

**The interdependency between supranational und international
arrangements setting standards for an emerging global
knowledge based economy**

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Abstract

This paper focuses on the simultaneity of fragmentation and the constitutionalisation of international law. The case in point is the interdependency between the global trade regime and international standard-setting organisations. The empirical study outlines the difference between the GATT and the GATS in their reference structure to international standard-setting organisations. A particular focus lies on the interdependency between the GATS and UNESCO in the sphere of recognition of qualifications.

The paper discusses in the second part a system-theoretical, a deliberative and a Neo-Gramscian approach and outlines how each of these three different approaches provides interesting insights into the underlying dynamic of the complex interrelation between very different types of international organisations. Four hypotheses are underlining the paper's analysis. 1.) The emergence of new actors at the global level and their standard-setting activities points to a new complexity of international politics with new dynamics and prerequisites. 2.) Strengthened enforcement mechanisms of international law change the very nature of international law. It increases the prerequisites for establishing international norms and values. 3.) As a result, what we can observe is an increasing interlinkage between different types of organisations. 4.) The interlinkage is much more contested in areas where standards are linked to values and norms and are less of purely technical nature as a result of more demanding prerequisites of standard-settings in the area of service.

Introduction

The current transformation of international law can be characterized by two contrasting trends: Dispersion and centralization. On one side we can observe an increasing number of international standard-setting activities along sectoral lines and established by very different international organisations. Some scholars see a fragmentation of international law taking place. At the same time, however, there is a trend towards centralization. The World Trade Organisation (WTO), established in 1995, is a case in point. It brings together very disparate sectors within one regulatory framework. The scholar of international law Jose Alvarez once called the WTO a linkage machine (Alvarez 2002). The WTO also provides strengthened compliance mechanism, which paves the way towards a constitutionalisation of international law. Is international law thus moving towards integration or rather fragmentation?

The paper provides empirical insights in the concurrence of these two trends and argues that the fragmentation is a precondition for a new form of integration at the global level. The paper highlights the complexity of the integration by outlining the reference structure between the international trade regime and international-standard setting organisations. At the heart of the analysis is the WTO. The analysis of the interdependency between the WTO agreements and international sectoral standard-setting organisations demonstrates how the WTO depends on such standards established outside its own realm in order to become effective. The reference structure has been analysed in the framework of the Agreement on Tariffs and Trade (GATT) with regard to technical barriers and sanitary and phytosanitary measures (Gehring 2002; Gstöhl and Kaiser 2004; Herwig 2004). Little attention has been paid so far to a similar trend in respect to the Agreement on Trade in Services (GATS). This trend will be the focus of this paper.

The interlinkage between the GATS and international standard-setting organisations are of particular interest. It illustrates the complexity of this new mode of integration even more than the GATT arrangement. A major reason lies in the difference between goods and services. The internationalisation of trade in services is challenging societal relations much more than does trade in goods. As an intangible commodity, the provision of services depends profoundly on shared norms, values and knowledge (Petit 1999; du Tertre 2005). Consequently, an analysis of the commonalities and the differences between the GATT and GATS reference structures to other international

organisations provides insights into new forms of global governance, which go along with a postnationalisation of societalisation.

The case study presented in this paper looks into the interrelation between the GATS and the United Nations Educational, Scientific and Cultural Organization (UNESCO) in the sphere of recognition of qualifications. The study is for various reasons a good illustration of the complexity of the development of international norms and standards, which are part of the new mode of integration at a global scale. International standards for qualification requirements are crucial with regard to the mobility of skilled labour force. Such standards are at the heart of an emerging migration regime, which is a politically sensitive issue, not at least because it has consequences for the social structure of the receiving society (and of course for the sending society as well). At the same time, qualification requirements are inseparable from the education system which in turn is an important sphere of socialization, ensuring the diffusion of societal norms and values. Historians have fleshed out the function of education in establishing the nation as an imagined community (Anderson 1991). Hence, education used to be pivotal for the establishment of national states. Consequently, an analysis of the internationalisation of educational standards is a “litmus test” whether we are facing a postnationalisation of integration mechanisms. By focusing not only on changes of global governance structures but also on changing societal integration mechanisms, the paper develops a perspective which goes beyond a narrowed perspective on global governance and outlines the socio-economic subtext of governance changes.

