

Part III

Negotiation and Deliberation in Regulatory Committees

*Transnational Administrative
Comitology: The Global
Harmonisation of Chemicals
Classification and Labelling*

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ABSTRACT

THE CHAPTER¹ STARTS by identifying the realm of transnational public administration. It then studies as a case the development of a globally harmonised system of classification and labelling of dangerous substances (GHS). The transnational administrative rulemaking is reconstructed in terms of its organisation, proceedings and outcome. Its organisational substructure is made up of a relatively stable and differentiated system of committees and working groups connecting civil servants from national and international technical administrations. The proceedings were characterised by a combination of rational discourse with bargaining and power play. Material and procedural meta-rules were established to guide the proceedings. These provided a modest level of self-legitimation, which still requires bolstering. Principles of domestic administrative law may be drawn on for this purpose. However, given their liberal roots in checking centralised public power, these principles will need to be modified to accord with the diffuse polyarchy of transnational public administration. Furthermore, the self-legitimation process cannot undercut national constitutional yardsticks controlling the entry of informal transnational rules into the national spheres of formal law. In addition, international law may develop juridifying informal rules of the transnational sphere.

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I. THE PHENOMENON OF TRANSNATIONAL PUBLIC ADMINISTRATION

National civil servants have interacted with colleagues from other states since the rise of the nation state (Tietje 2010). With the overall globalisation of societies, economies and states, the areas where this happens and the frequency of interaction have, however, substantially increased. A growing number of networks, working groups, committees, organisations and other structures have evolved, fixing these interactions on a more permanent and organised basis.

Transnational (as opposed to 'international' or 'inter-governmental') are these transboundary arrangements inasmuch as they connect actors from the working level of national administrations thus bypassing their ministers and the diplomatic relations practised between heads of government.² The forms and levels of the institutionalisation of transnational interactions are diverse. Looser, less-developed forms are characterised by a low frequency of interactions, unstable membership, unstructured work programmes and lack of centralised guidance. More established committees are more likely to exhibit features such as a long-standing membership, a well-determined work programme and perhaps a system of committees with assigned competences.³

What makes a structure administrative? One possible answer is that administrative arrangements are made up of public officials. However, this would reverse the logic that applies to the formation of administrative structures. Normally (but not always⁴), a problem arises and structures emerge to solve it. What it is that calls national public officials to a task, can only be explained by looking at the nature of the task itself. What then makes a task administrative? Some suggest that administrative matters are those that are neither political nor judicial in character (*cf* Kingsbury, Krisch and Stewart 2005). This approach of defining by subtraction is hardly seminal. We could define it positively as a task concerned with the practical management of technical problems, and not the formation of political will.⁵ This definition is supported by reference

² Keohane and Nye 1974: 43 defined this level as 'direct interactions among sub-units of different governments that are not controlled or closely guided by the policies of the cabinets or chief executives of those governments'. They contrast this with the 'club model' of networks of cabinet ministers from a small group of leading states which tend to elaborate their agreements secretly and impose them on the less powerful governments.

³ An elaborate example of this type is the Codex Alimentarius Commission. See the contributions by Arnold and Herwig in chapters five and six respectively.

⁴ Once structures have been created and after having solved the problem they tend to search for new tasks, but even those will be 'administrative'.

⁵ For the German tradition, see Lorenz v Stein (1869: 60), who defined *Verwaltung* as the activity of the state that subjects the real conditions of life (*wirkliche Lebensverhältnisse*) to the will of the state.

to the latin roots of the term, *administrare* and *manum agere*, which mean 'lending a hand', or by looking at the German word for administration, *Verwaltung*, with its connotation of 'mastering things'.⁶

Practical and technical matters of this sort should be distinguished from matters of high politics and fundamental policy orientation. High politics are handled by different fora and in a different way than by administrations.⁷ Frequently, administrators 'execute'⁸ a political will, but often act on their own initiative, and as a consequence, implicitly answer any political questions that may be involved.⁹

This state-bound characterisation of administration can also be applied to the transnational sphere, if it is taken into account that cases involving the execution of political will are much rarer in the transnational than in the national realm. In the transnational sphere, it is more typical that the 'policy' of management is incrementally elaborated in the administrative process, rather than hard-won from battles in a separate political arena. If the political will was formed through a process of transnational administrative cooperation, it is generally not conclusive, but is rather vague and more symbolic in nature.¹⁰ Thus, transnational administration could be understood as the management of technical matters of a transnational character, including the political implications of the technical.

