valuable comments.

Further, I would like to thank the editors of the *Studies of Regulatory Law* series, Justice Professor Dr. Gabriele Britz, Professor Dr. Martin Eifert, LL.M. (Berkeley), Professor Dr. Michael Fehling, LL.M., Professor Dr. Thorsten Kingreen, and Professor Dr. Johannes Masing, as well as the publishing house, Mohr Siebeck, for accepting my work.

This project was supported by a scholarship for doctoral students from the Friedrich Naumann Foundation for Freedom with funding from the German Federal Ministry of Education and Research. I wish to thank the Foundation for its support and trust.

Further, I would like to thank the Scientific Society of Freiburg (Wissenschaftliche Gesellschaft Freiburg i. Br. e.V.) which subsidized the printing of this book.

I would also like to thank my friends and colleagues for their support, patience, feedback, and humor. I wish to thank Mary Townswick in particular. The encouraging words I received at the Society of International Economic Law 2016 Johannesburg Global Conference, especially from Professor Ga-

brielle Marceau, Ph.D., and Professor Dr. Junji Nakagawa, inspired me to tackle this lengthy project.

I could not have completed this work without my family. My parents and my daughter Freya-Felicitas' love as well as the joyful anticipation towards the birth of my son kept me going.

My loving wife, Dr. Lea-Ariane Blenk, brought in the sunshine even while I was burning the midnight oil. To her I owe the most and dedicate this book.

Vienna, 27 March 2022 *Moritz Johannes Konrad Blenk*

Contents

Introduction

Thesis and Delineation of the Task

What is the relationship between international economic law and private standards? Recently, the debate on the relationship between private conduct and international economic integration has prominently reemerged within the World Trade Organization (WTO) and the European Union (EU). It is generally acknowledged that today private standards play a significant role in determining the nature and terms of international trade.[1] Some authors describe standards as pervasive mechanisms of international governance.[2] There is a heated debate over the status of many private standards under WTO law, and there is a longstanding discussion over the implications of the EU's fundamental freedoms for private actors and the role of private standards in EU policies. The debates concur with the ongoing discussion surrounding privatization and the role and meaning of the law.[3] It has been lamented, to give one example, that

> "the EU Commission and Member States have developed an extra-WTO Precautionary Principle-based […] policy framework that is implemented indirectly through the ostensibly private activities of […] private standards bodies that promote EU cultural preferences favourable to EU industry."[4]

The following study offers a principled analysis of the engagement of the WTO and the EU with the phenomenon of private conduct – especially standardization. It will build on a contextual comparative inquiry. The interaction of economic integration covenants with private standards offers a unique look into the heart of public international economic law. By comparatively exca-

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[1] *Du*, The Regulation of Private Standards in the World Trade Organization, Food and Drug Law Journal (2018), 432 (433).

[2] *Abbott/Snidal*, International 'Standards' and International Governance, Journal of European Public Policy (2001), 345 (345).

[3] See only *Dickinson*, Public Law Values in a Privatized World, Yale Journal of International Law (2006), 383–426 with further sources.

[4] *Kogan*, Discerning the Forest from the Trees: How Governments Use Ostensibly Private and Voluntary Standards to Avoid WTO Culpability, Global Trade and Customs Journal (2007), 319 (331). See also *Kogan*, The Extra-WTO Precautionary Principle: One European "Fashion" Export the United States Can Do Without, Temple Political & Civil Rights Law Review (2007), 491–604.

vating key concepts in international economic law, the aim is to provide deeper insights for both WTO and EU law that surpass the threshold issue of private standards – hence the broader title of this study.[5]

The relation between private standards and trade-liberalization efforts also offers a unique look into the heart of contemporary international and European law, as discussions over private standards feature in debates about the role of law in both European and global governance.[6] Indeed, some authors put forward private standards as a means of achieving law-mediated governance and propose a transnational version of what has been termed New Governance at the domestic level – a regulatory strategy relying on hybridization; soft law and co- and (orchestrated[7]) self-regulation. The very description of

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[5] The title borrows from *Kahn-Freund*, On Uses and Misuses of Comparative Law, The Modern Law Review (1974), 1–27.

[6] For examples of recent general discussions on global governance, see *Khanna*, Connectography: Mapping the Future of Global Civilization, New York 2016; *Mazower*, Governing the World, The History of an Idea, New York 2012. For an overview of the literature on global private governance see *Bartley*, Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards, Theoretical Inquiries in Law (2012), 517–542; *Wai*, The Interlegality of Transnational Private Law, Law and Contemporary Problems (2008), 107–127. For an overview of the governance literature, see *Fukuyama*, Governance: What Do We Know, and How Do We Know It?, Annual Review of Political Science (2016), 89–105, who finds that "[t]oday 'governance' is applied promiscuously to a whole range of activities that have in common the act of steering or regulating social behavior" (*Ibid*., 90). Some authors define Global Governance as "the transnational regulation of transnational policy problems, by either governmental, intergovernmental, or non-governmental actors" (see *Marx/Martens/Swinnen/Wouters*, Conclusion: Private Standards – A Global Governance Tool?, in: Marx/Martens/Swinnen/Wouters, Private Standards and Global Governance, Economic, Legal and Political Perspectives, Cheltenham [UK] and Northampton [MA, USA] 2012, 295). See also *Hoffmann-Riem*, Die Governance-Perspektive in der rechtswissenschaftlichen Innovationsforschung, Baden-Baden 2011.

[7] On this approach, see *Abbott/Genschel/Snidal/Zangl*, Orchestration: Global Governance Through Intermediaries, in: Abbott/Genschel/Snidal/Zangl (eds.), International Organizations as Orchestrators, Cambridge 2015, 3 et seqq. The gist of the orchestration literature is to observe, in a first step, that "IGO's ability to govern state and non-state behavior in pursuit of these goals ['containing the use of violence, facilitating free trade, advancing economic development, fighting crime, promoting human rights, improving labor standards, defending biodiversity and providing relief after natural disasters and armed conflicts'] is contained by restrictive treaty mandates, close member state oversight and limited financial and administrative resources. In brief, IGOs often lack the capabilities to perform the roles they have been nominally allocated." In a second step, this line of inquiry observes that international organizations are relying on "orchestration as a mode of governance" (governing through intermediaries) to overcome these limits. In a further step, some authors propose that international organizations should overcome these limits by orchestrating (see *Abbott/Snidal*, Strengthening International Regulation Through Transna-

the phenomenon and definition of private standardization is a question of ideology.[8]

Some authors suggest defining *regulation* as "the sustained and focused attempt to alter the behavior of others according to defined standards or purposes with the intention of producing a broadly identified outcome, which may involve mechanisms of standard-setting, information-gathering and behavioral modifications"[9].

Command-and-control regulations can be legally mandatory specific means-based regulation (design-based). This mode of regulation implies that the regulator dictates the particular activities in which businesses must engage. It imposes the same required measure or technology on the regulated entities, even if they are not the most cost effective for firms.[10] The process of development of the contents of means-based regulations can be delegated to both parties "internal" to the regulator – such as governmental bureaucracies – or "external", in which case the state endorses non-governmental standards, i.e., documents that are not legally mandatory.[11] These policies do not necessarily imply a specific form of market surveillance.

Surveillance techniques can range from the prohibitions of market placement for products not certified by an accredited certification body, to spot tests, which might ensue the prohibition of further operation. A conformity assessment process to determine compliance is usually obligatory and involves testing, inspection, and finally, certification, which can be linked to labeling.[12] Certification can be outsourced. An industry might be allowed to make self-declarations regarding compliance, or private actors can be accredited to certify compliance while being themselves surveilled by the state. A "strict reference" to a private

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tional New Governance: Overcoming the Orchestration Deficit, Vanderbilt Journal of Transnational Law [2009], 501–578). See also *Elsig*, Orchestration on a Tight Leash: State Oversight of the WTO, in: Abbott/Genschel/Snidal/Zangl (eds.), International Organizations as Orchestrators, Cambridge 2015, 65 et seqq.

[8] Indeed, "international trade and globalization are not just economic issues, and […] the various facts and figures and theoretical arguments that get thrown around have to be set in a broader intellectual and ideological context" (*Horwitz*, Spontaneous Order, Free Trade and Globalization, in: Garrison/Barry (eds.), Elgar Companion to Hayekian Economics, Cheltenham [UK] and Northampton [MA, USA] 2014, 309). For an example, see *Teubner*, Quod omnes tangit: Transnationale Verfassungen ohne Demokratie?, Der Staat (2018), 171–194 (in English: *Teubner*, Quod omnes tangit: Transnational Constitutions Without Democracy? Journal of Law and Society [2018], 5–29).

[9] *Black*, Critical reflections on regulation, Australian Journal of Legal Philosophy (2002), 1 (1). For a discussion about the difference between law and regulation, see *Kingsford Smith*, What is Regulation? A Reply to Julia Black, Australian Journal of Legal Philosophy (2002), 37–46.

[10] *Carrigan/Coglianese*, The Politics of Regulation: From New Institutionalism to New Governance, Annual Review of Political Science (2011), 107 (114).

[11] See *Abbott/Genschel/Snidal/Zangl*, Two Logics of Indirect Governance: Delegation and Orchestration, British Journal of Political Science (2015), 719–729.

[12] See *Egan*, Constructing a European Market, Standards, Regulation, and Governance, Oxford 2001, 57.

standard can incorporate it into a regulation.[13] Such a reference can be static or dynamic, although dynamic references tend to be constitutionally problematic.[14] Regulations can also require that goods bear labels transporting specific information, ranging from product contents and origin, the environmental friendliness and social equity of the production process to the full life-cycle impact of the product.[15] Regulations can define how the right to apply a specific "information shortcut" (label) may be won, i.e., what the criteria would be in order for a product to be lawfully marketed as, e.g., "child labor free").

Performance-based or ends-based regulations regulate targets by granting them the flexibility to find the best or most cost-effective steps to take to meet the performance limit.[16] This mode of regulation reduces the information costs for governments because they are no longer required to "understand how business operations contribute to the policy issue and what specific actions should be required in order to alleviate the problem"[17]. Performance-based regulations can be specific or general and explicitly or implicitly refer to private standards. In contrast to means-based regulations, performance regulations imply a much larger role for private standards. The "protection of public interests by private" actors is usually "under some kind of surveillance by government agencies […] [and] there is often implicit threat of imposed government regulation in case this 'associational' self-regulation becomes derailed".[18]

The OECD – Regulatory Policy Division, 2006, Alternatives to Traditional Regulation, 137, defines *co-regulation* as a situation in which "[t]he regulatory role is shared between government and industry. Typically (a large proportion of) industry participants formulate a code of practice in consultation with the government. The code of practice is usually effected through legislative reference or endorsement of a code of practice. Breaches of the code are usually enforceable via sanctions imposed by the industry or professional organisations rather than the government directly."

Self-regulation is "the possibility for economic operators, the social partners, non-governmental organizations or associations to adopt amongst themselves and for themselves common guidelines […] (particularly codes of practice or sectoral agreements)"[19].

The bottom line is that standards are "a guide for behavior and for judging behavior".[20] The ISO/IEC Guide 2 defines standardization as an

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[13] See *Bremer*, American and European Perspectives on Private Standards in Public Law, Tulane Law Review (2016), 325 (346).

[14] *Schepel*, The Constitution of Private Governance, Product Standards in the Regulation of Integrating Markets, Oxford and Portland (Oregon) 2005, 119.

[15] *Karbowski*, Grocery Store Activism: A WTO Compliant Mechanism to Incentivize Social Responsibility, Virginia Journal of International Law (2009), 727 (739).

[16] *Carrigan/Coglianese*, The Politics of Regulation: From New Institutionalism to New Governance, Annual Review of Political Science (2011), 107 (114).

[17] *Ibid*., 115.

[18] *Havinga*, Private Regulation of Food Safety by Supermarkets, Law & Policy (2006), 515 (517).

[19] See the Interinstitutional Agreement on Better Law Making, OJ C 321/01 2003, para. 22.

[20] *Abbott/Snidal*, International 'Standards' and International Governance, Journal of European Public Policy (2001), 345 (345). "Standards are a form of codified technical knowledge that enables the development of products and processes. While voluntary,

"activity of establishing, with regard to actual or potential problems, provisions for common and repeated use, aimed at the achievement of the optimum degree of order in a given context".

Without prejudice to their legal status in trade covenants, standards are private if they are "set (created) by commercial or non-commercial private entities, including firms, industry organisations, [and] nongovernmental organisations"; usually they are "owned and implemented by nongovernmental entities".[21] "Agreements to set standards […] may be either concluded between private undertakings or set under the aegis of public bodies or bodies entrusted with the operation of services of general economic interests such as" recognized standards bodies.[22] According to the Organisation for Economic Co-operation and Development (OECD), the standardization of products

"often promotes economies of scale in production, interchangeability between products of different manufacture, higher quality, complementarity between different products, and diffusion of technology. Standards may also reduce product heterogeneity and facilitate collusion and/or act as a non-tariff barrier to trade. Standards may also be used by incumbent firms in favour of their own products and processes and raise barriers to entry."[23]

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standards regularize and constrain behavior (regulative function), lend a taken-for-granted quality to certain technologies and *modi operandi* (cognitive function), and favor cooperative strategies over adversarial ones (normative function)" (*Delimatsis*, Global Standard-Setting 2.0: How the WTO Spotlights ISO and Impacts the Transnational Standard-Setting Process, Duke Journal of Comparative & International Law [2018], 273 [275]). See also U.S. Congress, Office of Technology Assessment, Global Standards: Building Blocks for the Future, TCT-512 (Washington D.C., DC: U.S. Government Printing Office, March 1992), 3.

[21] See *Chea/Piérola*, The Question of Private Standards in World Trade Organization Law, Global Trade and Customs Journal (2016), 388 (389 et seq.), who also offer an overview of definitions (including those cited here) coined by public organizations. For a good overview, see also *Henson/Humphrey*, Understanding the Complexities of Private Standard in Global Agri-Food Chains as They Impact Developing Countries, Journal of Development Studies (2010), 1628 (1630 et seqq.); *Du*, The Regulation of Private Standards in the World Trade Organization, Food and Drug Law Journal (2018), 432 (437), who finds that "[t]hese entities include companies such as transnational corporations and big supermarkets, sectoral trade associations, non-governmental standardizing bodies and other non-governmental organizations."

[22] Commission Notice, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, 2001/C 3/02, para 162. See also *Charnovitz*, International Standards and the WTO, GW Law Faculty Publications & Other Works, Paper 394 (2005), 2.

[23] Glossary of Industrial Organisation Economics and Competition Law**,** OECD 2006 (available at http://www.oecd.org/regreform/sectors/2376087.pdf, last visited 7 April 2022), 80 et seq. See also 2011/C 11/01, Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, paras 263 et seq.: "Standardisation agree-

In other words, private standards have it all; they can facilitate trade, be expressions of anticompetitive practices, or generally create market access barriers. They provide standardized solutions in almost all imaginable areas; from product safety (e.g., CEN, ISO, DIN or ASTM International[24]) and food safety (e.g., GlobalGAP or GFSI[25]) to environmental sustainability (e.g., FSC, MSC or ISO 14000[26]) and social issues (e.g., Rugmark, Fair Trade, SA 8000, or ISO 26000[27]).[28] Sometimes we consume them as labels; sometimes we take for granted a product's high standard of quality or safety, without knowledge of the standards involved.

In what follows, this introduction will briefly point out the relevance of private standards in the WTO and the EU and describe the limits of the comparative method (A). Next, it will outline the core thesis of the present study (B). This overview will be followed by a methodological justification for the policy-oriented approach of this study (C). Building on these insights, the path that the study will take will be portrayed in a reflection of the policy orientation sought (D).