The second part of the paper discusses three theoretical approaches, with a view to deepening our understanding of the interlinkage process. All of them go beyond a “methodological nationalism” which conflates society and the nation-state. These accounts are best equipped to theorise the transnationalisation of societal integration. At the same time, however, the three approaches differ significantly. The first perspective drawing on system theory offers insights into the underlying dynamic of the explosion of norms and standards on a global scale. The second approach draws heavily on the discourse analysis of Jurgen Habermas. At the core of this account are the prerequisites of the production of common values and norms. Each of these accounts has something to offer with regard to global integration processes. Each of them provides a different perspective on the exponential growth on international

standard-setting activities and their interrelation to the WTO. Both, however, do not offer an analysis of the power relations embedded in the process. In a third step, the paper turns to a Neo-Gramscian approach with a view to developing a more critical stand. A major point of reference is the work of Stephen Gill, who coined the term “New Constitutionalism” in order to describe the emerging economic order with its strengthened compliance mechanisms. The paper argues that Gill’s approach provides a better framework for the analysis of power relations, but it does not include major insights provided by the other two accounts. Consequently, the paper develops the Gramscian approach further by proposing the concept of an Enhanced New Constitutionalism.

The reference structure of the GATS

The reference to international standards established through the GATT and the GATS have much in common but differ in important aspects which will be outlined more in detail in this section. The reference to the outside are in both framework characterised by a tension which is at the heart of the trade regime and outlined in the Preamble of the GATS. The preamble of the GATS describes one major objective of the agreement as “Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade” (Preamble GATS: 285). The free trade agenda contrasts with the right of the WTO members to determine their national policy. To quote the Preamble again: “Recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives”. So we have on one side a commonly defined goal, the free trade agenda, and on the other side national policy objectives. The decisions made at these two levels may contradict each other.¹

The WTO agreements have established a particular form for mediating between these two levels of decision-making. It builds on the main difference between market access and market regulation. This means that even if a WTO member has open up its market, it does not have to accept any foreign good or service. At the same time it cannot reject foreign goods and services as it likes, as this would undermine the free trade agenda of the WTO. The WTO agreements confine the scope of national policy

¹ For a very interesting outline of this tension with regard to welfare state mercantilism see (Rieger and Leibfried 2003: 53-135)

objectives by establishing common principles which provide legitimation to some policy objectives and the measures to reach them while delegitimizing others . To put it in other words: In case of a dispute settlement process a government has to defend its domestic regulation with reference to commonly established principles in order to free its domestic regulation from the suspicion of protectionism. This is why international standards have gained in importance since the dispute settlement procedures had been strengthened. However, as I will outline in the next section, the relation between international standards and domestic regulations established in the framework of the GATT differs significantly from the one established in the framework of the GATS.

The General Agreement on Tariffs and Trade

International standards play a major role in the framework of the GATT with regard to technical regulation and sanitary and phytosanitary measures. The Agreement on Technical Barrier to Trade (TBT-Agreement) as well as the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS-Agreement) call for harmonisation. Where international standards, guidelines and recommendations exist, Member states are required to use them as a base for their own technical regulations or sanitary and phytosanitary measures (SPS-Agreement Art.3.1, TBT-Agreement Art 2.4). Only a limited number of exceptions are allowed.² Consequently, international standards play a crucial role in mediating between the free trade agenda of the GATT and the recognition of the WTO members' right to regulate.

The General Agreement on Trade in Services

The GATS distinguishes similar to the GATT between market access and market regulation. So even when a member has open up its market to foreign service providers, it can keep its qualification requirements and procedures, licensing requirements and technical standards as long as it can justify them with regard to concerns specified in the legal text. The concerns addressed by the GATT are mainly

² In the case of the TBT Agreements exceptions are only allowed when technical standards are “an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.” (TBT Agreement Art. 2.4). WTO members are required to justify higher standards scientifically with regard to sanitary and phytosanitary measures (SPS Agreement Art. 3.3).

related to health, safety and environmental issues, whereas concerns which are more difficult to define, such as competence, capacity to deliver and quality, are at the forefront of the service regime. Article VI.4 of the GATS requires that the measures addressing these concerns should not be more trade restrictive than necessary. The article itself does not further determine the meaning of this request. It delegates the specification to the Council for Trade in Services and its appropriate bodies. They are assigned with the task to develop “necessary disciplines”, how these international norms are called in the legal text (Art.VI.4).

Consequently, the GATS provisions are characterised by major incompleteness and the call for developing international standards. The Uruguay Round decided that the WTO should be the place for developing these standards. The task has been assigned to the Working Party of Domestic Regulation.³

In contrast to the GATT/TBT/SPS provisions, the GATS assigns a role to relevant standards of other international organisations only until the necessary disciplines have been developed (Art. VI.5). The reference structure to the outside is thus only a temporary one. Also in contrast to the GATT, the GATS does not specify which international organisations may produce the relevant standards.⁴ It only states that international organisations whose standards may be taken into account should be open to the relevant bodies of at least all WTO members. This requirement excludes, for instance, organisations such as the Organisation for Economic Co-operation and Development (OECD), but does privilege any other.