The case studied in this chapter concerns the global harmonisation of chemicals standards. In organisational terms, it is an example for established committee systems that are more stable than loose networks. The task that the transnational arrangement took upon itself—the definition and labelling of chemicals hazard categories—was a technical/scientific one which involved, however, intricate political questions. How this was reflected in the proceedings of rule-elaboration will be explored further.

⁶ The term *walten* means to perform, to master, to deal with something. The prefix 'ver' marks intensity (or a negation like in *Verbot*). *Verwaltung* is then the committed mastering of something. See Deutsches Wörterbuch 2004, Articles 'Ver' and 'Walten'.

⁷ Unfortunately, the US notion of administration ('the Clinton, the Bush administration') is often used precisely to denote such fundamental orientation. In the German tradition, this would be called *Regierung* (government). See again Stein who defines *Regierung* as the formation of a general will and deed representing the entirety of the state, whilst *Verwaltung* adapts the general will and deed to the given facts and life conditions (Stein 1869: 60 and 134).

⁸ From *exsequi* meaning to follow-up.

⁹ While Max Weber's (Weber 1964: 1047–62) ideal type of bureaucracy stresses the instrumental role of administrative bodies, more recent literature emphasises trends towards a self-programming of the administration (Mayntz 1978: 61–81). Based on Eisenstadt 1963, Mayntz proposes three types of self-programming: administration using its expertise in the public interest, administration pursuing selfish goals (eg maximal remuneration, defence of powerful positions), and administration advocating a specific interest (eg of a specific class or stratum). The first type is of most interest in the present context. It was already identified by Weber himself when he opposed the experienced bureaucracy with the dilettantism of politicians (Weber 1964: 730; cf Mayntz 1978: 63).

¹⁰ See, as an example, the role of the International Forum of Chemical Safety (IFCS) within the fabric of international chemicals regulation (Warning 2009; Nowrot 2010).

Did they follow a style of rational discourse,¹¹ or were they instead characterised by negotiation and power play? Did meta-rules emerge to establish at least second-best insurance of rationality? In the absence of such self-control, can and if so, how is formal state-based law to be brought in to tame creeping transnational power?

II. THE CASE

A. The Issue

Trade restrictions have come under close scrutiny with the growing world market of products, tariffary and non-tariffary. The classification of hazardous chemicals and associated regulations is one of those non-tariffary restrictions. Categories of hazards include bio-accumulation, persistence, and toxicity to human health, environmental toxicity, explosiveness, mutagenicity, and cancerogenicity. Obligations are tied to this classification such as that the chemical must be safely packaged, warnings and safety recommendations must be printed on packages, safety data sheets must be provided to downstream users, specific precautions must be taken at the workplace, and, for some categories, sales to end consumers may even be prohibited. The classification and regulation of such products may have the effect of restricting cross-border trade. This is particularly true where classification systems and laws differ among states. A producer will have to reclassify the same chemical as toxic, highly toxic or not toxic depending on the legal requirements in the country of importation. A common classification scheme would eliminate these obstacles, allowing a product to have a single classification on any national market. Under a unified system, the producer would still face different sanctions under national law. However, a common approach to classification is indispensable for harmonisation. A similar problem arises in relation to the labelling of products (ie printing symbols and additional consumer information about the substance on packaging). Different labelling systems are a barrier to transnational trade, because products would have to be labelled differently depending on the country of importation.

The harmonisation of classification and labelling schemes is not merely a matter of establishing common categories and labels. The legal consequences tied to the hazard categories impact upon sales and thus the profitability of the product. The regulatory framework also channels the product through the market to end consumers, ensuring its proper use and preventing it from being released into the environment. For instance, a non-toxic product that is classified as toxic will be held back, frustrating

¹¹ For a case of this kind see M Herberg, chapter 3 in this volume.

economic expectations. Conversely, a toxic product that is classified as non-toxic will enter the market without restriction, endangering human health and the environment.