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ments usually produce significant positive economic effects, for example by promoting economic interpenetration on the internal market and encouraging the development of new and improved products or markets and improved supply conditions. Standards thus normally increase competition and lower output and sales costs, benefiting economies as a whole. Standards may maintain and enhance quality, provide information and ensure interoperability and compatibility (thus increasing value for consumers). […] Standard-setting can, however, in specific circumstances, also give rise to restrictive effects on competition by potentially restricting price competition and limiting or controlling production, markets, innovation or technical development. This can occur through three main channels, namely reduction in price competition, foreclosure of innovative technologies and exclusion of, or discrimination against, certain companies by prevention of effective access to the standard."

[24] CEN: European Committee for Standardization; ISO: International Organization for Standardization; DIN: German Institute for Standardization; ASTM International: American Society for Testing and Materials International.

[25] GlobalGAP: Global Good Agricultural Practices; GFSI: Global Food Safety Initiative.

[26] FSC: Forest Stewardship Council; MSC: Marine Stewardship Council; ISO 14000 series on environmental management.

[27] SA: Social Accountability; ISO 26000: Guidance on social responsibility.

[28] Concerning these latter aims and especially where governments rely on New Governance, one commentator has lamented that "such countries may have more than acquiesced in the development of 'private' environmental and corporate social responsibility (CSR) certification and labelling standards regimes that have had the effect of denying market access to a host of foreign products and services" (*Kogan*, Discerning the Forest from the Trees: How Governments Use Ostensibly Private and Voluntary Standards to Avoid WTO Culpability, Global Trade and Customs Journal (2007), 319 (319).

A. Private Standards, Economic Integration, and the Comparative Method

How should the positive and negative potential of private standards play out in international economic integration? This inquiry proposes that looking at how a trade-liberalization covenant integrates private standards – as both trade restrictions and facilitators – is an extraordinarily potent method of digging into the heart of international economic law and thereby increases our knowledge about the subject more generally.[29] Highlighting the policy implications proposed by contemporary international legal theory concerning private standards – such as the International Public Law, Global Administrative Law and Transnational Law approaches – is an excellent way to understand and eventually evaluate these theories. In this vein, the WTO is seen as the focal point that would bridge the gap between trade liberalization and global governance – especially by relying on "publicized", or "constitutionalized", private standards. In the GATT/WTO context, private standards have featured in debates about treaty reform. One early example is the 1980's Agreement on Technical Barriers to Trade (TBT 1980) – the so-called Tokyo Standards Code. The contemporary debate about the relationship between GATT/WTO obligations and private food and sustainability standards began in 2005 – also as a development issue[30] – and has re-enthused proposals to introduce competition rules into WTO law. Such rules exist in the EU. There, private standards now play an essential role in efforts to approximate Member States' regulatory market interventions to create a single competitive environment. Especially since the 1980s, the New Approach to Technical Harmonization and Standardization tackled the problem of divergent domestic private standards by building a private European standardization system, involving national actors. Given that transnational governance structures that build on a trade-liberalization covenant exist in the EU, many see it as an avant-guard or believe that "[t]he E.U. […] is particularly instructive for

[29] *Enchelmaier*, Horizontality: The Application of the Four Freedoms to Restrictions imposed by Private Parties, in: Koutrakos/Snell (eds.), Research Handbook on the EU's Internal Market, Cheltenham (UK) and Northampton (MA, USA) 2017, 54, refers to the problem of private activities as "empirically relevant and dogmatically intriguing."

[30] The trade concern was raised in the WTO by Saint Vincent and the Grenadines (and since then echoed by many developing countries and China) against the effect of the good agricultural practice private standards EurepGAP – of European origin – on export opportunities regarding fresh fruit and vegetables to the United Kingdom (see G/SPS/R/37 [11 Aug. 2005], para. 16.). See also *Du*, The Regulation of Private Standards in the World Trade Organization, Food and Drug Law Journal (2018), 432 (433).

anyone considering the future growth of transnational or international regulation and its concomitant administrative law"[31].[32]

Many authors assume that the WTO and the EU can be meaningfully compared.[33] Some claim, for example, that the "WTO membership basically believes that the two organizations are manifestations, at different levels of governance, of a common legal tradition"[34] and are built on the same economic theory foundations "that mutual welfare gains accrue to both parties in cross-border exchanges based on comparative advantage."[35] In this vein, some observe that Member States of both the WTO and the EU tied their hands in matters of trade policy and extended this constraint to domestic policies that affect trade.[36] In addition, some observe that WTO's "Panels and Appellate Body fulfill the same function and cover the same issue based on similar norms that national courts and the ECJ [CJEU] are fulfilling in the European Union."[37] It may be easy to conclude that the function fulfilled by the EU and the WTO (trade liberalization) is the same and "as long as in law things fulfil the same function, they are normally comparable"[38]. Indeed, it

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[31] *M. Shapiro*, "Deliberative", "Independent" Technocracy v. Democratic Politics: Will the Globe Echo the E.U.? Law and Contemporary Problems (2005). 341 (347), referring to the comitology process. See also *Rodrik*, The Globalization Paradox: Democracy and the Future of the World Economy, New York and London 2012, 220: "Anyone who thinks global governance is a plausible path for the world economy at large would do well to consider Europe's experience."

[32] For an example, see *Rifkin*, The European Dream: How Europe's Vision of the Future Is Quietly Eclipsing the American Dream, Cambridge 2005; *Bogdandy*, The European Lesson for International Democracy: The Significance of Articles 9 to 12 EU Treaty for International Organizations, European Journal of International Law (2012), 315–334.

[33] See only *Ortino*, Basic Legal Instruments for the Liberalization of Trade, A Comparative Analysis of EC and WTO Law, Oxford and Portland (Oregon), 2004.

[34] *Gaines/Olsen/Sørensen*, Comparing Two Trade Liberalisation Regimes, in: Gaines/Olsen/Sørensen (eds.), Liberalising Trade in the EU and the WTO, Cambridge 2012, 6. See also *Weiler*, Epilogue: Towards a Common Law of International Trade, in: Weiler (ed.), The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade, Oxford 2000, 201–232.

[35] *Gaines/Olsen/Sørensen*, Comparing Two Trade Liberalisation Regimes, in: Gaines/Olsen/Sørensen (eds.), Liberalising Trade in the EU and the WTO, Cambridge 2012. 6. *Shapiro*, "Deliberative", "Independent" Technocracy v. Democratic Politics: Will the Globe Echo the E.U.? Law and Contemporary Problems (2005). 341 (341), holds that the "WTO and NAFTA […] share the free trade aspects of the E.U."

[36] See *Holmes*, The WTO and the EU: Some Constitutional Comparisons, in: de Búrca/Scott (eds.), The EU and the WTO, Legal and Constitutional Issues, Oxford and Portland (Oregon) 2001, 62.

[37] See *Ibid*., 79.

[38] *Platsas*, The Functional and Dysfunctional in the Comparative Method of Law: Some Critical Remarks, Electronic Journal of Comparative Law (2008), 1 (2). See also

can be argued that while "the EU is a different animal, it is worth reminding ourselves that [the] GATT itself is a form of preferential trading agreement for goods [and that] [w]e can compare the EU and the GATT/WTO in the same way that we can make comparisons with and between other bigger or smaller regional groupings such as NAFTA and Mercosur."[39] In this vein, some describe the EU as an ideal-type economic integrator, which can serve as a "blueprint"[40]. Comparative studies on the EU and the WTO have appeared in two waves.[41] The first came at the turn of the millennium following the substantial institutional changes in Europe and the GATT/WTO. These studies "explored the divergent and then re-convergent trajectories of the EU and the WTO"[42]. The second appeared roughly ten years later and, with "dimmed hopes for convergence", paid more attention to persistent differences.[43] One can describe all of these studies as broadly pursuing a functional approach to comparative law.[44] The essence of functional comparison is a comparison of problem solving, rather than a comparison of concepts.[45] The

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Zweigert/Kötz, An Introduction to Comparative Law, 3rd ed. Oxford 1998, 34; *Ortino*, Basic Legal Instruments for the Liberalization of Trade, A Comparative Analysis of EC and WTO Law, Oxford and Portland (Oregon), 2004, 5.

[39] *Holmes*, The WTO and the EU: Some Constitutional Comparisons, in: de Búrca/Scott (eds.), The EU and the WTO, Legal and Constitutional Issues, Oxford and Portland (Oregon) 2001, 68.

[40] *Gestel/Micklitz*, European Integration Through Standardization: How Judicial Review is Breaking Down the Club House of Private Standardization Bodies, CMLRev (2013), 145 (155).

[41] *Gaines/Olsen/Sørensen*, Comparing Two Trade Liberalisation Regimes, in: Gaines/Olsen/Sørensen (edit), Liberalising Trade in the EU and the WTO, Cambridge 2012, 4.

[42] *Ibid*., 4. See *Ortino*, Basic Legal Instruments for the Liberalization of Trade, A Comparative Analysis of EC and WTO Law, Oxford and Portland (Oregon), 2004, who provides further sources (*Ibid*., 6).

[43] See *Gaines/Olsen/Sørensen*, Comparing Two Trade Liberalisation Regimes, in: Gaines/Olsen/Sørensen (edit), Liberalising Trade in the EU and the WTO, Cambridge 2012, 5. Examples of literature from this time include *Reid*, Balancing Human Rights, Environmental Protection and International Trade: Lessons from the EU Experience. Northampton (UK) and Portland (Oregon) 2015; *Lianos/Odudu* (eds.), Regulating Trade in Services in the EU and the WTO, Trust, Distrust and Economic Integration, Cambridge 2012.

[44] See *Gaines/Olsen/Sørensen*, Comparing Two Trade Liberalisation Regimes, in: Gaines/Olsen/Sørensen (edit), Liberalising Trade in the EU and the WTO, Cambridge 2012, 8. On comparative law generally, see *Kischel*, Rechtsvergleichung, Munich 2015; *Ogus*, Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law, The International and Comparative Law Quarterly (1999), 405–418.

[45] *Kischel*, Rechtsvergleichung, Munich 2015, 183.

aim is not to compare two sets of norms but to compare how a legal order resolves specific real or imagined problems.[46]

Any research agenda that goes beyond description and hopes to "identify what each [legal order] might take from the approach or experience of the other"[47] has to acknowledge the limits of comparative law as a tool of law reform.[48] "Any attempt to use a pattern of law outside the environment of its origin […] [entails] the risk of rejection."[49] Therefore, the use of the comparative method "requires a knowledge not only of the foreign law, but also of its social, and above all its political contexts".[50] In this vein, some find that "[t]he EU has evolved into a much broader and more integrated internal market regime than the WTO, which expressly maintains its focus on international trade issues"[51], and that the two organizations are "fundamentally different in their essential structure and ambition and relationship with constituent national governments that define their legal and political cultures."[52] Some authors recognize that "[…] specific values are inevitably crystallised in international trade rules, and in our ideas about the meaning and purpose of international trade regulation."[53] Others observe that "[t]he idea that the WTO could look to, and even learn from – the EU may seem counter-intuitive; so different are these two organizations in terms of scale and ambition."[54]

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[46] *Ibid*., 180.

[47] *Reid*, Regulatory Autonomy in the EU and WTO: Defining and Defending Its Limits, Journal of World Trade (2010), 877 (878).

[48] See *Kahn-Freund*, On Uses and Misuses of Comparative Law, The Modern Law Review (1974), 1 (2), who describes "three purposes pursued by those who use foreign legal patterns of law in the process of law-making. Foreign legal systems may be considered first, with the object of preparing the international unification of the law, secondly, with the object of giving adequate legal effect to a social change shared by the foreign country with one's own country, and thirdly, with the object of promoting at home a social change which foreign law is designed either to express or to produce."

[49] *Ibid*., 27; for a critique of the "legal transplant" metaphor, see *Teubner*, Legal Irritants: How Unifying Law Ends up in New Divergences, in: Hall/Soskice (eds.), Varieties of Capitalism, The Institutional Foundations of Comparative Advantage, Oxford and New York 2001, 417 et seqq., who prefers the concept of "social irritants".

[50] *Kahn-Freund*, On Uses and Misuses of Comparative Law, The Modern Law Review (1974), 1 (27); See also *Kischel*, Rechtsvergleichung, Munich 2015, 164 et seqq., 187 et seqq.

[51] *Gaines/Olsen/Sørensen*, Comparing Two Trade Liberalisation Regimes, in: Gaines/Olsen/Sørensen (edit), Liberalising Trade in the EU and the WTO, A Legal Comparison, Cambridge 2012, 7.

[52] *Ibid*., 6.

[53] *Snyder*, The EU, The WTO and China, Legal Pluralism and International Trade Regulation, Oxford and Portland (Oregon) 2010, 285.

[54] *Scott*, International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO, EJIL (2004) 307 (352).

B. Thesis: Trade and Telos

The argument presented here is that the WTO and the EU are neither manifestations of a common legal tradition, nor do they exist on a single trajectory of evolutionary development. They are fundamentally different. Only a quantum leap could bring one onto the same level of integration energy as the other. While one can formulate functionally comparable problems, these problems are meta-problems relevant to all trade-liberalization efforts. The solutions offered by the WTO and the EU are the result of the particular way in which they define and answer problems, which depends upon the organizations' object and purpose – their telos.[55] They do so very differently. In terms of defining problems, it is of little help to find that the WTO means to address "discrimination and barriers to trade"[56] – so does the EU. If differences are teleological, then the comparative exercise can only serve to bring differences into focus and help to explain them on a principled basis.[57] It is not possible to learn from this comparison and transplant the discovered solution from one regime into the other without shifting or adapting the very function of the organization itself. Whether or not such a jump would be a good idea requires a more profound analysis than the belief in functionalist determinism.[58]

When economic theory meets the law, it becomes subject to the mechanisms and intricacies of the legal discipline.[59] Arguably, this means that trade-liberalization covenants must have a distinct integration-telos. There are three archetypical objects that drafters of a trade-liberalization covenant can pursue: free trade, market integration, and protectionism-free trade. If the

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[55] Indeed, the focus must be on policy problems, not concepts. By contrast the functional comparison by *Ortino*, Basic Legal Instruments for the Liberalization of Trade, A Comparative Analysis of EC and WTO Law, Oxford and Portland (Oregon), 2004, focuses on concepts, such as "shallow integration" or "*de facto* discrimination" and compares along these lines.

[56] See only *Chea/Piérola*, The Question of Private Standards in World Trade Organization Law, Global Trade and Customs Journal (2016), 388 (391).

[57] On comparative law as a means "for the attainment of knowledge", see *Ortino*, Basic Legal Instruments for the Liberalization of Trade, A Comparative Analysis of EC and WTO Law, Oxford and Portland (Oregon), 2004, 5.

[58] For a discussion, see also *Scott*, International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO, European Journal of International Law 2004, 307 (308): "Market integration begets regulatory gaps. Regulatory gaps beget political integration. Political integration begets…?"

[59] As *Davies*, Between Market Access and Discrimination: Free Movement as a Right to Fair Conditions of Competition, in: Koutrakos/Snell (eds.), Research Handbook on the EU's Internal Market, Cheltenham (UK) and Northampton (MA, USA) 2017, 15, holds, "[t]he underlying problem is one of translating broad policy into workable law […]."

telos pursued has implications for the relationship between the trade-liberalization covenant and private standards, then the relationship that decision makers of a trade covenant construct concerning private standards is revealing of the regime's integration telos.