Another important difference is the relation between the obligations and the possibility to enforce them. The *prima facie* rule is not applicable in the temporary provision when it comes to a dispute settlement process. A government interested in bringing a case to the Dispute Settlement Body with regard to licensing and qualification requirements or technical standards has to demonstrate that the other

³ This working party in which WTO members can participate was established in 1995 as the Working Party on Professional Services. It was renamed as *Working Party on Domestic Regulation* (WPDR) in 1999 (WTO/CTS 1995; WTO/CTS 1999a: Para: 1; for more details on the WPDR see Hartmann forthcoming b).

⁴ The only exception is the telecommunication sector. The Annex on Telecommunications refers explicitly to the International Telecommunication Union (ITU) and the International Organization for Standardization (ISO) and their standards with a view to ensuring global compatibility and inter-operability of telecommunication networks and services (GATS, Annex on Telecommunications No.7).

member's regulation nullifies or impairs the specific commitments made by this respective member. Consequently, the evidence of an infringement of the obligations introduced by Article VI is not enough for sustaining the suspicion of protectionism (for the *prima facie* regulation see DSU Art.3.8). This regulation with regard to the burden of proof clearly weakens the position of the complaining party and contrast with the provision of the TBT and SPS Agreement. According to many WTO experts the provision of Article VI.5 aims mainly at the perpetuation of the status quo until necessary disciplines have been developed (Nicolaidis and Trachtman 2000: 259; Nielson 2004: 7).

In short, international standards play a crucial role in mediating between the free trade agenda of the WTO agreements and the right of its members to set their own national regulations and measures. They are established with a view to assessing the "adequacy" of domestic regulation in relation to specified political objectives. The form of mediation, however, differs significantly between the GATT and the GATS. The GATS assigns the task of developing such international standards for the provision of service to the WTO itself. However, the longer the Working Party for Domestic Regulation fails to establish necessary disciplines the more the temporary provision tends to become a permanent one.⁵ International standards established outside the WTO are thus increasing in importance. Consequently, a similar reference structure can be identified in the context of the GATS and the GATT. The GATS provisions for recognition of the education, licenses or certifications, which I will outline in the next section, strengthen international standards furthermore.

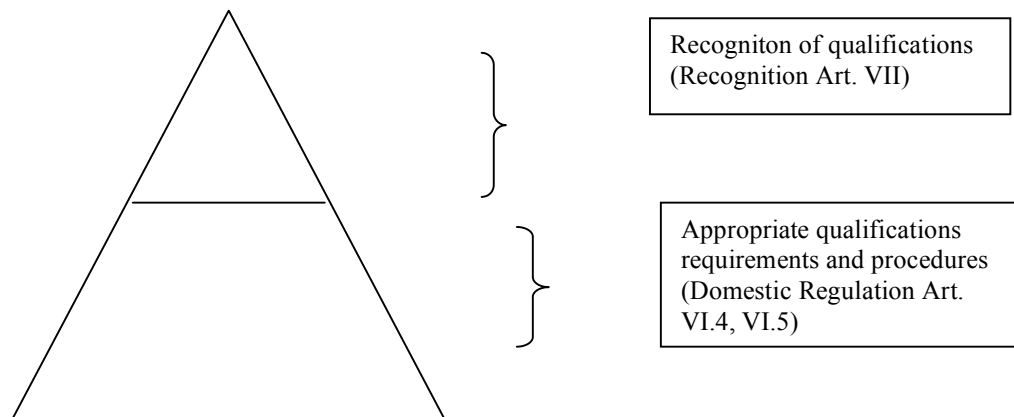
Recognition issues and the GATS

The GATS regulatory framework distinguishes between procedural aspects with regard to qualifications and licensing requirements and the very act of recognition, which is regulated by Article VII of the agreement. The recognition regime of the GATS could be compared to a two-layer pyramid. The bottom contains principles which define what may count as legitimate requirements and procedures. The upper part comprises the very act of the recognition of "education or experience obtained,

⁵ Since its establishment in 1995 the Working Party has only managed to develop necessary disciplines in the field of accountancy (for further details on the current state of negotiations see Hartmann forthcoming b).

requirements met, or licenses or certifications granted in a particular country” (Art.VII.1).

The GATS recognition regime



The two levels differ significantly in the leeway provided to national authority. As outlined in the previous sections, Article VI constraints the member’ justification for qualification requirements by introducing guiding principles and norms. Conversely Article VII concedes full recognition competence to the members. The very act of recognition remains therefore in the competence of the member states. It is up to a WTO member or its responsible body to decide if it recognizes the qualification of a foreign provider seeking access to one of its liberalised sectors.