Cross-cutting the classical conflict between economic interests and health and the environment is a third interest: developing countries. Developing countries are in a paradoxical situation. They have reasons to oppose strict chemicals regulation, such as in the area of pesticides, to protect their agricultural production and to remain attractive for investment in the chemicals production sector. On the other hand, they have an interest in protecting the health of workers and consumers, as well as the environment. The result is that they have often hesitated to adopt any chemicals regulation at all.

A further concern relates to how national legal systems view the particular approach of another country. There is a significant divergence between the way the United States and European Union regulates chemicals, respectively referred to as the risk approach and hazard approach (Pallemaerts 2003). The EU hazard approach identifies the inherent characteristics of a substance or preparation, and classifies and labels them independently of the question of 'end-points' exposure (ie whether the chemical will come into contact with humans or the environment). By contrast, the US risk approach takes into account the chemicals end-points from the outset, with the consequence that certain substances may not be classified at all, or that labelling is not required. For instance, a substance normally used in closed systems would not have to be classified as toxic, or bear the symbol for toxicity. The European Union assumes that the properties of a substance must be determined and communicated regardless of its normal use by the end consumer. The European approach is precautionary, and assumes that by not providing specific information, the substance will ultimately end up in the environment. The US approach is more pragmatic, standing by until there is evidence of potential damage.

There are also ideological differences to take into account. This is a consideration with regard to the symbols used for the labelling of packages. The St Andrew's cross, a diagonal cross or X,¹² was traditionally used in Europe to mark the toxicity of a substance. Its allusion to death may be misunderstood in the non-Christian world.

In conclusion, in contrast to matters of 'high' transnational politics, such as the establishment of rules concerning global trade or the fight against terrorism, the classification and labelling of hazardous chemicals is certainly a technical matter. Nevertheless, the interests and traditions at stake show that significant policy questions are also involved.

¹² The Apostle Andrew, when martyred, requested out of modesty that a different type of cross should be used than that used for Jesus Christ. See www.en.wikipedia.org/wiki/St._Andrew.

B. The Run Up¹³

Plans to harmonise the classification and labelling of chemicals at the international level have long been part of more comprehensive initiatives to manage the risks of hazardous chemicals. These include the harmonisation of test guidelines, the registration of chemicals, prior information provided to the importing state about risks of chemicals, and the restriction of production and trade of chemicals. These initiatives have different origins. The Organisation for Economic Cooperation and Development (OECD) became involved at an early stage. In 1971, the OECD Council adopted an Environment, Health and Safety Programme and established the Environment Policy Committee (EPOC), which then set up a Working Party on Chemicals, Pesticides, and Biotechnology. In 1987, the OECD Council established the Chemicals Committee, which set up the 'Joint Meeting' with EPOC. Around the same time, a number of other international organisations took an interest in the problem of hazardous chemicals, including the International Labour Organisation (ILO), the World Health Organisation (WHO), and the United Nations Environmental Programme (UNEP). Each organisation looked at the problem from its own sectoral perspective—occupational health (ILO), human health (WHO) and environmental pollution (UNEP).

In 1980, the ILO, WHO and UNEP concluded a Memorandum of Understanding to set up the International Programme on Chemical Safety (IPCS). Thirty six countries have agreed to participate in the programme activities. Participation has been based on memoranda of understanding between IPCS and each individual country and has involved certain financial contribution. After years of slow progress, chemicals regulation—including the harmonisation of classification and labelling—gathered new momentum as part of Agenda 21, which was concluded at the Rio Conference in 1992.¹⁴ In 1995, the Inter-Organisation Programme for the Sound Management of Chemicals (IOMC) was established by a Memorandum of Understanding between UNEP, ILO, the Food and Agriculture Organisation of the United Nations (FAO), the United Nations Industrial Development Organisation (UNIDO), OECD, and was later joined by other international organisations. While IOMC has strategically coordinated the activities of different international organisations, IPCS has operated on a working level developing risk assessment rules and elaborating assessments of individual substances.

The most important practical step in the global harmonisation of chemicals classification and labelling was the creation of the Coordination

¹³ See, for a more detailed description, Warning 2009.

¹⁴ Agenda 21 ch 19 no 19.24 to 19.32 detail the agenda for the classification and labelling of chemicals.