First, in terms of defining problems, decision makers must determine how the trade covenant relates to the concept of market access. Market access is – necessarily – at the center of every trade-liberalization covenant because it is the basis of the theory of comparative advantage and international specialization. Asking "how far 'domestic' policies must be adapted to the needs of […] market access"[60] distracts from the real issue. From a legal perspective, the concept of market access must be substantiated and contextualized – defined *in situ* in the environment of a specific telos. What we should ask is: how is the relevant market defined, and what is the role that the concept of market access plays concerning it? The *market-telos* requires (market) access to the project's entire geographical scope, and to its competitive environment so that producers may not only benefit from a level playing field but also from its economies of scale. It requires intra-project openness for the functioning of the transnational internal market, the properly functioning (or undistorted) market being a legal concept. For *protectionism-free trade*, market access to national markets in a fragmented global economy is a canary in the coal mine; restricted market access can be agreed on to be circumstantial evidence for disallowed protectionist intent. In this case, the aim, or outcome, of actual access to a market is legally irrelevant because non-protectionism implies that Governments may deny market access if this denial does not reflect protectionist intent. *Free trade*, by contrast, requires that import product placement is not made conditional on the fulfillment of the importing country's regulations and thereby maximizes production site (regulatory) competition; this is also its telos and requires a high degree of trust between decision makers. Protectionism-free trade pursues only limited regulatory competition. Market building seeks to root out regulatory competition and construct an embedded level playing field, a single competitive environment.

Second, the argument presented here is that the WTO pursues the telos of protectionism-free trade, while the EU seeks to build a transnational market and thereby pursues the market-telos. Only the state can engage in a market-restricting protectionist policy – private actors cannot. Private actors can only act anti-competitively and thereby restrict market access. If this is true, then market access restrictions emanating from private standards acting independently from the government should be irrelevant for rooting out protec-

[60] *Holmes*, The WTO and the EU: Some Constitutional Comparisons, in: de Búrca/Scott (eds.), The EU and the WTO, Legal and Constitutional Issues, Oxford and Portland (Oregon) 2001, 63.

tionist trade policy, that is: within the context of non-protectionism. Only public policy incorporating private standards in one way or another can appear – albeit indirectly – on the radar of a non-protectionism regime. The market-telos, by contrast, should be more sensitive. Here private standards *per se* should be problematic in their potential market access restricting capacity; they are a problem in that they can threaten the openness of the single market diverting trade patterns and thereby threatening the proper functioning of the market. The teleological implications for a Member are what we might refer to as the *problem of responsibility*; what purpose did Members agree on, and how do private standards relate to this aim? How one answers the problem of responsibility determines another problem, that of *regulatory autonomy*. What degree of unqualified self-determination do the regime's subjects retain? Must Members yield autonomy for the pursuit of common-interests – building and embedding a market – or must they yield autonomy only to protect others from the negative externalities of disallowed protectionism? The response, again, determines the answer to the last problem, that of *legitimacy*. Under what circumstances can decision makers rely on private standards as trade facilitators? The answers should depend on the integration goal. If decision makers aimed at the creation of a competitive environment, then private standards that seek harmonization should be accompanied by a legitimating structure that seeks to make them acceptable as part of the law. If they are mere yardsticks for protectionist intent, then this function should delimit their legitimacy.

Third, protectionism-free trade fits directly into the inter-state normative pattern of international law because it pivots on the agreement as to what types of protection from imports are allowed. The market-telos rests on a common-interest normative pattern and thereby leans towards the achievement – through law – of common or public interests. The concept of the common interest easily transcends the boundaries of states. (Global) Public interest regulation does not only relate to democracy but also the universalism of technocracy, expert knowledge, and administration. If the EU endorses the common interest, it must deal with the ensuing problems of acceptance that the tension between the competing normative claims of national and supranational law produces. The EU might (successfully) seek to overcome this strain by relying on shared experiences and the construction of a European identity. The reliance on private standards does not promote this process. Some commentators might attack the WTO for the limits of non-protectionism, for its blindness to purported collective public interests. However, such a critique misjudges the virtue of the inter-state normative pattern by applying, in order to pronounce regime totalitarianism, normative faith in global legalism to the WTO, where in fact the inter-state pattern should countenance ongoing and *ad hoc* re-formulation of policy in accordance with community expectations that can go beyond treaty law in the books. This

process of non-patterned discovery of customs seems at once more suitable to a world of diverse values, can integrate (*ad hoc*) policy adaptation and reformulation without destroying general trust in desired and expected consequences. This process can thereby tolerate and square the circle of seemingly conflicting international normative orders – does not conceive of "fragmentation" – by regarding values as expressions of desired consequences which cross-fertilize in terms of decision makers' perspectives. In addition to its being politically unlikely, there are substantial theoretical grounds for the argument that the WTO should not make the quantum leap to the market-telos, especially neither to discipline private standards as market access barriers nor to rely on them as an instrument of law-mediated global governance.

The effective authoritative decision-making elites of the world should promote the common interest of all peoples. Their perspective, however, can neither effectively be required by international law derived from logical exercises nor consensus-oriented deliberation. Instead, their perspectives must grow out of a sense of common vocation, of inclusive identification – "concern for all humanity"[61] – and should find a variety of expressions. Private standards, it will be argued, can play a vital role in this regard, while remaining contestable and subject to competition, by creating and diffusing human values such as diversity, well-being and wealth, freedom of choice, participation in decision making, and – by elucidating interdependence with other communities and the natural environment – affection, individual responsibility and rectitude.[62] Arguably, only if decision makers, and those with the power to influence them, internalize these values, believe in them as virtuous and authoritative, will they find increasing expression in peaceful, legitimate and effective cooperation at the global level. Only a contextual policy-oriented approach can yield these insights:

C. International Law and Policy

Arguably, international law and national law are not experienced as the same – as equally legitimate – by those whom the law intends to rule.[63] This insight is not immediately apparent. On cannot easily understand it from a normative perspective that looks at the world as it should be (informed by ends-based, or historical notions of justice). "Politically we operate with a very traditional

[61] *Chen*, An Introduction to Contemporary International Law, A Policy-Oriented Perspective, Oxford 2015, 103.

[62] On these values, see *Ibid*., 16.

[63] See only *Kahn*, The Cultural Study of the Law, Reconstructing Legal Scholarship, Chicago and London 1999, 86 et seq.

model of the soul […]. We think of ourselves as divided into three faculties: reason, will and desire. Reason and desire compete for the loyalty of will. Will is the source of action, but it must choose at every moment between the products of reason's deliberation and the immediate ends of desire."[64] From a normative perspective, our character should be the product of reason. Similarly, "the problem of a democratic order under law is to determine the collective will by reason rather than desire."[65] However, "[t]he terms reason and will are themselves empty of substantive content (i.e., they do not provide a specific program). Instead, they structure the larger conceptual order within which we deliberate about our political life."[66] Within this structure, "politics is conceived as a struggle between good and evil, represented by reasons and desire." Within this scaffolding, "both sides of a political debate will claim the virtue of reason and accuse the other of wilful self-interest."[67]

In this vein, we might differentiate between various ideas of what is reasonable and just.[68] On the one hand, one can normatively place the individual at the center and prefer a historical conception of justice over ideas of justice that seek to judge the distribution of scarce resources by a structural principle of distribution.[69] This perspective assimilates reason to the realization of individual choices, which will create a spontaneous order.[70] Market interventions can be declared reasonably necessary to protect individual freedom of choice,[71] and inefficient market interventions can be decried as unreasonable willfully self-interested (public choice) – thereby correlating to an under-

[64] *Ibid*., 17.

[65] *Ibid*.

[66] *Ibid*.

[67] *Ibid*.

[68] In this vein, see *Haltern*, Erklärungsnotstand des Liberalismus: Warum Rechtswissenschaft keine Wissenschaft der Politik ist, in: Senn/Puskás (eds.), Rechtswissenschaft als Kulturwissenschaft? Kongress der Schweizerischen Vereinigung für Rechts- und Sozialphilosphie, 15. und 16. Juni 2007, Zurich 2007, 158 et seqq.

[69] See especially *Nozick*, Anarchy, State and Utopia, Reprint New York 2013, 153 et seqq.

[70] *Hayek*, Government Policy and the Market, in: Hayek (ed.), Law, Legislation and Liberty, A New Statement of the Liberal Principles of Justice and Political Economy, London and New York, Reprinted 2013, 406 et seqq. Note, however, that the impetus here was to "'use Reason to whittle down the claims of Reason'" and that spontaneous order implies "'the results of human action but not human design'" – a view pitted against scientism, "this 'fatal conceit' that we can use the methods and procedures of science to organize human social activity." (*Horwitz*, Spontaneous Order, Free Trade and Globalization, in: Garrison/Barry [eds.], Elgar Companion to Hayekian Economics, Cheltenham [UK] and Northampton [MA, USA] 2014, 295 et seq.).

[71] See for example *Zimmer*, The Basic Goal of Competition Law: To Protect the Other Side of the Market, in: *Ibid*., The Goals of Competition Law, Cheltenham (UK) and Northampton (MA, USA) 2012, 486 et seqq.

standing of liberty as freedom from interference.[72] On the other hand, one might place the individual at the center of political organization, but assimilate reason to justice expressed by structural principles of distribution.[73] From this perspective, the question is how to liberate reason from "instrumental" constraints, especially from the market.[74] While the proposed strategies for so doing have and do differ,[75] in particular the "progressive" strand believes in the possibility (or relies on the counterfactual presuppositions) of consensus-oriented rational talk, for example, behind a veil of ignorance or in an ideal speech situation.[76] Any measures necessary to bring about the *ex-post* agreed-on structured pattern of distribution – linked to the idea of freedom as self-mastery – can thereby be identified as just and all behavior which deviates as unjust and therefore unreasonable, indeed as willfully self-interested. In claiming reason for themselves, both sides to this debate can assert universality for the law that seeks to realize its notion of reason.

Being normatively focused on what would be reasonable and not driven by misleading desires, both normative views are stuck in a debate over what type of political organization would be just and reasonable.[77] In so doing, such

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[72] On the idea of freedom from interference as opposed to freedom as self-mastery, see *Berlin*, Two Concepts of Liberty, in: Berlin (ed.), Liberty, Oxford 2002,166 et seqq.

[73] For an overview, see *Horwitz*, Spontaneous Order, Free Trade and Globalization, in: Garrison/Barry (eds.), Elgar Companion to Hayekian Economics, Cheltenham (UK) and Northampton (MA, USA) 2014, 299.

[74] For example, see the discussion on Habermas' views in *Kolakowsi*, Main Currents of Marxism: The Founders – The Golden Age – The Breakdown, New York and London 2008, 1096 et seqq.

[75] This position "found its most powerful voice in the Marxian critique of capitalism and that critique's implication for the socialist alternative" – "[t]he core Marxian impulse is that the system of commodity production is inherently irrational and, in some sense, inefficient. Because capitalism relies on what one might call 'after the fact' coordination (that is, we only know what should have been produced after production takes place and profit and loss provide us with signals about how we did), it will be wasteful and irrational" *Horwitz*, Spontaneous Order, Free Trade and Globalization, in: Garrison/Barry (eds.), Elgar Companion to Hayekian Economics, Cheltenham (UK) and Northampton (MA, USA) 2014, 296). Of course, "[i]t is the height of hubris to imagine that one could take control of, and consciously plan, the productive activities of anything resembling a modern economy" and "to decide collectively what to produce, how to produce it, and how to distribute [is an] atavistic throwback […]" (*Ibid*., 297).

[76] See *Haltern*, Erklärungsnotstand des Liberalismus: Warum Rechtswissenschaft keine Wissenschaft der Politik ist, in: Senn/Puskás (eds.), Rechtswissenschaft als Kulturwissenschaft? Kongress der Schweizerischen Vereinigung für Rechts- und Sozialphilosphie, 15. und 16. Juni 2007, Zurich 2007, 160 et seq.

[77] Theories on regulation reflect these notions. Regulations are the classical tool for the pursuit of public interests. We can differentiate between private (concentrated) and public (diffuse) interests, the former specific to an individual or group; the latter seek benefits for

approaches ignore the actor, who is imagined to behave. Thus, "[w]hile the path ahead is clear, the meaning of personal identity is not. […] Yet, even if reason fails, identity is affirmed in the assertions of the Will."[78] The approaches underestimate the implications for the rule of law of the historical fact that within the context of the modern and still pervasive organic or bodily conception of the territorial nation-state,[79] identities were successfully constructed (imagined communities[80]).[81] Those who identify with the collec-

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the whole of society (*Hix/Høyland*, The Political System of the European Union, 3rd ed. Houndmills 2011, 160). In liberal democracies, the deciding on the relative importance of these two sets of interests is what public debate and the limits set by constitutions seek to achieve. From the perspective of developmental democracy, this process can have more than a protective worth; it has an intrinsic value (see *Gardner*, Shut up and Vote: A Critique of Deliberative Democracy and the Life of Talk, Tennessee Law Review [1996], 421 [425]). On the level of policy science (i.e., proposing and measuring outcomes of policy deliberations against hypothesized normative premises), there are two apologies for government market regulation for the benefit of the public interest. *On the one hand*, according to economic theories of regulation the public interest is best served if the economy is efficient (see *Veljanovski*, Economic Approaches to Regulation, in: Baldwin/Cave/Lodge (eds.), The Oxford Handbook of Regulation, Oxford and New York 2010, 19). *Classical liberal economics* makes the point that markets are naturally efficient; the concept of market failures – especially concerning market power, externalities, public goods, and asymmetric information – has provided a *prima facie* case for government market intervention through regulation. *Normative welfare economics* seek regulation to correct these market failures (*utility individualism*) (see *Hix/Høyland*, The Political System of the European Union, 3rd ed. Houndmills 2011, 189; *Vanberg*, Individual Choice and Social Welfare, Theoretical Foundations of Political Economy, Freiburg Discussionspapers on Constitutional Economics, Walter Euken Institut [2018], 3 et seqq.). *On the other hand*, one can define the public interest as social choices seeking equity through redistribution. These are broader values not limited to utility, i.e. "distributional issues which cannot be addressed without considering conflicts of interests and of preferences" for the sake of social justice (*preference individualism*) (*Sen*, The Possibility of Social Choice, The American Economic Review [1999], 349 [352]; *Feintuck*, Regulatory Rationales Beyond the Economic: In Search of the Public Interest, in: Baldwin/Cave/Lodge [eds.], The Oxford Handbook of Regulation, Oxford and New York 2010, 39 et seqq.).

[78] *Kahn*, The Cultural Study of the Law, Reconstructing Legal Scholarship, Chicago and London 1999, 17.

[79] *Haltern*, Recht und Soziale Imagination, in: Gephart (ed.), Rechtsanalyse als Kulturforschung, Frankfurt a. M. 2012, 96; *Haltern*, Erklärungsnotstand des Liberalismus: Warum Rechtswissenschaft keine Wissenschaft der Politik ist, in: Senn/Puskás (eds.), Rechtswissenschaft als Kulturwissenschaft? Kongress der Schweizerischen Vereinigung für Rechts- und Sozialphilosphie, 15. und 16. Juni 2007, Zurich 2007, 150.

[80] See only *Anderson*, Imagined Communities, Reflections on the Origin and Spread of Nationalism, London and New York (Revised Edition) 2016.