The GATS allows its members to facilitate recognition by establishing mutual recognition agreements with other members. The decisive point is that it does not oblige any member to include automatically all other WTO members in this kind of recognition agreement. This specific regulation is a clear deviation from the Agreement’s most important principle, the Most-Favoured-Nation (MFN) requirement. It permits discrimination and, as a results, limits the drive towards generalisation which is built into the MFN requirement. The existing recognition agreements for professional qualifications reveal a clear trend towards privileging high-income countries as preferred members of such agreements (WTO/CTS 1999c: 4-13; Hartmann 2006). This situation is remarkable, even more so as countries of the South are highly interested in participating in such mutual recognition agreements. Such agreements would clearly improve their access to the labour market in the North (Chanda 2001; Winters, Walmsley et al. 2002). Their inclusion would increase in turn

their support for the other modes of service provision from which they derive less benefits than the countries in the North. However any effort to gain their support by enhancing free movement of natural persons will be nullified if the qualifications of these persons are not recognised. The deviation from the MFN requirement thus affects negatively the balance of interests between the North and South.

The deviation is to be seen in the light of the particularity of service provision whose regulation interferes much more into the political and administrative system of a nation state than the regulation of goods. The recognition regime of the GATS has an impact on the education system where national states show strong reservation to delegate any competence to a postnational level. This is true for the European Union, where member states have delegated only little competence in the sphere of education to the European Community, and even more so for the international level. In the GATS recognition regime the recognition competence remains within the realm of the member states.

In order to provide a generalisation mechanism, albeit a soft one, the GATS asks members of mutual recognition agreements to afford adequate opportunity for other interested members to negotiate their accession to such an agreement (GATS, Art.VII.2). Yet the burden to prove that its qualifications are of comparable quality lies with the access-seeking member. The GATS requests its members to ground recognition on multilaterally-agreed criteria. In this context, international standards of relevant international organisations whose membership is open to all WTO members come into play. Widely acknowledged international standards for describing the quality of a qualification and an international monitoring system that increases trust in the reliability of the information would clearly improve the position of access-seeking country in the negotiation. Consequently, the GATS aims at strengthening international standards by calling upon its members to work “in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions”. (Art.VII.5).

To sum up, international standards play also in the framework of the GATS an important role in mediating between the free trade agenda and the need for market regulation. The reference to international standards established outside the WTO is

less straightforward than in the framework of the GATT but has become more important in recent years due to the failure to develop necessary disciplines within the realm of the WTO. The role of standards in facilitating access of third parties to mutual recognition agreements has further increased the interest in such standards.

The UNESCO recognition regime

Major efforts to develop generic standards for the recognition of qualifications and the provision of information on the degree awarding institutions can be seen taking place in recent years. UNESCO and its regional conventions on the recognition of higher education qualification play a major role in this context. These conventions are regional in scope and were established in the late 1970s and early 1980s.⁶ The revision of these conventions has been put on the political agenda of the UNESCO in recent years. The motivations underlying the endeavour are manifold. The EU member states have been a major driving force from the beginning. They are interested in a strengthened UNESCO convention for the European region as a way to facilitate recognition of higher education qualifications and thus the mobility of skilled people in Europe without being obliged to delegate any competence to the supranational framework of the EU (more further details see Hartmann forthcoming b). In contrast to the EU, the UNESCO has no enforcement mechanism. The reformed UNESCO recognition convention for the European region, the Convention on the Recognition of Qualifications concerning Higher Education in the European Region, has been adopted by the European states in Lisbon in April 1997 and become later well known as the Lisbon Convention. Since its adoption the Lisbon Convention has become the main legal framework for the endeavour to establish a European Area of Higher Education, also called Bologna process. Hence, the European member states' interest in a new, strengthened UNESCO convention for the European region has not been motivated by the GATS recognition regime (for further details see Hartmann forthcoming c). However, their strategy to privilege an international regime with no enforcement mechanism in order to facilitate recognition resembles in many respects

⁶ There is one convention for Latin America and the Caribbean (adopted in 1975), one for the Arab States (1978), one for the region of Europe (1979), one for Africa (1981), one for Asia and the Pacific (1983), and one for the Arab and European states bordering on the Mediterranean (1976).

the architecture of the Article VII of the GATS. The similarity underlines the sensitivity of a supranationalisation of education policy.