Group for the Harmonisation of Chemicals Classification Systems (CG/HCCS) in 1995. This was based on a Memorandum of Understanding concluded under the auspices of the IOMC. The Coordination Group was conceived as part of the IPCS and supported logistically by the ILO Secretariat. Its task was to elaborate the rules of the GHS. While the right to vote in the CG was restricted to government representatives, non-governmental organisations (NGOs) representing the interests of industry and the public were admitted as observers.

In 2001, the CG completed its work. To enhance its acceptance by states, the CG sought the endorsement of the UN Economic and Social Council

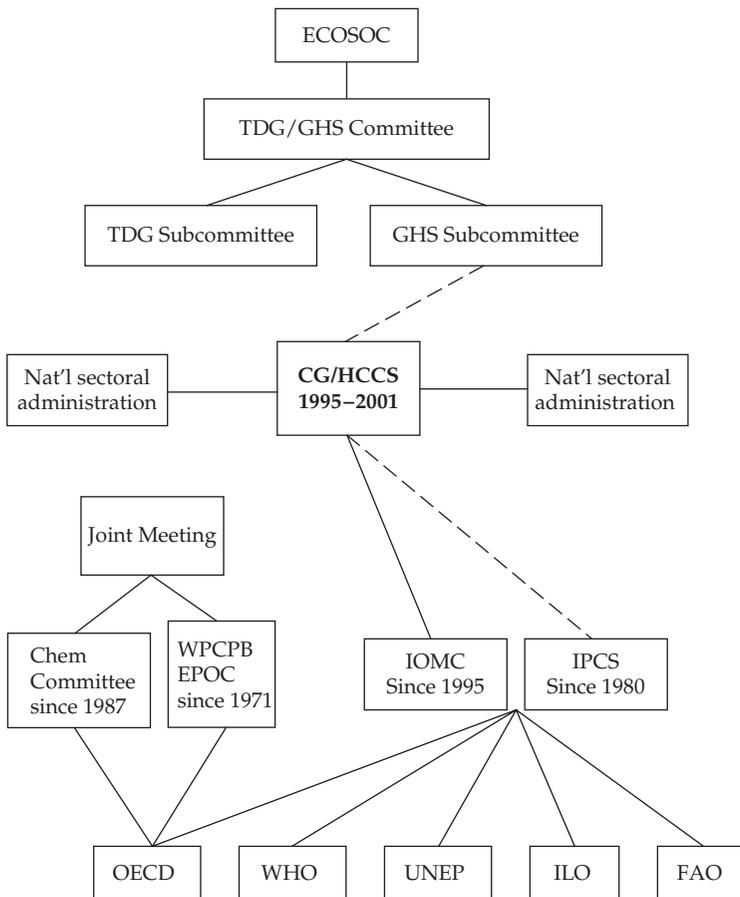


Figure 1: Organisations, programmes and committees participating in the development of the GHS; dotted line = working relationship; straight line = constituting relationship.

(ECOSOC), which could provide the necessary authority to crosscut the views of participating sectoral organisations (ILO, WHO, UNEP) and the OECD, a regional organisation. Accordingly, the work document was handed over to the United Nations. For many years, ECOSOC had been engaged in classification and labelling issues through its Committee of Experts on the Transport of Dangerous Goods (TDG Committee). This sectoral focus on transport was too narrow to encompass the broad scope of the GHS, and, as a result, ECOSOC enlarged the mandate of the TGD Committee by reconfiguring it into a joint Committee of experts on TGD and GHS (TDG&GHS Committee). At the same time, two sub-committees were formed: one on the Transport of Dangerous Goods (TDG Sub-Committee) and the other on the Globally Harmonized System (GHS Sub-Committee). In 2001, the GHS Sub-Committee took note of the GHS as developed by the Coordination Group, and endorsed it. In 2002, ECOSOC approved the GHS in a resolution expressing its 'deep appreciation' for this work, and 'inviting all governments' to implement it. The GHS Sub-Committee was also charged with further developing and promoting the implementation of the GHS. It was to report to ECOSOC through the TDG/GHS Committee.