[81] See *Kahn*, The Reign of Law, Marbury v. Madison and the Construction of America, Binghamton 1997, 230 et seq. See also *McCann*, F. A. Hayek: The Liberal as Communitar-

tive represented by a popular sovereign experience membership of the collective as part of their own identity.[82] Assertion of the imagined sovereign Will can thereby affirm individual identity.[83] Participation in such a construction offers purpose.[84] It is, however, also the road to accepting the meaning and symbolic dimensions of the Political.[85] Ignoring its existence implies risking ignoring its dangers.[86]

Both concepts of reason identify law as an instrument in the quest to realize particular notions of justice. In this way, the law is conceived of as purely instrumental. Looked at as an instrument, the law is always the same. Moreover, the law is always the subject of reform – subject to a better realization of a particular idea of reason.[87] Therefore instrumentally perceived, international law looks no different from national law.[88] If the law is – or rather, should be – the product of reason, establishing the rule of law to replace an arbitrary rule of man, then – reason being a universal category – the claims of reasonable law are equally universal.[89] Because the practice of law suggests that the application of law amounts to the application of reason, the existence of a

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ian**,** The Review of Austrian Economics (2002), 5 (5): "The individual is not taken to be asocial or pre-social, but rather it is recognized that society *defines* the individual."

[82] *Haltern*, Integration durch Recht, in: Bieling/Lerch (eds.), Theorien der europäischen Integration, 3rd ed. Wiesbaden 2012, 354; *Haltern*, Finalität, in: Bogdandy/Bast (eds.), Europäisches Verfassungsrecht, 2nd ed. Berlin and Heidelberg 2009, 306 et seq. On the meaning of identity in liberal democracies, see also *Mounk*, The People vs. Democracy, Why Our Freedom is in Danger and How to Save it, Cambridge (MA, USA) 2018, 161 et seqq.

[83] *Haltern*, Erklärungsnotstand des Liberalismus: Warum Rechtswissenschaft keine Wissenschaft der Politik ist, in: Senn/Puskás (eds.), Rechtswissenschaft als Kulturwissenschaft? Kongress der Schweizerischen Vereinigung für Rechts- und Sozialphilosphie, 15. und 16. Juni 2007, Zurich 2007, 164.

[84] See *Bolz*, Das Konsumistische Manifest, Munich 2002, 7: "Wer Sein in die Unordnung hineinkonstruiert hat, ist kaum bereit, seine Konstruktion aufzugeben."

[85] *Haltern*, Erklärungsnotstand des Liberalismus: Warum Rechtswissenschaft keine Wissenschaft der Politik ist, in: Senn/Puskás (eds.), Rechtswissenschaft als Kulturwissenschaft? Kongress der Schweizerischen Vereinigung für Rechts- und Sozialphilosphie, 15. und 16. Juni 2007, Zurich 2007, 164.

[86] See *Ibid*., 162.

[87] See *Kahn*, The Cultural Study of the Law, Reconstructing Legal Scholarship, Chicago and London 1999, 17.

[88] Hence, it is only natural that international law scholars seek to transplant concepts of domestic law into the international context – for an example, see *Bogdandy/Goldmann/Venzke*, From Public International to International Public Law: Translating World Public Opinion into International Public Authority, The European Journal of International Law (2017), 115–145.

[89] See *Kahn*, The Cultural Study of the Law, Reconstructing Legal Scholarship, Chicago and London 1999, 18.

reliable rule of law at the national level can be conceived to be based solely on reason itself. If this were true, then an international rule of law looks like "the next step of a progressive development of the rule of law with which we are familiar in the nation-state."[90] However, "[t]he rule of law is not the product of reasoned discourse."[91] Instead, if we contextualize the rule of law in a nation-state, we can observe that it "rests on a thoroughly politicized and historicized concept of community and self."[92] Within this context, the law has more than just a functional or instrumental character; it has a symbolic or aesthetic character and is itself a medium that stabilizes identity and thereby the community.[93] Law has a symbolic function whereby it represents the Will of the imagined personification of the state, the popular sovereign. It is the common belief in the existence of a particular popular sovereign, which gives law representing the imagined sovereign source legitimacy – this union in belief unites the rulers and the ruled and assures loyalty towards the prescrip-

[90] *Kahn*, The Cultural Study of the Law, Reconstructing Legal Scholarship, Chicago and London 1999, 85. For an example of such a linear argument, see *Höffe*, Geschichte des Politischen Denkens, Zwölf Porträts und Acht Miniaturen, Munich 2016, 406 et seq.

[91] *Kahn*, The Cultural Study of the Law, Reconstructing Legal Scholarship, Chicago and London 1999, 86.

[92] *Ibid*., 86. Similar: *Wahl*, In Defence of 'Constitution', in: Dobner/Loughlin (eds.), The Twilight of Constitutionalism?, Oxford and New York 2010, 236; *Somek*, Administration without Sovereignty, in: Dobner/Loughlin (eds.), The Twilight of Constitutionalism?, Oxford and New York 2010, 267–287; *Haltern*, Recht und Soziale Imagination, in: Gephart (ed.), Rechtsanalyse als Kulturforschung, Frankfurt a. M. 2012, 92; *Haltern*, Integration durch Recht, in: Bieling/Lerch (eds.), Theorien der europäischen Integration, 3rd ed. Wiesbaden 2012, 354: "Zugleich besitzt das Recht eine Tiefenstruktur, die Bedingung seiner Normativität ist. Dass wir Recht als ‚unser' Recht annehmen, liegt in seiner Eigenschaft als Träger und Speicher von der Normengemeinschaft Eigenem begründet. Man mag dies als symbolische oder ästhetische Eigenschaft des Rechts bezeichnen. In dieser Gestalt wirkt das Recht konstitutiv auf die Stabilisierung der Normengemeinschaft als transtemporale Einheit ein. Recht operiert als Medium für Ansprüche des Staates und trägt dazu bei, diese als legitim erscheinen zu lassen. Manche dieser Ansprüche gehen über das hinaus, was im Rahmen einer Vertragskonstruktion des Rechts erklärbar ist. Sie sind lesbar und verstehbar unter dem Topos der Identität, die den Bürger zum Teil des Volkssouveräns werden lässt." These dynamics have important consequences for freedom if it is true that "freedom has never worked without deeply ingrained moral beliefs and that coercion can be reduced to a minimum only where individuals can be expected as a rule to conform voluntarily to certain principles" (*Hayek*, The Constitution of Liberty, Chicago 1960, 62). In this vein, see also *Jung*, The Undiscovered Self, The Dilemma of the Individual in Modern Society, Reprint New York 2006, 19 et seqq.

[93] *Haltern*, Integration durch Recht, in: Bieling/Lerch (eds.), Theorien der europäischen Integration, 3rd ed. Wiesbaden 2012, 354. See also *Haltern*, Recht und Soziale Imagination, in: Gephart (ed.), Rechtsanalyse als Kulturforschung, Frankfurt a. M. 2012, 92; *Kahn*, The Cultural Study of the Law, Reconstructing Legal Scholarship, Chicago and London 1999, 31 et seqq.

tion of law.[94] The law is symbolic in that it represents the sovereign; compliance with the law stabilizes the belief in its sovereign source and by extension, stabilizes the community of believers itself, implying a repeating reification of the law's experienced legitimacy.[95]

International law lacks all of these imaginative preconditions of the rule of law.[96] One cannot conceptualize it as a progressive extension of the rule of law as experienced in a nation under law's rule without entering "make-believe universalism"[97]. Conceiving international law as a system of rules, which offer themselves merely to be neutrally found or derived from past decisions by the application of logical exercises and which simply lack more effective compliance mechanisms to secure an international rule of law, thus under-contextualizes international law. It diverts attention away from the function of international law, at the peril of its acceptance and collective problem-solving capacity. Turning away from the positivist rule-based approach – as much as from the view that international law is not law at all – liberates us to identify international law as something idiosyncratic, "as uniformity of decisions in accord with community expectations"[98] established by "a continuing process of authoritative decision for clarifying and securing the common interest of community members"[99], a process in which "many decision makers continually formulate and reformulate policy. These decision makers formulate policies projecting desired consequences into living contexts as well as respond to words describing what prior decision makers have

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[94] *Haltern*, Finalität, in: Bogdandy/Bast (eds.) Europäisches Verfassungsrecht, 2nd ed. Berlin and Heidelberg 2009, 301 et seqq. As to the (dangerous) consequences of this shared belief, see *Haltern*, Erklärungsnotstand des Liberalismus: Warum Rechtswissenschaft keine Wissenschaft der Politik ist, in: Senn/Puskás (edit,), Rechtswissenschaft als Kulturwissenschaft? Kongress der Schweizerischen Vereinigung für Rechts- und Sozialphilosphie, 15. und 16. Juni 2007, Zurich 2007, 149.

[95] See *Haltern*, Finalität, in: Bogdandy/Bast (eds.) Europäisches Verfassungsrecht, 2nd ed. Berlin and Heidelberg 2009, 306 et seqq. *Kahn*, The Cultural Study of the Law, Reconstructing Legal Scholarship, Chicago and London 1999, 85 et seq.

[96] *Kahn*, The Cultural Study of the Law, Reconstructing Legal Scholarship, Chicago and London 1999, 86: "There is, as yet, no global sovereign of which we can imagine the self to be a part. International law in a collection of norms that represent nothing beyond themselves. No one sacrifices the self for a world sovereign that realizes itself in a global rule of law. Yet, that act of sacrifice – the suppression of a unique subject hood in the place of law's subject – has been at the core of individual identity in the nation state under law's rule." Similar: *Miller*, Legal Scholarship, Realism, and the Search for Minimum World Order, World Politics (1965), 478 (481).

[97] See *Chen*, An Introduction to Contemporary International Law, A Policy-Oriented Perspective, Oxford 2015, 105.

[98] *Ibid*., 102.

[99] *Ibid*., 14.

done in earlier contexts."[100] International law operates as policy choices made by real people, by authoritative decision makers that project demands of expected behavior.[101] Depending on authoritative decision makers' choices to apply legal rules in a certain way,[102] or at all – especially at the domestic level –, the impact of international law depends significantly upon the harmonization of inclusive and exclusive interests (i.e., those with a high degree of collective impact and those whose effect extends to peoples of a single territorial community).[103] Finding means to encourage the perspective that we should all serve the goal of human dignity in a free society will arguably be more effective in pursuit of this goal than conjuring yet another doctrinal theory of international law.

D. Thumbnail Itinerary

Looked at from this perspective of international law as policy-choice, "[f]unction and context, goals and expectations, trends, conditions, projections and alternatives are properly within [the] domain of concern and inquiry."[104] These elements will frame this study. *Part One* (The Analytical Framework) will outline the framework for the comparative inquiry. Both the "goals and expectations" decision makers agree on are translatable to a choice of integration-telos. The choice of a particular integration goal is a constitutive decision, identifying and projecting basic community policies, reflecting decision makers' expectations. Public order decisions, by extension, can "emerge as an outcome of the established constitutive process that shape and maintain the protected features of the communities shared processes."[105] This part will also elaborate on the importance of telos in international economic integration. Key concepts will be clarified (protectionism, fair trade, trade liberalization) to inform the discussion. The argument is that a distinct type of economic integration goal exists that corresponds to a distinct telos, which in turn delimits expectations (free trade, market building, and

[100] *Ibid*., referring to *Reisman*, The View from the New Haven School of International Law, International Law in Contemporary Perspective, New York 1992, 2.

[101] *Chen*, An Introduction to Contemporary International Law, A Policy-Oriented Perspective, Oxford 2015, 12 et seq.

[102] For the pluralism inherent in international rules, see *Kennedy*, One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream. NYU Review of Law & Social Change (2007), 641–659.

[103] On inclusive and exclusive interest, see *Chen*, An Introduction to Contemporary International Law, A Policy-Oriented Perspective, Oxford 2015, 101, 118.

[104] *Ibid*., 14.

[105] *Ibid*., 18.

protectionism-free trade). When confronted with the phenomenon of private standards, the integration-telos decision makers operate within should delimit the reactions of said decision makers to this phenomenon. To compare the choices made by decision makers within the GATT/WTO and the EU, we will elaborate on the three distinct, yet interrelated problems noted above. These are the problem of responsibility, the problem of regulatory autonomy, and the problem of legitimacy. These choices provide the trends and conditions that will be studied. To duly reflect upon the conditions affecting decision making and given the dynamic nature of international law, these trends will be described chronologically in their historical contexts: *Part Two* (The Problem of Responsibility) will describe how the trade-in-goods regimes of the GATT/WTO and the EU construct legal responsibilities for the achievement of their particular constitutive choices – their integration goal. We will study the public order decisions made concerning private standards and the problem of responsibility. Within the context of the GATT/WTO we will study the early and contemporary rise of private standards as a regulatory phenomenon and see how the GATT 1947/1994, the TBT and the Agreement on Sanitary and Phytosanitary Measures (hereafter: SPS) relate to private standards.[106] Within the context of the EU, we will study the implications of Art. 34 TFEU for private activities and look at how the EU, as a collective actor, responds to its responsibility for the functioning of the market and how this relates to private standards. *Part Three* (The Problem of Regulatory Autonomy) will illustrate the degree to which Members have yielded their regulatory autonomy and what this implies for the role of private standards within the respective contexts. Within the GATT/WTO context, we will study the legal effects of protecting regulatory competition and what this means for the role private standards can play. Within the EU context, we will study what it means that the EU provides and protects a single competitive environment as a public good and what this implies for private standards. *Part Four* (The Problem of Legitimacy) will analyze and compare the conditions under which decision makers in the GATT/WTO and the EU have integrated private standards into their respective regimes' public order choices. *Part Five*

[106] In this context, one commentator has summarized the issue as "whether national and/or regional governments can be held responsible under the General Agreement on Tariffs and Trade (GATT)/World Trade Organization (WTO) law [especially Art. 4.1 TBT and Art. 13 SPS] if it can be proven that their official policies and activities directly or indirectly permit, support or otherwise influence the adoption, promulgation and/or maintenance of ostensibly private and voluntary standards that result in discriminatory trade practices or in the creation of unnecessary obstacles to international trade" (*Kogan*, Discerning the Forest from the Trees: How Governments Use Ostensibly Private and Voluntary Standards to Avoid WTO Culpability, Global Trade and Customs Journal [2007], 319 [319]).

(Comparison) will draw together and compare the findings from above. On this basis, *Part Six* (Appraisal) will evaluate the comparative analysis. It will deal with and evaluate projections of future trends in decision making as well as policy alternatives. Here current themes in international law (International Public Law, Global Administrative Law and Global Legal Pluralism) and their conception of the role that private standards might play within the EU, the WTO, and global governance more broadly, will be discussed. We will also evaluate the EU's reliance on private standards. *Lastly*, a conclusion and summary of the results will be provided.

Part One

The Analytical Framework

A. Trade: Protectionism, Fair Trade and Trade Liberalization

Foreign trade is a polarizing subject.[1] Today we can roughly differentiate between three archetypical attitudes towards trade. *First*, some favor protection from imports. *Second*, fair traders are interested in the ethical aspects of commerce. These two camps have different goals, although "they can and do make common cause in their opposition."[2] *Third*, pro-traders are in favor of less state intervention in cross-border exchanges.

First, protectionists are concerned with defending their domestic economy and society from the impacts of imports.[3]

"What we call an economy, i.e. the nexus of economic activities and the relations within some defined regional limits […] has always been subject to measures taken, or constraints imposed by political authorities."[4]

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[1] For an overview, see *Irwin*, Against the Tide, An Intellectual History of Free Trade, Princeton 1996; *Lester/Mercurio/Davies*, World Trade Law, Text Materials and Commentary, 3rd ed. Oxford 2018, 28 et seqq.; *Ehrlich*, The Politics of Fair Trade, Moving Beyond Free Trade & Protectionism, New York 2018; *Bernstein*, A Splendid Exchange: How Trade Shaped the World, London 2008.