Since 2001 the efforts to revise the other UNESCO regional recognition conventions have been intensified. This process drives major benefits from the norms and standards established in the European region. The Lisbon Convention and the further development and concretization of its instruments in the course of the Bologna process have become an important point of reference. Interests in the generic standards provided by the UNESCO conventions emerged also in the Working Party on Domestic Regulation recent years (WTO/WPDR 2005m: Para 16; WTO/WPDR 2005p: 3). The increasing importance of international standards in the framework of the GATS recognition regime has thus assigned a new role to the UNESCO as part of an emerging migration regime. Its recognition conventions provide generic standards for formal qualifications which in turn facilitate the access of interested countries to more sector specific mutual recognition agreements.

The more indirect relation between the GATS and the WTO illustrates well the complexity of standard-setting processes in the field of trade in services. Much more stakeholders have to be integrated. The lack of enforcement mechanism with regard to the very act of recognition ensures that only these standards can become effective which are widely accepted as legitimate. The case study also sheds light on the role of the European integration in establishing postnational norms and standards which then are taken up by other regions of the world. The Lisbon convention and the Bologna process have both benefited from the European integration process even though they are not part of the institutional framework of the EU.

In the following sections three different theoretical approaches will be questioned whether they can provide a conceptual understanding for the reasons motivating the reference structure in the GATT and the GATS but also for the differences between the GATS and the GATT.

The heterarchy of transnational constitutionalism

Drawing on Niklas Luhmann's systems theory, Gunther Teubner and Andreas Fischer-Lescano offer an interesting perspective on the exponential growth of juridical and quasi-juridical postnational mechanisms at the global level. They argue that this diversity should not be understood as a pathology, as an expression of a political "new medieval times" with a plurality of *dominia* and *iurisdictions*

(Fischer-Lescano and Teubner 2006: 23). They criticise this perspective for continuing to take the national constitution as the hidden matrix for the analysis of the new postnational mechanisms. This continuing fascination with the nation-state architecture is bound to lead to a negative assessment of the lack of hierarchy of norms, argues Teubner (Teubner 2004: 7).⁷

These scholars suggest a different approach, which draws on Luhmann's understanding of the world as a complex system of communications that has differentiated itself horizontally into a network of interconnected social sub-systems. This approach understands the increasing number of norms and judicial mechanisms, often contradicting each other, as an expression of a fundamental dynamic of world society as it undergoes a global process of functional differentiation. In this framework, law is described as just as one system among others (economic, political, educational, medical etc.). The different societal-sectoral systems are described as autopoietic in their orientation, with their own codes and programmes as well as their own interests in self-reproduction. The systems take account of each other only to a limited extent and only when the information provided by the other system makes sense to them, which in turn depends on their own code. In other words, the approach breaks with the part-whole schema in favour of relations between system and environment (Fischer-Lescano and Teubner 2006: 26). This perspective has consequences for the understanding of world society. World society has no centre but exists as a plurality of parts. It is polycentric in nature.

The specialisation improves the systems' ability to deal with risks. However, it also has a detrimental potential, according to system theory. Self-referential systems may tend to optimise their own rationality irrespective of other social systems and regardless of their natural and social environment. This "imperial" tendency can turn out to be destructive. This system-theoretical perspective reflects the problem raised already by Max Weber's "iron cage" of rationalisation and bureaucratisation as the dominant feature of modern forms of organisation, which its necessary to ensure functionality but which is at the same time problematic. A system-theoretical

⁷ At the centre of this criticism are approaches which draw on the work of Hans Kelsen and HLA Hart; Cass, D. Z. (2005): *The Constitutionalization of the World Trade Organization. Legitimacy, Democracy, and Community in the International Trading System*. New York, Oxford University Press. First steps towards constitutional pluralism at the global level are suggested by Neil Walker (2002): *The Idea of constitutional Pluralism*, 65, *Modern Law Review*, 317-59, and by C Walter (2001): *Constitutionalising (inter)national Governance: Possibilities and Limits to the Development of an International Constitutional Law*, 44, *German Yearbook of International Law*, 170-201.

approach takes a critical position on the dominance of one rationality. Fischer-Lescano and Teubner, who have developed a more normative perspective than Luhmann, prefer the development of a heterarchical system, informed by the idea of equilibrium between a plurality of functionalities. Its underlying normative imperative can be summed up as “the more the better”. This theoretical perspective perceives the exponential growth of international standard-setting and norm-setting activities as a positive trend and not as pathology. The objective is to enable systems to link up with each other reflexively, with a view to avoiding the dominance of any one, and to ensure the adaptability of each to its environment without endangering its functionality (Fischer-Lescano and Teubner 2006: 168).