C. The Proceedings¹⁵

i. The Organisational Fabric

The organisational fabric of the GHS committee system may suggest that all activities occur within the formal structures of international organisations. However, almost everyone acting within this complex structure were employees of participating states. Hence, the working level was very

¹⁵ Most of the following observations rely on four interviews with experts who have for many years participated in the elaboration of the GHS. Interviews I and II were conducted in 2004 and 2007 with public officials from the Federal Institute for Occupational Safety and Health (*Bundesanstalt für Arbeitsschutz und Arbeitsmedizin*), Interview III in 2007 with a public official of the Federal Institute for Materials Research and Testing (*Bundesinstitut für Materialforschung and -prüfung*), and Interview IV in 2005 with a public official of the IPCS. The interviews were conducted by my collaborators, Martin Herberg and Michael Warning. I am very thankful that they allowed me to make use of their material. As I am not trained in qualitative sociological methods, my observations can only achieve plausibility, not full reliability. I carefully read the interviews, tried to understand from them the reality of proceedings, reorganised the most significant passages around characteristic aspects, and abstracted summary observations from them. I present the results of my study by first giving the summary observations and then illustrating them by citing core passages from the interviews. Of course, for reasons of space not every single conclusion can be fully proven; a measure of trust in the objectivity of the researcher is requested. May this be furthered by my acknowledgement that my 'null-hypotheses' about the observed discourses were fundamentally different from what I learned from the material. I expected scientific deliberations but learned about a complex mixture of rationalities.

much determined by transnationalism in the meaning explained above. International organisations contributed two additional functions: they participated in agenda-setting by making strategic recommendations and concluding interorganisational memoranda of understanding; and they furthered the practical progress of negotiations by providing secretarial assistance.

The whole setting was structured according to working groups and 'official' committees, such as the global CG and the OECD 'Joint Meeting' in the initial phase, and later the TDG/GHS Committee and its sub-committees. While the bulk of deliberation and drafting was done in numerous informal working groups, the committees served as clearing houses for controversial issues, coordinators setting terms for working groups, and ratifiers of texts submitted by working groups. Here is one account of the relationship between working groups and committees:

In the UN sub-committee it is true that they do have discussions there, but they do not treat the technical details. This is done in the working groups, for instance, those dealing with chemically instable gases, sensitives, explosives. Or, regularly, at every July session the working group on explosives meets, which then, for instance, discusses such and such footnote and at the end recommends that it shall be adopted and then the subcommittee decides whether to follow the recommendation or not.¹⁶

The OECD as a special organisation, which comprises the developed world (and in fact most of the chemical-producing countries), had similar groups working in parallel with the CG and its working groups which operated at the global level. These groups provided assistance and heavily influenced the global process.

ii. Participating Members

Committees and working groups were made up of public officials from sectoral (not foreign) ministries and the expert administrative bodies of participating states. Even the chairpersons were national officials. Only very few appointees from international organisations attended, providing either secretarial assistance or as observers. Membership in working groups, sub-committees and committees overlapped to a certain extent, simply because many states did not have sufficient personnel to staff so many bodies. Industry members were also admitted as observers, and frequently made use of this opportunity. However, they were not allowed to vote. Public interest NGOs were also admitted, but were present less frequently, and were therefore less active. Even though the acting bodies

¹⁶ Interview III.

operated within the framework of global international organisations (IOs), developing states were underrepresented. This is due to the fact that developing countries could not normally afford the costs of travel and preparation for sessions.

iii. Principles of Procedure and Policy

The IOMC functioned as the umbrella programme that coordinated chemicals regulation within the framework of sectoral international organisations. The IOMC's acting body, the Inter-Organisation Coordinating Committee (IOCC), had set out certain organisational and procedural rules for coordination groups operating under its auspices. According to these rules

the coordination groups must obtain IOCC approval of their tasks, membership, and observers (which they are basically free to determine themselves);

industry, labour and public interest NGOs are responsible for coordinating representation and membership within and among their respective nongovernmental organization groupings;

the coordination groups are to 'operate on the basis of consensus';

members and observers must bear their own costs.¹⁷

There is no rule regarding procedural transparency in the interest of the general public.