[2] *Ehrlich*, The Politics of Fair Trade, Moving Beyond Free Trade & Protectionism, New York 2018, x. See also *Horwitz*, Spontaneous Order, Free Trade and Globalization, in: Garrison/Barry (eds.), Elgar Companion to Hayekian Economics, Cheltenham (UK) and Northampton (MA, USA) 2014, 294: "The result is an unusual coalition in opposition to globalization that comes from the protectionist right and the 'progressive' left, with the former seeing only harm to the Western working class and the latter seeing globalization (or at least what they would call 'corporate-led' globalization) as impoverishing the developing world, both materially and culturally, by turning it into mini-Americas." *Ibid*., 305 notes that "[i]t is of note that these two forms of argument seem to run in contradiction to each other, as the first assumes that free trade harms large trading nations (or at least a substantial subset of citizens therein), while the second assumes free trade benefits them at the expense of poorer countries. It would seem that both cannot be true."

[3] *Fidler*, Competition Law and International Relations, International and Comparative Law Quarterly (1992), 563 (570 et seq.) cites *Rousseau*, who held that international commerce creates "conflict, turmoil and violence."

Such measures can be socially or economically motivated, while the effects in both cases are economic.[5] We can divide the protectionist motive into two categories: non-economic and economic protection. The former type of protection is sincerely concerned with the defense of public interests, such as consumer safety and pest control. The latter is overtly commercial and seeks to protect society from imports, primarily because of fears that imports might create unemployment.[6] Some might base protectionism on the notion of collective self-determination.[7] It is a protectionist economic policy to discriminate "against imported goods in favor of those produced within the country, usually with the aim of sheltering domestic producers from foreign competition through tariffs, quantitative restrictions, or other import barriers. These trade interventions distort the prices faced by domestic producers and consumers away from those arising in the world market."[8] It is also economically protectionist to restrict trade in order to seek a "favorable balance of trade" – mercantilism[9] – or to engage in "strategic trade policy" (where only a small number of firms compete internationally).[10] Reciprocity, or the "terms of trade argument for protection", is another case for restricting trade in favor of the domestic economy. A trade restriction in form of, e.g., a technical regulation (i.e., the compliance cost)[11] or "a tariff could benefit a country by making the ratio at which it exchanges its products with the rest of the world – the terms of trade, or the purchasing power of a country's exports in terms of the

[4] *Vanberg*, Individual Choice and Social Welfare, Theoretical Foundations of Political Economy, Freiburg Discussionspapers on Constitutional Economics (2018), 1.

[5] *Ehrlich*, The Politics of Fair Trade, Moving Beyond Free Trade & Protectionism, New York 2018, 18; *Irwin*, Against the Tide, An Intellectual History of Free Trade, Princeton 1996, 5.

[6] *Ehrlich*, The Politics of Fair Trade, Moving Beyond Free Trade & Protectionism, New York 2018, 18; *Sykes*, Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations, The University of Chicago Law Review (1991), 255 (261 et seq.). See also *Irwin*, Against the Tide, An Intellectual History of Free Trade, Princeton 1996, who discusses prominent cases for protectionism; Mercantilism, the Terms of Trade Argument, the Infant Industry Argument, the Increasing Returns Argument, the Wage Differential Argument, the Australian Case for Protectionism, Keynes and the Macroeconomics of Protectionism and Strategic Trade Policy.

[7] For a critique of globalization from this perspective, see *Hazony*, The Virtue of Nationalism, New York, 2018.

[8] See *Irwin*, Against the Tide, An Intellectual History of Free Trade, Princeton 1996, 5.

[9] See *Ibid*., 27.

[10] See *Ibid*., 207.

[11] *Fontanelli*, ISO and Codex Standards and International Trade Law: What Gets Said is Not What's Heard, International and Comparative Law Quarterly (2011), 895 (914); *Staiger/Sykes*, International Trade and Domestic Regulation. Stanford Law and Economics Online Working Paper No. 387; Stanford Public Law Working Paper No. 1504913,19 et seqq.

imports it can procure – more advantageous."[12] Some explain protectionism as a policy preference by building on the theory of comparative advantage:[13] Both Stolper/Samuleson and Ricardo/Viner have developed models to predict who will be opposed to trade and when.[14] The former stress that the organized representation of the scarce production factor, e.g., labor unions, will pressure governments to intervene to protect their factor from the consequences of decreased demand resulting from trade.[15] The latter find that factors are not mobile so that protection will help those in import-competing industries while it will hurt those in export industries.[16] Moreover, even if trade raises everybody's utility, some claim that it does not make everybody better off. Even if there might be some set of transfers from winners to losers, these ostensibly remain theoretical and "ignore the effects of free trade on people's essential communitarian needs."[17]

Economic protectionists often refer to the concept of fairness.[18] As traditionally understood, the goal of fair trade is to change trading practices in foreign countries for the benefit of domestic producers – to create a level playing field.[19] Unfairness implies that traders can import goods at prices that

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[12] See *Irwin*, Against the Tide, An Intellectual History of Free Trade, Princeton 1996, 107. See also *Rigod*, The Purpose of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), The European Journal of International Law (2013), 503 (520 et seqq.).

[13] *Goldsmith/Posner*, The Limits of International Law, Oxford and New York 2005, 138 et seqq.

[14] For more detail, see *Stolper/Samuelson*, Protection and Real Wages, The Review of Economic Studies (1941), 58 (73); *Ehrlich*, The Politics of Fair Trade, Moving Beyond Free Trade & Protectionism, New York 2018, 52 et seq.; *Kuo/Naoi*, Individual Attitudes, in: Martin (ed.), The Oxford Handbook of the Political Economy of International Trade, Oxford and New York 2015, 100.

[15] *Stolper/Samuelson*, Protection and Real Wages, The Review of Economic Studies (1941), 58–73. See also *Bernstein*, A Splendid Exchange: How Trade Shaped the World, London 2008, 366 et seqq.

[16] *Ehrlich*, The Politics of Fair Trade, Moving Beyond Free Trade & Protectionism, New York 2018, 53. See also *Irwin*, Against the Tide, An Intellectual History of Free Trade, Princeton 1996, 196.

[17] See *Etzioni*, Happiness is the Wrong Metric, A Liberal Communitarian Response to Populism, Cham (CH) 2018, 132.

[18] For a critical discussion, see only *Bhagwati*, Trade Liberalisation and 'Fair Trade' Demands: Addressing the Environmental and Labour Standards Issues, The World Economy (1995), 745 (746)*:* "[P]rotectionists see great value in invoking 'unfairness' of trade as an argument for getting protection: it is likely to be more successful than simply claiming that you cannot hack it and therefore need protection."

[19] See *Ehrlich*, The Politics of Fair Trade, Moving Beyond Free Trade & Protectionism, New York 2018, 29; *Braga/Fink/Hoekman*, Telecommunications-Related Services: Market Access, Deeper Integration and the WTO, HWWA Discussion Papers 158, Hamburg Insti-

can out-compete domestic products due to practices resulting in artificial regulatory comparative advantage, such as dumping or subsidization.[20] Subsidizing and dumping can be understood economically or in non-economic terms.[21] It pertains to the latter when environmental and social justice arrangements enable producers to outsource. Outsourcing allows them to do abroad what they are forbidden to do domestically – purportedly with the effect of downward competition against which domestic social or environmental regulations are supposed to protect.[22]

Some suggest private actors, especially standard setters, can act with a protectionist motive.[23] This idea is conceptually unconvincing. Protectionism is an inherently public activity.[24] Notwithstanding publicly owned enterprises,

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tute of International Economics (HWWA), 17; *de Witte*, Non-Market Values in Internal Market Legislation, in: Shuibhne (ed.), Regulating the Internal Market, Cheltenham (UK) and Northampton (MA, USA) 2006, 61; *Vossenaar/Jha*, Environmentally Based Process and Production Method Standards: Some Implications for Developing Countries, in: Jha/Hewison/Underhill (eds.), Trade, Environment and Sustainable Development: A South Asian Perspective, Houndmills and London 1997, 30; *Hudec*, Differences in National Environmental Standards: The Level-Playing-Field Dimension, Journal of Global Trade (1996), 1–28.

[20] See *Fidler*, Competition Law and International Relations, International and Comparative Law Quarterly (1992), 563 (573): *Haltern*, Internationales Wirtschaftsrecht, in: Ipsen (ed.), Völkerrecht, 6th ed. Munich 2016, 647.

[21] For a definition and discussion, see *Hoekman/Kostecki*, The Political Economy of the World Trading System: The WTO and Beyond, 3rd ed. Oxford 2009, 431; *Hudec*, Differences in National Environmental Standards: The Level-Playing-Field Dimension, Journal of Global Trade (1996), 1 (14 et seqq.)

[22] See *Rodrik*, The Globalization Paradox: Democracy and the Future of the World Economy, New York and London 2012, 191; *Weilert*, Transnationale Unternehmen im rechtsfreien Raum? Geltung und Reichweite völkerrechtlicher Standards, ZaöRV (2009), 883 (885, 898 et seq.). *Radaelli*, The Puzzle of Regulatory Competition, Journal of Public Policy (2004), 1 (2), is critical of the force of the "race to the bottom" argument. *Khanna*, Connectography: Mapping the Future of Global Civilization, New York 2016, 303, notes that "[s]upply chains were once thought of as spurring a race to the bottom; now it is clear they are how countries race to the top."

[23] For examples, see *Partiti*, What Use is an Unloaded Gun? The Substantive Discipline of the WTO TBT Code of Good Practice and its Application to Private Standards Pursuing Public Objectives, Journal of International Economic Law (2017), 829 (849); *Epps*, Demanding Perfection: Private Food Standards and the SPS Agreement, in: Lewis/Frankel (eds.), International Economic Law and National Autonomy, Cambridge and New York 2010, 91; *Enchelmaier*, Horizontality: The Application of the Four Freedoms to Restrictions imposed by Private Parties, in: Koutrakos/Snell (eds.), Research Handbook on the EU's Internal Market, Cheltenham (UK) and Northampton (MA, USA) 2017, 67.

[24] See also *Fox*, The WTO's First Antitrust Case – Mexican Telecom: A Sleeping Victory for Trade and Competition, Journal of International Economic Law (2006), 271 (277): "Antitrust law opens markets by prohibiting private and other commercial

competition for and in the market is between private actors. Indeed, this is the whole idea of the binary value of the market. It enables liberty from public intrusion with the benefit of leading to an allocation of resources that is more efficient than what central planning would achieve.[25] If private parties' choices constitute the market, they cannot not compete, even as they act anti-competitively. Only the state can ultimately legislate the conditions of competition. Indeed, some argue, from different angles, that this is the very definition of regulation. It is either displacing or distorting free competition,[26] or guaranteeing market competition as a public good.[27] The arguments which have been conjured in favor of protectionism ever since the modern case for free trade emerged have concerned only these regulatory limits. The state needs to intervene, with the distributional effect of taking potential gains away not only from foreign producers – allocating the problem of unemployment to foreign jurisdictions – but also from those at home that would gain. What is more, the race-to-the-bottom arguments are social-justice-oriented with the same redistribution consequences. Trade policy can protect social choices that follow a public ends-based patterned-distribution aim and distribute wealth by using the law. By definition, only the state can develop a complete system of distribution because it requires the persuasive power of the law to sustain any such system.[28] Economic protectionism is the outward extension of patterned systems of redistribution naturally threatened by liberty.[29] Even if private interests can help explain protectionist policies (public choice),[30] this does not change the intrinsically public nature of the patterned-distribution system defended.

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constraints, while trade law opens markets by prohibiting public restraints." In a simial vein, see *Villalpando*, The Attribution of Conduct to the State: How the Rules of State Responsibility may be Applied within the WTO Dispute Settlement System, Journal of International Economic Law (2002), 393 (415 et seq.) who believes that private actors lack "the public power to restrict trade."

[25] See only *Hayek*, Government Policy and the Market, in: Hayek (ed.), Law, Legislation and Liberty, A New Statement of the Liberal Principles of Justice and Political Economy, London and New York, Reprinted 2013, 404–433.

[26] *Marenco*, Competition between National Economies and Competition between Businesses – A Response to Judge Pescatore, Fordham International Law Journal (1987), 420 (421).

[27] *Goldschmidt/Wohlgemuth*, Entstehung und Vermächtnis der Freiburger Tradition der Ordnungsökonomik, in: Goldschmidt/Wohlgemuth (eds.), Grundtexte zur Freiburger Tradition der Ordnungsökonomik, Tübingen 2008, 13.

[28] *Nozick*, Anarchy, State and Utopia, Reprint New York 2013, 149 et seqq.

[29] On patterned systems of distribution threatened by liberty, see *Ibid*., 149 et seqq.

[30] In this vein also *Perdikis/Kerr Shelburne/Hobbs*, Reforming the WTO to Defuse Potential Trade Conflicts in Genetically Modified Goods, The World Economy (2001), 379 (392) speak of "consumers asking for protection."

Second, the forces demanding trade barriers can also emerge as concerns about personal or societal complicity in the alleged global negative effect of trade on labor, environmental conditions, and human rights – particularly abroad.[31] These concerns are what the modern definition of fair trade seeks to circumscribe, characterized by the aim of globally protecting the environment and people. This aim can take the form of "inter-state paternalism"[32] or private self-restriction.[33] This protection is not economic protectionism. Indeed,

[31] See *Ehrlich*, The Politics of Fair Trade, Moving Beyond Free Trade & Protectionism, New York 2018, 18; *de Witte*, Non-Market Values in Internal Market Legislation, in: Shuibhne (ed.), Regulating the Internal Market, Cheltenham (UK) and Northampton (MA, USA) 2006, 63; *Dohmen*, Das Prinzip Fair Trade – Vom Weltladen in den Supermarkt, Berlin 2017, 10 et seqq.; *Koenig-Archibugi*, Introduction: Globalization and the Challenge to Governance, in: Held/Koenig-Archibugi (eds.), Taming Globalization: Frontiers of Governance, Oxford 2003, 2; *Horwitz*, Spontaneous Order, Free Trade and Globalization, in: Garrison/Barry (eds.), Elgar Companion to Hayekian Economics, Cheltenham (UK) and Northampton (MA, USA) 2014, 308 et seqq.

[32] See *Ankersmit/Lawrence/Davies*, Diverging EU and WTO Perspectives on Extraterritorial Process Regulation, Minnesota Journal of International Law Online (2012), 14 (16). Regulations can govern the components of a product or how a product is composed, packaged, labeled, and marketed – e.g., environmental packaging rules, technical requirements, and product safety codes. These include product-related production process regulations, i.e., processes which leave a trace in the finished product (*Ibid*., 14). Regulations can also be non-product-related production process focused, governing, e.g., pollution, working conditions and industrial relations (*Hix*, The Political System of the European Union, 2nd ed. Houndmills 2005, 262). Such regulations usually do not target products but producers directly (*Conrad*, Processes and Production Methods [PPMs] in WTO Law, Interfacing Trade and Social Goals, Cambridge and New York 2013, 66 et seqq.). If they pertain to products, their scope is, necessarily, not limited to a specific jurisdiction (*Ankersmit*, Green Trade and Fair Trade in and with the EU, Process-based Measures within the EU Legal Order, Cambridge and New York, 2017, 3). One can read regulations that focus on product-unrelated production processes as a species of hard law corporate social responsibly (CSR) – see, *Schrader*, Nachhaltigkeit in Unternehmen – Verrechtlichung von Corporate Social Responsibility (CSR), Zeitschrift für Umweltrecht (2013), 451–458.