This perspective helps us to understand the increasing importance of international standards as an effort to deal with an increased complexity introduced by globalisation. Furthermore, the interlinkage between the WTO and other standard-setting organisations can be understood as an attempt to limit the imposition of the free trade agenda of the WTO on other subsystems. The standard-setting organisations bring in a different rationalities. However, a system theoretical account fails to explain why the interlinkage between the GATT and other international standard-setting organisations is better established than in the context of the GATS. Furthermore, it provides little insight into the reasons why some international standard-setting organisations have been chosen as a reference for the WTO and others not.

The social-integrative function of norm generation

Jurgen Habermas’ discourse theory offers an explicit criticism of Niklas Luhmann’s systems theory. A major point of divergence is the role of modern law. This criticism provides a different perspective on the implication of the constitutionalisation of international law for standard-setting processes. Habermas criticises the perception of law as just one out of many other sub-systems. This conceptual decision reduces the role of law to an autopoietic system whose only function is to stabilise expectations over time (Habermas 1994 [1992]: 68). This kind of objectivation deprives law and the discourse on right and wrong of its socio-integrative function, which is at the heart of Habermas’ discourse-theoretical account of modern law and his theory of deliberative democracy. Consequently, Habermas emphasises the interconnectivity between ethics and modern law.

Habermas draws on speech act theory, and develops it further into a theory of communicative action. He distinguishes between strategic actions and communicative actions oriented towards reaching understanding. Habermas does not deny the existence of strategic actions, but highlights their limits by pointing to the role of the listener. A speaker wanting her speech to have a perlocutive effect has to persuade the listener. This communicative power can only evolve under certain conditions, according to Habermas. The listener has to assume that the message is intelligible, true, legitimate, and valid. If this assumption turns out to be mistaken, the communication process is likely to be interrupted and as a consequence the perlocutive effect of a speech act undermined.

In his book “Faktizität und Geltung” (Between Facts and Norm), Habermas links the theory of communicative action to a discourse theory of constitutional law. This allows him to highlight two functions of law: law as positive law which secures existing order, and law in its socio-integrative function. The second dimension refers to norms of an ideal speech situation and provides the conditions for an “idealistic necessitation” (idealistische Nötigung) (Habermas 1994 [1992]: 60). This necessitation reduces the dominance of purely strategic actions in favour of communicative actions. The constitutional dimension of law empowers weak members of the society to have a say in the public sphere. It counterbalances the tendency of the state towards autonomy by protecting the rights of the citizens against the state. This perspective also takes up a central dynamic which informs Luhmann’s theory: the “iron cage” of rationalisation and bureaucratisation which is functional and problematic at the same time. Habermas’ proposed way out, however, differs significantly. The central elements are empowerment and constitutional law in order to counterbalance the “iron cage” tendency. These two elements ensure that all members of a society have a say and that their rights as citizens are protected. In other words, they weaken the strategic actions of dominant forces and the tendency of bureaucracies towards auto-centrism. As a result they strengthen communicative actions. The constitutional dimension of law is a major prerequisite for developing common norms and values. Such a process is, in turn, crucial for social integration, according to Habermas. In communicating with each other, people abstract from their concrete lifeworlds with a view to making themselves understandable. As a result, general norms and values are produced through public communicative actions which refer to, but also abstract from lifeworlds. This process of integration through

abstraction ensures that general norms and standards make sense to all participants in spite of the difference of their lifeworlds which in turn increases compliance. The more the legality of a state is sustained by such norms and standards, the more legitimacy it enjoys. Consequently, people follow legal orders without being forced to do so. Conversely, if a state is not accepted by the public as representing the interests of the general will, it risks losing its legitimacy and hence its influence. Habermas' approach highlights, in other words, the complex relation between social integration and the interplay between legality, legitimacy and legitimation.

Transferred to the international level, this perspective offers an interesting perspective on the prerequisites of standard-settings in the service economy. The moralisation of the economy, as Nico Stehr has recently called the trend towards tertiarisation, depends much more on norms, values and knowledge commonly shared by the provider and the consumer than trade in goods (Stehr 2007). Such norms and standards need to be accepted as legitimate in order to be influential. Consequently, their development has to be more inclusive than technical standards for goods. In order to be relevant for the provider and the consumer, they need to undergo a process of abstraction of very different local and national contexts.

This theoretical perspective sheds a different light on the function of international standard-setting organisations, such as UNESCO. They can be understood as fora facilitating such integration through abstraction. The great variety of different actors participating in the Bologna process is one of the major reasons why this process has become so effective in reorganising the higher education sector, in spite of the lack of any enforcement mechanism. In countless meetings, workshops and conferences experts came together and translated the meaning of the general principles outlined in the Lisbon Convention and other declarations and recommendations into their national regulations and organisational structures. A similar process is now endeavoured in the other regions of the world. The more widely these standards are accepted the more likely they are to play a role in defining if qualification requirements and the measures to assess them are "justified". A discourse analytical perspective thus provides an explanation of why the interlinkage between standard-setting organisations and the WTO is much more precarious in the framework of the GATS than in the framework of the GATT.

However, a Habermasian perspective falls short when it comes to the analysis of power relations and selectivity in this deliberation process. This is true at the national

level, but even more so at the regional and global level (Fraser 1992; Fraser 2005). Who has access to international standard setting processes? Why are some standards easier accepted than others? In short, it tells us little about the structural power and the strategic selectivity underlying the standard-setting processes. The identification of them is the strength of the Neo-Gramscian approach, to which I will turn in the next section.

New Constitutionalism

A very different perspective on globalisation is offered by Neo-Gramscian accounts. This approach draws on Antonio Gramsci's further development of historical materialism. Gramsci developed this concept in order to show how a certain mode of production is linked to a certain kind of social formation. His crucial contribution to the development of historical materialism lies in the role that he assigns to ideas. With this emphasis, he reintegrated a more Hegelian tradition into historical materialism and developed a complex understanding of the role of civil and political society. His theory of hegemony highlights the important role of a political-ethical project, which not only includes the promotion of a specific production and accumulation regime but also involves the promotion of a specific lifestyle, as well as a way of thinking, behaving and consuming. Hence the dominance of one social group is not only based on the conditions of production, but also on their normative leadership which promotes a particular ethical-political project for the whole society. A Gramscian perspective fleshes out the importance of civil society as the major locus for norm and value production. In this respect this approach has some similarities with Habermas' concept of the political public sphere as the sphere for deliberation. Both refer more or less explicitly to Rousseau's conceptualisation of the general will. Gramsci turns it around in order to analyse the dominance of the bourgeoisie in capitalist societies.

Neo-Gramscian scholars have introduced the concept of hegemony into International Relations. They provides an interesting perspective on the role of norms and values in sustaining a particular global order which favours the interests of the dominant economic forces. In other words, the global order also includes a normative frame promoting a particular set of values, norms and standards, a mode of development and lifestyle.

The Neo-Gramscian scholar Stephen Gill introduced the term New Constitutionalism in order to describe the current change of the economic world order. At the core of the new power constellation is the WTO with its strengthened non-compliance procedures (Gill 2003a: 131). The political-ethical project of the New Constitutionalism is put forward by a class fraction which is no longer linked to one single country, as it used to be in former times. This fraction is rather transnational in nature. The project promoted by this fraction aims at developing “a politico-legal framework for the reconstitution of capital on a world scale, and thus for the intensification of the market forms of discipline” (Gill 1997: 78). It promotes competitiveness and more accountability of the state to “market needs”, and seeks to facilitate further commodification of social relations.

A Neo-Gramscian perspective provides, thus, a theoretical framework which allows us to analyse the economic power constellation underlying standard-setting activities and the free trade agenda of the WTO. The GATS can be seen as a new emerging political project seeking to become hegemonic. It has its economic basis in high-income countries where the service sector contributes up to 70% to the total value-added, with rising tendency.⁸ The importance of this sector for these economies contrasts with the still marginal role of this sector on a global scale, where it accounts for only 20% of total exports of goods and services. Knowledge-intensive work like computer and information services, financial services, insurance, and personal, cultural, and recreational services are, however, gaining in importance (WTO 2004: 14-15). So what we can see is a new social group, linked to the service economy, which is using the GATS in order to put forward a free trade agenda on a global scale. According to Gill, the success of the transnational class fraction in implementing the neoliberal agenda at the national level can be related to their ability to use the enforcement mechanisms of the WTO. He sees the WTO usurped by the transnational capital fraction. At the heart of his analysis are the strengthened non-compliance procedures of the WTO as part of the constitutionalisation of international law which turns the requirements of the necessary disciplines into enforceable obligations. This is why Gill calls the new economic order new constitutionism. He pays, however, little attention to the incompleteness characterising the GATS as well as the reference structure to other international standard-setting organisations. By doing so he fails to

⁸ See OECD 2003: Structure and Trends in International Trade in Services.
http://www.oecd.org/document/28/0,2340,en_2825_495663_2510108_1_1_1_1,00.html

explain convincingly how GATS agenda manages to become hegemonic. Could a project become hegemonic only by using top-down enforcement mechanisms? Or, to rephrase this question in more Habermasian terms: Why should the listener accept the norms and standards put forward by the project?