[33] *Ankersmit*, Green Trade and Fair Trade in and with the EU, Process-based Measures within the EU Legal Order, Cambridge and New York, 2017, 7. CSR policies subject companies to constraints that go beyond current legal and ethical rules that allow them to seek profit on the market. They comprise rules that include "an explicit 'social' component in the sense of a direct pursuit of 'socially desirable aims'" (*Vanberg*, Corporate Social Responsibility and the "Game of Catallaxy": The Perspective of Constitutional Economics, Freiburg Discussion Papers on Constitutional Economics [2006], 1 et seq., 24). This notion boils down to "'the triple bottom line' of economic, social and environmental performance" (*Hatanaka/Bain/Busch*, Third-Party Certification in the Global Agrifood System, Food Policy [2005], 354 [364]). Consumption oriented tools, such as labeling requirements, give consumers information on products and production methods for them to make informed consumer choices (*Micheletti*, Political Virtue and Shopping, Individuals, Consumerism, and Collective Action, New York 2003, 76, 89 et seqq.). Beyond being manda-

it is possible to bribe economic protectionists; "it is always possible to bribe the suffering factor by subsidy or other redistributive devices so as to leave all factors better off as a result of trade."[34] This is a premise the idea of embedded liberalism is built on.

"[G]overnment policies to shield citizens from income shocks of trade liberalization through welfare and job-training programs, can mobilize support for free trade among citizens."[35]

Embedded liberalism as a bribe fails to sway those who wish to be altruistic.[36] This connection between trade and fair-trade values means that fair-traders hold that "trade and human rights can reinforce one another rather than resulting in a zero-sum game."[37] Rather than only resisting trade, fair-

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tory market transparency requirements, public information can have further effects on behavior by furnishing information to guide decision making – "choice architecture". (*Thaler/Sunstein*, Nudge, Improving Decisions About Health, Wealth and Happiness, London 2009, 89 et seqq., 200 et seqq.). In this vein, regulations (company law) may also demand the disclosure of non-financial and diversity information by certain large companies and groups (see *Spießhofer*, Wirtschaft und Menschenrechtliche Aspekte der Corporate Social Responsibility, NJW [2014], 2473 [2474 et seqq.]). Such a shift of focus from share-holder to stake-holder-value (see Lindgreen/Vanhamme/Kotler/Maon [eds.], A Stakeholder Approach to Corporate Social Responsibility: Pressures, Conflicts, and Reconciliation, London and New York 2016) might nudge firms by changing the default. It persuades them to introduce, e.g., human rights compliance mechanisms (comply-or-explain), especially if they fear liability costs due to faulty declarations. On might also employ competition law in this vein (*Kocher/Wenckebach*, Recht und Markt. Ein Plädoyer für gesetzliche Pflichten von Unternehmen zur Offenlegung ihrer Arbeits- und Beschäftigungsbedingungen, Kritische Justiz [2013], 18 [24]). Some also discuss warranty rights in this context (see *Schrader*, Nachhaltigkeit in Unternehmen – Verrechtlichung von Corporate Social Responsibility (CSR), Zeitschrift für Umweltrecht [2013], 451 [452]).

[34] *Stolper/Samuelson*, Protection and Real Wages, The Review of Economic Studies (1941), 58 (73).

[35] *Kuo/Naoi*, Individual Attitudes, in: Martin (ed.), The Oxford Handbook of the Political Economy of International Trade, Oxford and New York 2015, 107. See also *Rodrik*, The Globalization Paradox: Democracy and the Future of the World Economy, New York and London 2012, 69; *Mazower*, Governing the World, The History of an Idea, New York 2012, 423; *Ruggie*, International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order, International Organizations (1982), 379–415.

[36] *Ehrlich*, The Politics of Fair Trade, Moving Beyond Free Trade & Protectionism, New York 2018, 42 et seqq. See also *Ankersmit*, Green Trade and Fair Trade in and with the EU, Process-based Measures within the EU Legal Order, Cambridge and New York, 2017, 2; *Dohmen*, Das Prinzip Fair Trade – Vom Weltladen in den Supermarkt, Berlin 2017, 12.

[37] *Karbowski*, Grocery Store Activism: A WTO Compliant Mechanism to Incentivize Social Responsibility, Virginia Journal of International Law (2009), 727 (730, 768);

traders can seek global governance through trade. If self-professed fair-traders harbor the idea to "change radically the patterns and assumptions about trade and commerce maintained by capitalism", then this can be aligned with the socialist approach to economic interaction.[38] Private actors and public regulations can pursue fair-trade objectives.

Third, those in favor of trade liberalization build their case on the welfarist theory of comparative advantage or rely on moral philosophy.[39] Normatively speaking, trade liberalization generally implies the reduction of artificial barriers, or restraints, to the social act of trading.[40] International inter-dependency through specialization also has an explicit positive foreign policy implication. Its proponents hope to dissuade states from waging economically unattractive wars; "where goods are not allowed to cross borders, soldiers will"[41] – hence its prominent position within liberal theories of international

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Dohmen, Das Prinzip Fair Trade – Vom Weltladen in den Supermarkt, Berlin 2017, 10 et seqq.

[38] *Fidler*, Competition Law and International Relations, International and Comparative Law Quarterly (1992), 563 (571). "The socialist perspective holds that patterns of trade and commerce reflect the exploitative prerogative of capitalist States. The dynamics of an international system driven by capitalist forces creates injustice as the system subordinates the welfare of many peoples to the affluence and hegemony of the few capitalist powers. Economic interaction *per se* is not evil; rather, the socialist perspective targets a particular way of organising such interaction. The solution to the injustice is to change radically the patterns and assumptions about trade and commerce maintained by capitalism." See also *Horwitz*, Spontaneous Order, Free Trade and Globalization, in: Garrison/Barry (eds.), Elgar Companion to Hayekian Economics, Cheltenham (UK) and Northampton (MA, USA) 2014, 309: "For the most part, this particular critique of free trade has come from the political left. This is somewhat surprising given the left's historical commitment to cosmo-politanism and objections to nationalism. In response, many of the left have qualified their criticisms of globalization to reflect a specific objection to 'corporate-led' globalization. The argument is that the ongoing globalization process is controlled by corporations and their collaborators within government and thus primarily benefits them, rather than the people in general. By contrast, the leftist critics of globalization argue that if globalization were 'directed from below' with workers and others controlling the processes by which global integration takes place, then these processes would be more fair and humane and provide greater benefits for more people."

[39] See, respectively *Ricardo*, Principles of Political Economy and Taxation, Reprint New York 2005; *Mill*, On Liberty, Reprint New York 2002, 80 "Restrictions on trade, or on production for purposes of trade, are indeed restraints; and all restraint, qua restraint, is an evil […]".

[40] See *Irwin*, Against the Tide, An Intellectual History of Free Trade, Princeton 1996, 5.

[41] See *Bernstein*, A Splendid Exchange: How Trade Shaped the World, London 2008, 376; *Hayek*, The Road to Serfdom, The Definitive Edition, Edited by Caldwell, London 2007, 223 et seqq.

relations.[42] Different theories try to explain why states liberalize trade, or "integrate" economically.[43] Stolper/Samuelson suggest that the organized representation of an abundant factor of production will support trade liberalization because products made intensively with this factor will enjoy more exportation.[44] Ricardo/Viner predict that rather than helping a specific factor, trade liberalization will help those in export industries, who will probably support it because it grants them economies of scale.[45]

B. Law: Cooperation and Telos

Trade-liberalization covenants reflect the "political interests of the officials that induce their nations to accede and to remain a party."[46] Here we will briefly discuss what motivates such cooperation before laying out the framework of analysis in terms of telos, of the constitutive choices that decision makers can make within the context of international economic law and what this implies.

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[42] *Fidler*, Competition Law and International Relations, International and Comparative Law Quarterly (1992), 563 (570 et seq.).

[43] For a definition, discussion and further sources, see only *Lianos/Le Blanc*, Trust, Distrust and Economic Integration: Setting the Stage, in: Lianos/Odudu (eds.), Regulating Trade in Services in the EU and the WTO, Trust, Distrust and Economic Integration, Cambridge 2012, 17 et seqq. The authors refer to the following prominent theories of integration: *Functionalism* and *neo-functionalism*, believing that integration is an automatic process and concerned mainly with functional spill-overs and political spill-overs. *Realist* and *neo-realist* approaches insist that integration happens because different States with different preferences see integration as an opportunity to preserve their sovereignty. *Transnational federalism* focuses on inter alia open-ended dynamics, networked cooperation, and regulatory pluralism in a move away from both collaboration and hierarchy towards multi-centered governance and stresses shared meanings also between governments. *Liberal regime theory* and *neo-liberal institutionalism* focus on problems of interdependence whereby governments and private actors compete to manipulate the international system for their own benefit so as to avoid having burdens of adjustment forced upon them and believe that networks of rules, norms and procedures (regimes) help coordinate actors to achieve more efficient outcomes than *ad hoc* interactions would yield.

[44] *Ehrlich*, The Politics of Fair Trade, Moving Beyond Free Trade & Protectionism, New York 2018, 52.

[45] *Ibid*.

[46] *Sykes*, Product Standards for Internationally Integrated Goods Markets, Washington D.C. 1995, 64.

I. International Cooperation

If political support for trade liberalization is strong enough to achieve consensus amongst states' policy-makers,[47] then they have an incentive to lock in consensus – this might be a prerequisite for political consensus in the first place.[48] If governments negotiate away a particular trade barrier, economic actors who feel threatened by foreign competitors will seek to replace it with another to achieve the same level of protection ("Law of Constant Protection").[49] Agreement-generating international law can tackle the moral hazard problem ensuing from this "law of constant protection" – policy-makers can promise to abstain from this substitution game.[50] Institutions of the nation-state embed law at the national level while international law is not naturally embedded in institutions. However, states can decide to embed international law in international institutions.[51] Institutionalization can be a promising endeavor because institutions can strengthen legal regimes.[52] Law requires

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[47] See *Rigod*, The Purpose of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), The European Journal of International Law (2013), 503 (517 et seqq.) for a discussion on "Commitment Theory" (focused on "relationship between governments and their various domestic constituencies") and "Terms of Trade Theory" (concerned with overcoming the "prisoner's dilemma" of "beggar-my-neighbour" policies) that seek to explain what, for Government's decision makers, the purpose of a Trade Agreement is.

[48] See *Haltern*, Internationales Wirtschaftsrecht, in: Ipsen (ed.), Völkerrecht, 6th ed. Munich 2016, 626 et seq.; *Sykes*, Regulatory Protectionism and the Law of International Trade, The University of Chicago Law Review (1999), 1 (6); *Rittberger*, Institutionalizing Representative Democracy in the European Union: The Case of the European Parliament, Journal of Common Market Studies (2012), 18 (22 et seqq.).

[49] *Bhagwati*, Protectionism, Cambridge (MA, USA) and London [1989] 1993, 53.

[50] *Sykes*, Regulatory Protectionism and the Law of International Trade, The University of Chicago Law Review (1999), 1 (6); *Du/Deng*, International Standards as Global Public Goods in the World Trading System, Legal Issues of Economic Integration (2016), 113 (114).

[51] On institutional choice dynamics, see *Rittberger*, Institutionalizing Representative Democracy in the European Union: The Case of the European Parliament, Journal of Common Market Studies (2012), 18 (22 et seqq.). See generally on the relationship between law and institutions in the context of international economic law: *Haltern*, Internationales Wirtschaftsrecht, in: Ipsen (ed.), Völkerrecht, 6th ed. Munich 2016, 624 et seqq.

[52] See *Haltern*, Internationales Wirtschaftsrecht, in: Ipsen (ed.), Völkerrecht, 6th ed. Munich 2016, 626; *Lianos/Le Blanc*, Trust, Distrust and Economic Integration: Setting the Stage, in: Lianos/Odudu (eds.), Regulating Trade in Services in the EU and the WTO, Trust, Distrust and Economic Integration, Cambridge 2012, 35 et seq. See also *Trubek/Cottrell/Nance*, 'Soft Law', 'Hard Law' and EU Integration, in: de Búrca/Scott (eds.), Law and New Governance in the EU and the US, Oxford and Portland (Oregon) 2006, 71.

the practitioner to subsume contemporary circumstances under decisions of the past. The conditions under which decision makers formulated a legal rule can change. If the law remains static, its subjects are incentivized to breach their obligations.[53] Institutions can increase the flexibility of a legal regime by framing negotiations and rule adaptation; institutions enable the building of trust and are persistent enough for a longer time horizon to develop, which in turn might ease the finding of compromises and even entice states to delegate agenda setting or decision making to the institution to overcome political roadblocks.[54] International institutions can be focal points for weak and strong states alike; they can foster the transition from power politics to rule-based results by delivering a forum in which weaker states might more easily find common cause and allies.[55] Institutions can aid in the identification of rule breach,[56] especially where international courts, arbitration, or dispute settlement panels replace the practice of auto-interpretation of international law by national decision makers – a practice that is likely to yield legal pluralism and confusion over the rule.[57]

II. Telos and Trade Liberalization

Internationally juridifying trade policy brings law together with economic doctrine. Rather than diluting the former, it renders trade a legal discipline. It means that trade liberalization occurs within a legal universe, in which only

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[53] *Posner/Sykes*, Efficient Breach of International Law: Optimal Remedies, Legalized Noncompliance, and Related Issues, University of Chicago Law & Economics, Online Working Paper No. 546; Stanford Law and Economics Online Working Paper No. 409 (2011); *Haltern*, Internationales Wirtschaftsrecht, in: Ipsen (ed.), Völkerrecht, 6th ed. Munich 2016, 626.

[54] See *Haltern*, Internationales Wirtschaftsrecht, in: Ipsen (ed.), Völkerrecht, 6th ed. Munich 2016, 626.

[55] See *Lianos/Le Blanc*, Trust, Distrust and Economic Integration: Setting the Stage, in: Lianos/Odudu (eds.), Regulating Trade in Services in the EU and the WTO, Trust, Distrust and Economic Integration, Cambridge 2012, 35.

[56] *Haltern*, Internationales Wirtschaftsrecht, in: Ipsen (ed.), Völkerrecht, 6th ed. Munich 2016, 626; *Lianos/Le Blanc*, Trust, Distrust and Economic Integration: Setting the Stage, in: Lianos/Odudu (eds.), Regulating Trade in Services in the EU and the WTO, Trust, Distrust and Economic Integration, Cambridge 2012, 36.

[57] See *Bratspies*, Rethinking Decisionmaking in International Environmental Law: A Process-Oriented Inquiry into Sustainable Development, Yale J. Int'l L. (2007), 363 (369); *Haltern*, Internationales Wirtschaftsrecht, in: Ipsen (ed.), Völkerrecht, 6th ed. Munich 2016, 624 et seq.; *Kennedy*, One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream. NYU Review of Law & Social Change (2007), 641–659.

legally framed arguments are generally accepted as convincing.[58] The economic and political are the context of international economic law informing legal arguments – even the decision to breach obligations.[59] Generally speaking, trade liberalization means making cross-border commerce easier concerning the legal situation *ex-ante*. What this short-hand or, indeed, economic integration, does not say is which barriers need to go and why.[60] Below, it will be shown that this depends on the objectives that guided constitutive decision making about the telos of the constituted trade-liberalization covenant. The differentiation between distinct ideal-type trade-liberalization covenants is not new. One approach identifies "different stages of integration"[61] another differentiates two regime types – "free market access" and "economic integration"[62]. A common distinction is between negative and positive integration.[63] In this vein, some refer to "shallow and deep integration"[64]. Others

[58] For the role of law in the context of (European) economic integration, see *Haltern*, Integration durch Recht, in: Bieling/Lerch (eds.), Theorien der europäischen Integration, 3rd ed. Wiesbaden 2012, 339 et seqq.

[59] See *Lianos/Le Blanc*, Trust, Distrust and Economic Integration: Setting the Stage, in: Lianos/Odudu (eds.), Regulating Trade in Services in the EU and the WTO, Trust, Distrust and Economic Integration, Cambridge 2012, 39.

[60] See also *Lianos/Le Blanc*, Trust, Distrust and Economic Integration: Setting the Stage, in: Lianos/Odudu (eds.), Regulating Trade in Services in the EU and the WTO, Trust, Distrust and Economic Integration, Cambridge 2012, 17; *Hoekman/Mavroidis*, Competition, Competition Policy and the GATT, The World Economy (1994), 121 (124); *Rabkin*, Law Without Nations? Why Constitutional Government Requires Sovereign States, Princeton (US) and Woodstock (UK) 2005, 140: "[E]conomic integration has no clear meaning to economists."

[61] See only *Balassa*, The Theory of Economic Integration, London 1961.

[62] See only *Hoekman/Mavroidis*, Competition, Competition Policy and the GATT, The World Economy (1994), 121 (124 et seq.). According to these authors, free market access "is premised on the maintenance of national sovereignty regarding non-border policies. In such a world there is free trade and freedom to engage in foreign direct investment. Countries remain sovereign, but do not pursue any discriminatory regulation of foreign products or producers, and compete on the basis of their natural endowments and regulatory regimes.[…] [In 'Economic integration'] governments seek to further integrate their economies and are willing to cooperate on various domestic regulatory policies. […] In the literature the approaches underlying these two models are sometimes described as negative and positive integration, the first implying that governments agree *not* to be certain things, the second that they agree to *do* certain things."

[63] See *Tinbergen*, International Economic Integration, Amsterdam 1954; *Pinder*, Positive and Negative Integration: Some Problems of Economic Union in the EEC, World Today (1968), 88–110. In a similar vein *Ortino*, Basic Legal Instruments for the Liberalization of Trade, A Comparative Analysis of EC and WTO Law, Oxford and Portland (Oregon), 2004, 24 proposes a differentiation between judicial and legislative integration.

[64] On the concepts of shallow and deep integration, see *Hoekman/Kostecki*, The Political Economy of the World Trading System, The WTO and Beyond, 3rd ed. Oxford 2009,

differentiate between "non-discrimination" and "market access"[65] (or "obstacles to trade"[66]). The present study proposes that a trade-liberalization covenant can have one of three purposes that come with distinct legal baggage: free trade, protectionism-free trade, and market building.[67] They differ fundamentally in their relationship with the concept of market access (which implies shelf access[68]) and by corollary their stance towards regulatory competition.[69] Their relationship should not exist on a functionalist slippery slope.

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582 et seqq.; *Ortino*, Basic Legal Instruments for the Liberalization of Trade, A Comparative Analysis of EC and WTO Law, Oxford and Portland (Oregon), 2004, 27 who refers to *Pelkmans*, Removing Regulatory Access Barriers: the Case of "Deep" Integration, OECD paper (1996).

[65] See *Barnard*, The Substantive Law of the EU, The Four Freedoms, 5th ed. Oxford 2016, 14 et seqq. For a discussion, see *Davies*, Between Market Access and Discrimination: Free Movement as a Right to Fair Conditions of Competition, in: Koutrakos/Snell (eds.), Research Handbook on the EU's Internal Market, Cheltenham (UK) and Northampton (MA, USA) 2017, 13 et seqq.

[66] *Weiler*, Epilogue: Towards a Common Law of International Trade, in: Weiler (ed.), The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade, Oxford 2000, 205.

[67] Hence, I contend the view offered by *Koskenniemi*, The Fate of Public International Law: Between Politics and Technique, Modern Law Review (2007), 1 (26), that a trade "regime is as indeterminate as the nation" – it is a different question if "its founding principles [are in practice] contradictory and amenable for conflicting interpretations and its boundaries constantly penetrated by adjoining rationales."

[68] *Barnard*, The Substantive Law of the EU, The Four Freedoms, 5th ed. Oxford 2016, 23 discusses the difference between market access restrictions at and behind the border. One may refer to the latter as shelf access restrictions.

[69] Hence, the concept of market access cannot be defined in the abstract but is determined by the integration telos and the legal tools employed in its pursuit. *Snell*, The Notion of Market Access: Concept or a Slogan?, CMLRev (2010), 437 (437) finds that "[t]he relationship between the term [market access] and other concepts such as "discrimination" and "obstacle" is by no means clear". It cannot and should not be "clear" in distinction to these concepts because market access is as contingent upon substantiation (e.g., what market must there be access to?) as it is – due to the theory of comparative advantage and international specialization – at the heart of all trade-liberalizing covenants. *Bagwell/Mavroidis/Staiger*, It's A Question of Market Access, American Journal of International Law (2002), 56 (59 et seq.) argue that "the fundamental problem to be solved by a trade agreement is insufficient market access"). One should disagree with the hypothesis that "[t]he term could be abandoned with little loss to the law" (*Snell*, The Notion of Market Access: Concept or a Slogan?, CMLRev [2010], 437 [438]). It is the telos that must substantiate the legal role of this undetermined, yet necessary, concept, so that one can no longer describe it as "inherently nebulous" (see, however, *Oliver/Enchelmaier*, Free Movement of Goods: Recent Developments in the Case Law, CMLRev [2007], 649 [674]). Also, the distinction between "pure trade and non-trade issues" (*Ortino*, Basic Legal Instruments for the Liberalization of Trade, A Comparative Analysis of EC and WTO Law,

1. Free Trade: Maximum Regulatory Competition

Free trade is about the maximum individual and production-site (regulatory) competition[70], based on the aim of realizing personal freedom and the welfarist assumption that this maximizes aggregate global welfare.[71] Normatively, one might suggested that "only when the effective unit of international trade is taken down to the smallest level possible (the household and the firm) [will] we truly get peaceful international interaction."[72] Free trade throws more than just competing products into a process of competition. It envisions competition between legal systems (jurisdiction enterprises[73]) whereby "competition performs a dual function. It allows citizens to migrate from one group or jurisdiction to another in search of satisfaction, and it encourages public and private institutions to satisfy their constituents so that they stay put voluntarily"[74].[75] To this end, free trade implies the reduction of artificial barriers to trade with the ultimate goal of the complete removal of

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Oxford and Portland (Oregon), 2004, 17) is superfluous, because whether an issue is a "trade issue" depends on the teleological context in which "trade" in embedded – hence it is not a very useful analytical distinction.

[70] One can define regulatory competition as "a process whereby legal rules are selected (and de-selected) through competition between decentralized, rule-making entities […]" (*Barnard/Deakin*, Market Access and Regulatory Competition, in: Barnard/Scott [eds.], The Law of the Single European Market, Unpacking the Premises, Oxford and Portland [Oregon] 2002, 198 et seq.). See also *Hatzopoulos*, From Hard to Soft: Governance in the EU Internal Market, The Cambridge Yearbook of European Legal Studies, Oxford and Portland (Oregon) 2013, 111; *Radaelli*, The Puzzle of Regulatory Competition, Journal of Public Policy (2004), 1–24; See also *Scharpf*, Community and Autonomy: Multilevel Policy-Making in the European Union, in: Scharpf, Community and Autonomy, Institutions, Policies and Legitimacy in Multilevel Europe, Frankfurt and New York 2010, 82.

[71] See *Barnard/Deakin*, Market Access and Regulatory Competition, in: Barnard/Scott (eds.), The Law of the Single European Market, Unpacking the Premises, Oxford and Portland (Oregon) 2002, 199; *Hatzopoulos*, From Hard to Soft: Governance in the EU Internal Market, The Cambridge Yearbook of European Legal Studies, Oxford and Portland (Oregon) 2013, 111.

[72] *Horwitz*, Spontaneous Order, Free Trade and Globalization, in: Garrison/Barry (eds.), Elgar Companion to Hayekian Economics, Cheltenham (UK) and Northampton (MA, USA) 2014, 303.

[73] On the concept, see *Vanberg*, Globalization, Democracy and Citizens' Sovereignty: Can Competition Among Governments Enhance Democracy?, Freiburg Discussion Papers on Constitutional Economic (1999), 3 et seqq.

[74] *Kincaid*, The Competitive Challenge to Cooperative Federalism: A Theory of Federal Democracy, in: Kenyon/Kincaid (eds.), Competition Among States and Local Governments – Efficiency and Equity in American Federalism, Washington D.C. 1991, 98.

[75] See *Horwitz*, Spontaneous Order, Free Trade and Globalization, in: Garrison/Barry (eds.), Elgar Companion to Hayekian Economics, Cheltenham (UK) and Northampton (MA, USA) 2014, 295 et seqq.

these barriers.[76] Free trade generally means that there are no artificial impediments to the exchange of goods across national markets.[77] In general terms, this implies a policy of the nation-state toward international commerce in which trade barriers are absent, implying no restrictions on the import of goods from other countries or restraints on the export of domestic goods to other markets.[78] This concept implies – beyond a prohibition of *de iure* quantitative restrictions, prohibitions or quotas – a degree of access to the national market of a Member whereby all domestic measures that induce adjustment costs on foreign products, and thereby undo (regulatory) competitive advantages, must be prohibited.[79] This scope implies the liberalization of domestic regulatory interventions to such an extent, i.e., the adoption of a *laissez-faire*, *laissez-passer* approach to all foreign goods (which can imply reverse discrimination), thereby throwing into competition not only goods produced under different legal regimes but also the very laws of those systems.[80] Only spontaneous ordering might see the creation of a world market-equilibrium where the most efficient laws, which have mimetically globalized themselves, frame private conduct.[81] Concerning internal market regulation – with protectionism and motive irrelevant – the law in the service of free trade can rely on mutual recognition (i.e.,

[76] *Ehrlich*, The Politics of Fair Trade, Moving Beyond Free Trade & Protectionism, New York 2018, 22. See also *Irwin*, Against the Tide, An Intellectual History of Free Trade, Princeton 1996, 5, who also notes that "a more limited, nineteenth century definition holds that under free trade the government does not discriminate between domestic and foreign goods in its tax or regulatory policies." Many authors today still rely on this older definition (see for example *Driesen*, What is Free Trade?: The Real Issue Lurking Behind the Trade and Environment Debate, Virginia Journal of International Law (2001), 279–368).

[77] See *Irwin*, Against the Tide, An Intellectual History of Free Trade, Princeton 1996, 5.

[78] *Ibid.*

[79] See also *Barnard/Deakin*, Market Access and Regulatory Competition, in: Barnard/Scott (eds.), The Law of the Single European Market, Unpacking the Premises, Oxford and Portland (Oregon) 2002, 198: "[M]arket access and regulatory competition are two sides of the same coin."

[80] See *Hayek*, The Road to Serfdom, The Definitive Edition, Edited by Caldwell, London 2007, 224: "The conflict between planning and freedom cannot but become more serious as the similarity of standards and values among those submitted to a unitary plan diminishes."

[81] See in this vein *Purnhagen*, Voluntary "New Approach" Technical Standards are Subject to Judicial Scrutiny by the CJEU! – The Remarkable CJEU judgment "Elliott" On Private Standards, European Journal of Risk Regulation (2017), 586 (592), who refers to "harmonization by competition of legal orders." See also *Ogus*, Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law, The International and Comparative Law Quarterly (1999), 405–418, who is critical in this regard concerning "interventionist law" (*Ibid*., 412 et seqq.).

unconditional mutual recognition) of foreign regulatory standards and (*de facto*) non-discriminatory market-circumstance regulation (regulating the conditions of competition rather than product characteristics).[82]

First, the imports of foreign products can introduce products with physical characteristics deemed dangerous domestically, thereby undermining national levels of uncertainty and risk toleration enshrined in public measures.[83] Examples include human, animal or plant health and safety, and public morals, e.g., regarding pornography. Further, international demand can be threatening to domestic non-renewable natural resources. In reaction, governments can restrict trade using market exit or entry regulations such as border controls (e.g., veterinary checks) or outright moratoria and embargos. Moreover, governments can employ behind the border regulations to this end.[84] If the core principle of free trade is *laissez-faire*, *laissez-passer*, then regulation for the protection of national levels of uncertainty- and risk tolerance must conform to this discipline, which does not necessarily imply the abandonment of domestic uncertainty- or risk regulations. It does, however, imply the suspension of their adverse trade effects. The primary legal tool is unconditional mutual recognition of foreign regulatory standards and certification. Unconditional mutual recognition obliges contracting members of a free-trade covenant not to regulate foreign products. They remain principally free to regulate domestic producers, entailing reverse discrimination. In other words, at its core, free trade is the realization of

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[82] On the concept of unconditional mutual recognition, see *Weatherill*, The Principle of Mutual Recognition: It Doesn't Work Because It Doesn't Exist, European Law Review, Forthcoming; Oxford Legal Studies Research Paper No. 43/2017 (2017), 4 et seqq. *Hatzopoulos*, From Hard to Soft: Governance in the EU Internal Market, The Cambridge Yearbook of European Legal Studies, Oxford and Portland (Oregon) 2013, 101 (113); *Scharpf*, Community and Autonomy: Multilevel Policy-Making in the European Union, in: Scharpf, Community and Autonomy, Institutions, Policies and Legitimacy in Multilevel Europe, Frankfurt and New York 2010, 81.

[83] *Risk* refers to an event subject to a known or knowable probability distribution, while *uncertainty* refers to events for which it is not possible to specify numerical probabilities (*LeRoy/Singell*, Knight on Risk and Uncertainty, Journal of Political Economy [1987], 394 [395]). See also *Marceau/Trachtman*, The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade. A Map of the World Trade Organization Law of Domestic Regulations of Goods, Journal of World Trade (2002), 811 (811).

[84] These measures include *ex-ante* regulations, e.g., via taxations or the prohibition of sale or use of certain products not conforming to specific regulatory standards, principle based-regulation, or *ex-post* tort law.

maximum regulatory competition: "all that is necessary is to accept regulatory competition."[85]

In a world of globalized and networked value chains, many products are, however, multinational. Unconditional mutual recognition thereby prohibits regulations, which would become compatibility issues if sustained. This rule pertains especially to all means- and specific ends-based regulations; if certain foreign parts cannot be sold on national markets because they are technically incompatible with domestically produced parts, then such standards are legally relevant barriers to trade. Hence, unconditional mutual recognition precludes certain forms of domestic regulation; free trade prefers states to regulate via general ends-based ex-post market placement regulations. Tort law's general ends-based, no-harm rule thereby becomes the preferred regulatory tool. Unconditional mutual recognition of foreign regulatory standards should imply that courts also recognize compliance with foreign (regulatory) standards as proof of due diligence (which can imply reverse discrimination). Private norm-generation defining best practice will replace specific means-based regulations. However, the elimination of all obstacles to trade is not required; regulations must merely not undermine regulatory competition. By extension, free trade does not imply that states must allow the import of foreign products that cannot be legally placed on the markets within the jurisdiction of their origin – the idea of mutual recognition is that there has to be something to be recognized.