Gill's shortcoming can be linked to his underestimation of the role of organic intellectuals. Gramsci himself assigned a very important role to organic intellectuals as mediators. They are organic in the sense that they are related to the dominant social group. At the same time it is their relative autonomy, which allows them to mediate between conflicting interests. Their task is to include the concerns of allies, though without challenging the interests of the dominant class to which they belong organically. The norms and values of the project provide legitimacy to existing power relations once they have been accepted by society in general. As a compromise, however, hegemonic norms and values cannot be reduced to the interests of the dominant class.

Drawing on Gramsci, I suggest that we should understand the interlinkage between the WTO and international standard setting-organisations as an institutionalisation of the function of organic intellectuals. Standards are established with a view to reducing risks and ensuring quality, health and food safety, liability, corporate responsibility and sustainability. By doing so, these organisations take into account the worries of their allies and as a result gain their support for the overall free trade agenda. Such a perspective differs significantly from a system-theoretical approach. The interlinkage does not aim to reduce the imperialistic tendency of one of the system. It can be understood as a strategy to ensure the dominance of the free trade agenda by turning it into a hegemonic one.

But how can we explain the difference between the GATT and the GATS? Why is such an interlinkage more precarious in the framework of the GATS inspite of the clear interest of powerful groups in expanding the international trade in services? An enhanced Neo-Gramscian perspective sheds light on the more demanding prerequisites for establishing hegemony in the framework of the services compared to goods. The intangibility of the goods provided through service, the dependence on common norms, values and understanding of quality, in short, the moralisation of the market, turns trade in services into a complex endeavour. The crucial role of the European integration process in establishing norms and standards highlight the institutional prerequisites for such an endeavour. People need to interiorise these

norms in order to make them effective. Taking a Habermasian perspective one could understand this process as a mode of integration through abstraction. A Neo-Gramscian perspective pays more attention to the power constellation involved in the process which integrates, as a consequence, primarily the important consumers with considerable purchasing power. In other words, the internationalisation of the service requires a fundamental transnationalisation of the “institutional trust” (Zucker 1986). In more Neo-Gramscian terms we could call it a transnationalisation of hegemony. The precariousness of this interlinkage can be interpreted as an indication that such a process is still in its making. The greater leeway provided to national authority in the sphere of services highlight the continuing importance of organising hegemony at the national level.

Summary

The point of departure of this paper was the interlinkage between international standard-setting organisations and the WTO. This relation is well established in the framework of the GATT, but more precarious and contested in the framework of the GATS. In order to understand this difference, the paper presented three different theoretical approaches. Each of them has something to offer. Each of them provides a different perspective on the underlying dynamic and its implications for transnational societalisation. A system-theoretical perspective sees an emerging world society characterised by societal-sectoral lines of demarcation. The interlinkage can be understood as an attempt to ensure the adaptability of each system without endangering its functionality. The interlinkage is thus a strategy to cope with increasing complexity. The paper has argued that this approach cannot explain the difference in the interlinkage between the GATT and the GATS.

A discourse analytical approach informed by Habermas’ theory of constitutional law provides a better framework for understanding this difference. It helps us to identify the more demanding prerequisites of developing norms and standards with regard to trade in services. Norms and standards in services need to be fully shared by the provider and the consumer in order to be effective. Norms and standards thus have to undergo a complex process of abstraction from very different local and national contexts in order to have relevance. This process includes broad communication processes. International standard-setting organisations can thus be understood as fora for deliberation. The precariousness with regard to the GATS sheds light on the

limitations of standard-setting organisations' attempts to guarantee such a process, notably in the absence of constitutional law which empowers the weaker members in the communication process. A Neo-Gramscian perspective, which the paper introduced in the last section, provides a more critical perspective. Gill suggests that we should understand the emerging new economic order as a New Constitutionalism, which promotes a neoliberal agenda. In order to ensure the implementation of the neoliberal agenda, its proponents, the transnational fraction, use of the strengthened mechanism for compliance introduced with the establishment of the WTO. The paper has criticised this top-down perspective, which does not take into account the freedom of the listener not to listen. Reformulated in more Gramscian terms, this freedom points to the need for the dominant power to take the interests of its allies into account in order to guarantee their power position, which is linked to normative leadership as well. The paper has argued that the attempt to interlink standard-setting activities to the WTO can be understood as a strategy to gain the support of these allies, and thus to sustain the New Constitutionalism with strengthened mechanisms for ensuring compliance. They point to the complex structure of an enhanced New Constitutionalism. The precarity of the interlinkage between the GATS and international standard-setting organisations thus sheds light on the more demanding prerequisites of establishing hegemony in a global service economy. Such an economy requires a transnationalisation of the institutional trust. A service economy cannot expand without undergoing this transformation. However, more research which looks into other sectors is needed to better understand the transnationalisation of the institutional trust.

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