Second, one can see foreign trade as an unfair threat to domestic social choices. In the context of free trade, however, the concept of allowing economic protectionism to fend off equally economic protectionist measures or "unfair" competition – conceptualized as externalities[86] – is foreign.[87] Moreover, from a theoretical standpoint, a policy of free trade can be argued to be in the economic interest of a country regardless of the policies adopted by trading partners.[88]

Third, trade policies can be employed in pursuit of fair-trade objectives. These include production-related product regulations – which can result in

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[85] *Braga/Fink/Hoekman*, Telecommunications-Related Services: Market Access, Deeper Integration and the WTO, HWWA Discussion Papers 158, Hamburg Institute of International Economics (HWWA), 23.

[86] *Lianos/Le Blanc*, Trust, Distrust and Economic Integration: Setting the Stage, in: Lianos/Odudu (eds.), Regulating Trade in Services in the EU and the WTO, Trust, Distrust and Economic Integration, Cambridge 2012, 45.

[87] See for a discussion *Klitgaard/Schiele*, Free Versus Fair Trade: The Dumping Issue, Current Issues in Economics and Finance (1998), 1–6.

[88] See *Sykes*, Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations, The University of Chicago Law Review (1991), 255 (261).

embargos, tariffs, taxes, and prohibitions of sale or use.[89] Such measures are incompatible with the goal of maximizing regulatory competition because they are restrictions on trade aimed at regulatory production conditions. By contrast, domestic product-unrelated process regulations might give domestic goods a competitive advantage and thereby decrease market access opportunities because traders would sell more imports if domestic producers could not reap the benefits of the advantage. However, such obstacles are what free trade protects. Free trade requires that product-unrelated process regulations be unconditionally mutually accepted, both by the importing and by the exporting state. If trade liberalization moves beyond maximizing regulatory competition, its drafters cross the Rubicon of working towards a single market.

The "willingness to place the fate of one's interests under the control of others", i.e., trust, conditions the possibility of free trade.[90] Free trade finds no expression in reality – also not in the EU.[91] So-called "Mutual Recognition Agreements" are mostly not a case of free trade because national standards usually remain the benchmark for certification of foreign products.[92] Free

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[89] For exampels, see *Klinger/Hartmann/Krebs*, Vom Blauen Engel zum Bekleidungsengel? Umweltsiegel als Vorbild staatlicher Zertifizierung in der Textilindustrie, Zeitschrift für Umweltrecht (2015), 270–277; *Kaltenborn/Reit*, Das Verbot der Aufstellung von Grabsteinen aus Kinderarbeit, Bedarf es neuer bundes- bzw. landesrechtlicher Ermächtigungsgrundlagen?, Neue Zeitschrift für Verwaltungsrecht, 2012, 925–300.

[90] Generally, see *Lianos/Le Blanc*, Trust, Distrust and Economic Integration: Setting the Stage, in: Lianos/Odudu (eds.), Regulating Trade in Services in the EU and the WTO, Trust, Distrust and Economic Integration, Cambridge 2012, 47.

[91] In this vein, see *Weatherill*, The Principle of Mutual Recognition: It Doesn't Work Because It Doesn't Exist, European Law Review, Forthcoming; Oxford Legal Studies Research Paper No. 43/2017 (2017), 4 et seqq.

[92] The EC-Japan MRA of 2002 is an example and shows that MRAs are governed by distrust. Such agreements are preceded by a phase in which governments seek to learn and understand each others' regulations, a costly process *(Naiki*, The Complexity and Difficulty in Mutual Recognition, RIETI, Research & Review [2006], available at https://www.rieti.go.jp/en/papers/research-review/035.html, last visited 7 April 2022). Mutual recognition itself then requires third-party certification, which is, in this context, "a conformity assessment system in which a neutral, non-governmental organization conducts an assessment as to whether a product is in accordance with the safety technology standards of the importing country" (*Ibid*). Indeed, the use of the term mutual recognition is misleading because it does not refer to the recognition of foreign regulatory standards. Rather contrarily, "actually, this type of mutual recognition, which is globally prevalent, is not for recognizing laws and regulations relevant to certain product safety technology, but for recognizing conformity assessment procedures governed by the relevant laws and regulations" (*Ibid*). "The government of an importing country must unconditionally accept the results of the assessment carried out by a registered body of an exporting country [concerning the importing country's regulatory standards] as equivalent to those obtained

trade is especially unlikely where *ex-post* market placement regulation through tort law is generally believed to be insufficient, e.g., where punitive damages may be believed to be incompatible with the *ordre public*.[93] Concerning social choices, it requires either a steadfast belief in the long-term benefits of free trade or a high level of trust in prospective Members not to exploit each other's trust (at least the belief that the cost of this risk is lower than the benefit of free trade).[94] Relatedly, free trade demands cultural tolerance – a belief that people should do their own thing, even if the foreign practices are unethical – or is founded on the assumption that trade itself will eventually threaten evil practices.[95]

2. Market Building: The Open Level Playing Field

If free trade is the maximization of regulatory competition, the single market is its minimization. Markets "are social institutions, created and sustained by competing values and interests; and […] 'single markets' have specific attributes, embedded in the governmental mechanism which define and protect legal, political and economic rights."[96] Building[97] markets "requires a mutually reinforcing relationship between business, government, and society, in which government accepts responsibility for establishing a clearly defined and uniformly enforced 'playing field' for economic actors, for sustaining the vitality of markets."[98] The telos of a market-building project is to create a

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from a domestic one" (*Ibid*). Indeed, the use of the term free trade endorsed here differs from the use of the term free trade in Free Trade Agreements. Free Trade Agreements must generally "identify ways to eliminate technical barriers to trade that respect and accommodate the unique public law constraints to which each government is subject" (*Bremer*, American and European Perspectives on Private Standards in Public Law, Tulane Law Review [2016], 325 [370]).

[93] Germany is an example, see *Tolani*, U.S. Punitive Damages Before German Courts: A Comparative Analysis with Respect to the Ordre Public, Annual Survey of International & Comparative Law (2011), 185–207.

[94] See *Grieco*, Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism, International Organization (1988), 485 (487) who tells us that "realists find that states are positional, not atomistic, in character, and therefore realists argue that, in addition to concerns about cheating, states in cooperative arrangements also worry that their partners might gain more from cooperation than they do."

[95] In this vein, see *Bolz*, Das Konsumistische Manifest, Munich 2002, 15

[96] *Egan*, Single Markets, Economic Integration in Europe and the United States, Oxford 2015, 13.

[97] For a discussion of the "building"-metaphor, see *Haltern*, Europarecht und das Politische, Tübingen 2005, 157 et seqq.

[98] *Egan*, Single Markets, Economic Integration in Europe and the United States, Oxford 2015, 13. See also *Trubek/Trubek*, Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination, European Law Journal (2005), 343

single competitive economy;[99] undistorted competition not between regulatory regimes but between businesses.[100] From a normative economic point of view, this will increase efficiency – indeed, the market-telos implies that the integration project seeks collective competitiveness gains *vis-à-vis* other markets.[101] *First*, within the transnational context, market integration seeks exploitation of the geographical scope of the project to achieve economies of scale – specifically, market-wide price development.[102] *Second*, the law protecting the market should be in the service of competition, not of competitors – Members of a market-integration covenant must generally agree on the necessity of providing and protecting the undistorted project-wide process of competition.[103] Because a critical normative purpose of the market-telos is instrumental (efficiency), competition policy may allow supposedly efficiency increasing behavior, which restricts competition.[104] The project-wide open and competitive market is a "jurisdiction characteristic"[105] that has the character of a public good for jurisdiction users (non-excludable and non-

(345); *Dougan*, Minimum Harmonization and the Internal Market, CMLRev (2000), 854 (854 et seq.); *Davies*, Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law, German Law Journal, 2010, 671 (671).

[99] *Hashimzade/Myles/Black*, A Dictionary of Economics, 5th ed. Oxford 2017, "*competitive economy*": "An economy in which all economic agents treat prices as given when making economic choices. […]"

[100] *Müller-Graff*, Die horizontale Direktwirkung der Grundfreiheiten, Europarecht (2014), 3, (11); *Straßburger*, Die Dogmatik der EU-Grundfreiheiten, Konkretisiert anhand des nationalen Rechts der Dividendenbesteuerung, Tübingen 2012, 11.

[101] See *Koos*, Europäischer Lauterkeitsmaßstab und Globale Integration, Beitrag zur Weltmarktorientierten Sichtweise des Nationalen und Gemeinschaftlichen Wettbewerbsrechts, Munich 1996, 8 et seqq.; *Straßburger*, Die Dogmatik der EU-Grundfreiheiten, Konkretisiert anhand des nationalen Rechts der Dividendenbesteuerung, Tübingen 2012, 9.

[102] In this vein, see *Koos*, Europäischer Lauterkeitsmaßstab und Globale Integration, Beitrag zur Weltmarktorientierten Sichtweise des Nationalen und Gemeinschaftlichen Wettbewerbsrechts, Munich 1996, 12.

[103] On the goals of competition law see *Zimmer*, The Basic Goal of Competition Law: To Protect the Other Side of the Market, in: Zimmer (ed.), The Goals of Competition Law, Chemtenham (UK) and Northampton (MS, USA) 2012, 499.

[104] See *Zimmer*, The Basic Goal of Competition Law: To Protect the Other Side of the Market, in: Zimmer (ed.), The Goals of Competition Law, Chemtenham (UK) and Northampton (MS, USA) 2012, 499; *Koos*, Europäischer Lauterkeitsmaßstab und Globale Integration, Beitrag zur Weltmarktorientierten Sichtweise des Nationalen und Gemeinschaftlichen Wettbewerbsrechts, Munich 1996, 9.

[105] On the concept, see *Vanberg*, Globalization, Democracy and Citizens' Sovereignty: Can Competition Among Governments Enhance Democracy?, Freiburg Discussion Papers on Constitutional Economic (1999).

rivalry).[106] The market-telos suggests the provision of this good.[107] It is also a competition law of jurisdiction enterprises: Members must not distort the conditions of competition between private market actors (what might be called "artificial differences in competitive conditions"[108]) within the territorial reach of the project, distorting market-wide price formation.[109] These functions of the transnational market should determine what market access means in this context: Market access should mean access to the public good that is the transnational market. The single market must be open and level so that undistorted market-wide competition may unfold the benefits of market dynamics. Measures adopted in the territory of a Member of a market-building regime which do not threaten the economy of scale that is the transnational market, and do not appreciably distort competition within it should not threaten the common project.

There is no universal blueprint for building a market. International market building has to start from the *status quo* in which different nation-states have their national markets and compromises on how they should be regulated, which artificially fragment the transboundary market for trade in goods (some argue that *laissez-faire* was planned).[110] The means of creating a competitive level playing field, however, can be identified in general.[111]

First, a national regulatory disparity between Members of the market-integration covenant may potentially frustrate the free circulation of goods to the degree that such free circulation is necessary for undistorted market-wide price development (open process), and/or it may frustrate equity in competi-

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[106] *Maher*, Competition Law and Transnational Private Regulatory Regimes: Marking the Cartel Boundary, Journal of Law and Society (2011), 119 (122 et seq.); *Goldschmidt/Wohlgemuth*, Entstehung und Vermächtnis der Freiburger Tradition der Ordnungsökonomik, in: Goldschmidt/Wohlgemuth (eds.), Grundtexte zur Freiburger Tradition der Ordnungsökonomik, Tübingen 2008, 13.

[107] Hence, contrary to *Reid*, Regulatory Autonomy in the EU and WTO: Defining and Defending Its Limits, Journal of World Trade (2010), 877 (882), "market integration" does not only imply "the removal of nationality-based barriers to trade", as the nineteenth-century definition of free trade would have suggested.

[108] *Hudec*, Differences in National Environmental Standards: The Level-Playing-Field Dimension, Journal of Global Trade (1996), 1 (27).

[109] See *de Witte*, Non-Market Values in Internal Market Legislation, in: Shuibhne (ed.), Regulating the Internal Market, Cheltenham (UK) and Northampton (MA, USA) 2006, 61; *Bock*, Rechtsangleichung und Harmonisierung im Binnenmarkt, Zum Umfang der allgemeinen Binnenmarktkompetenz, Baden-Baden 2004, 27.

[110] See *Deneen*, Why Liberalism Failed, New Haven and London 2018, 52, who refers to *Polanyi*, The Great Transformation: The Political Origins of Our Time, Boston 1944, 147.

[111] See also *Egan*, Single Markets, Economic Integration in Europe and the United States, Oxford 2015, 13 et seqq.

tion as the precondition for a competitive environment.[112] Generally, goods should circulate free of regulation that extends geographically determined handicaps, protectionist, or not;[113] goods – as befits a single market – should only bear the compliance cost with one set of regulations. Unconditional mutual recognition, however, would enable free trade and thereby create only a distorted market. If the market is to remain regulated, the project has to turn to the approximation of risk regulations.[114] This tool is necessary to the degree that the market is no longer distorted.[115] Although regulatory approximation might do the job, having one standard for one product (harmonization) is the most obvious pillar for the construction of a (legal) level playing field.[116] The level of protection of public interest which the project grants uniformly is "then dictated by the political debate."[117] Hence, internal market regulation, because it is concerned with the functioning of the market, "is always also 'about something else' [such as public health], and […] something else may, in fact be the main reason why the internal market measure was adopted" in the first place.[118] The liberalization of market access for goods must be ac-

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[112] See *de Witte*, Non-Market Values in Internal Market Legislation, in: Shuibhne (ed.), Regulating the Internal Market, Cheltenham (UK) and Northampton (MA, USA) 2006, 61; *Lianos/Le Blanc*, Trust, Distrust and Economic Integration: Setting the Stage, in: Lianos/Odudu (eds.), Regulating Trade in Services in the EU and the WTO, Trust, Distrust and Economic Integration, Cambridge 2012, 24 et seq.; *Straßburger*, Die Dogmatik der EU-Grundfreiheiten, Konkretisiert anhand des nationalen Rechts der Dividendenbesteuerung, Tübingen 2012, 10.

[113] See *Egan*, Single Markets, Economic Integration in Europe and the United States, Oxford 2015, 79; *Koos*, Europäischer Lauterkeitsmaßstab und Globale Integration, Beitrag zur Weltmarktorientierten Sichtweise des Nationalen und Gemeinschaftlichen Wettbewerbsrechts, Munich 1996, 1.

[114] See *Weatherill*, The Competence to Harmonise and its Limits, in: Koutrakos/Snell (eds.), Research Handbook on the EU's Internal Market, Cheltenham (UK) and Northampton (MA, USA) 2017, 84.

[115] See *Straßburger*, Die Dogmatik der EU-Grundfreiheiten, Konkretisiert anhand des nationalen Rechts der Dividendenbesteuerung, Tübingen 2012, 13 et seqq., who refers to the so-called "Wettbewerbsgleichheitspostulat" (equality in competition).

[116] G/TBT/GEN/199, Thematic Session on Standards, 14 June 2016, Report by the Moderator to the TBT Committee, 2.

[117] In this vein see *de Witte*, Non-Market Values in Internal Market Legislation, in: Shuibhne (ed.), Regulating the Internal Market, Cheltenham (UK) and Northampton (MA, USA) 2006, 75, referring to *Weatherill*, Supply of and demand for internal market regulation: strategies, preferences and interpretation, in: Shuibhne (ed.), Regulating the Internal Market, Cheltenham (UK) and Northampton (MA, USA) 2006, 29–60; *Bock*, Rechtsangleichung und Harmonisierung im Binnenmarkt, Zum Umfang der allgemeinen Binnenmarktkompetenz, Baden-Baden 2004, 204 et seqq.

[118] *de Witte*, Non-Market Values in Internal Market Legislation, in: Shuibhne (ed.), Regulating the Internal Market, Cheltenham (UK) and Northampton (MA, USA) 2006, 76.