These principles were also binding for the Coordination Group for the GHS. However, the Coordination Group amended these by adding a number of more specific rules on policy and procedure. These concerned the level of health and environmental protection, as well as the involvement of and communication with stakeholders. Some of them read as follows:

the level of protection offered to workers, consumers, the general public and the environment should not be reduced as a result of harmonising the classification and labelling systems;

the involvement of concerned international organizations of employers, workers, consumers, and other relevant organizations in the process of harmonization should be ensured;

in relation to chemical hazard communication the safety and health of workers, consumers and the public in general, as well as the protection of

¹⁷ See IOMC Co-ordinating Groups Standard Operating Procedures. See www.who.int/iomc/groups/standard_operating_procedures.pdf (last visited 2 November 2008).

the environment, should be ensured while protecting confidential business information, as prescribed by the competent authorities.¹⁸

The principles once again do not address the question of transparency for the general public. De facto, however, the CG/HCCS did make some documents available on the internet; this was not an invitation for public comment, but instead done with the intention to inform the public about what had been achieved.¹⁹

iv. The Discourse

Much of the discourse in the working groups and official committees centred on technical expertise. For instance, one discussion concerned whether, based on an LD₅₀-Test²⁰ of rats, it is appropriate to classify a substance as toxic. Even though scientists may have different views in this regard (for example, some may argue that tests of a different animal are more applicable to issues of human health), this kind of discussion involves largely a scientific question. Based on this, one may expect that the deliberations were of the type of Habermasian rational discourse. Such discourse would presuppose an 'ideal speech situation': in which participants argue on point (*sachhaltig*), without bias (*vorurteilsfrei*), and are unimpelled (*herrschaftsfrei*) (Habermas 1992). Nevertheless, such discourse remains embedded in social structures of opportunity, interest and power. If the issue is highly technical and other conditions are favourable, the structural setting may be 'rationalised', ie fully transformed by arguments and deliberations. However, often the nature of the issue and context are such that rational discourse is severely limited, and the negotiations are instead characterised by bargaining, tactical behaviour, and even obstruction or demonstrations of power. Ultimately, it was this style that characterised the GHS proceedings.

a. Status Quo, Vested Interests and Blocking

Major obstacles to achieving scientific consensus are arguments in defence of the status quo and the protection of vested interests by those who fear the uncertainty or costs brought about by new rules. Anxiety about changes to the status quo is often present and disrupts open discourse,

¹⁸ Coordination Group for the Harmonization of Chemical Classification Systems, Revised terms of reference and work programme Geneva 1996 No 8. Available at www.ilo.org/public/english/protection/safework/ghs/ghsdocs/index.htm (last visited 2 November 2008).

¹⁹ See overview of available documents at www.ilo.org/public/english/protection/safework/ghs/cghccs.htm (last visited 2 November 2008).

²⁰ LD means lethal dose (LD), and LD₅₀ that dose of a tested substance which causes the death of 50% of a sample of test organisms exposed to the substance.

if the participants at meetings are higher administrative officials or non-expert industry representatives:

Well, the first point is that the structures and the behaviour of acting persons are very formal. This is even more common in the UN Committee than at the OECD level. The second point is that, at the UN level, normally or often persons participate at meetings, or at least partially is that so, who I may say represent the higher levels, but do not understand the technical details, ie who act more politically than technically, substantially. A further point is, that even at the OECD level in the expert groups representatives of certain interest groups can be found, I mean also of industry, who partly have insufficient technical expertise and act for the industrial interest. This of course renders negotiations very, very difficult (laughing). Our German industry can well keep pace her, that if there is a fear that new burdens may result and the issue is not well understood the industry is not in a position to clarify the matter for them but blocks the further proceeding for the single reason that there might be a burdensome result.²¹

In the UN Subcommittee, I must say, of course, sit experts. You can certainly come in with technical arguments. Sometimes however our impression is that technical arguments do not help. When certain countries are against, it is hard to get through.²²

However, according to one interviewee, perseverance in advancing scientific argument can break new ground:

Every change is burdensome and therefore normally participants act so that nobody—really nobody—is committed to discuss with a view to improve things. Well, this is about what I realise, I am here—and this is also the position of my [agency]: we allow ourselves the luxury in the technical bodies to argue technically. We argue like we find it appropriate in technical terms and, well, I am not a politician and sit in these bodies and always struggle for something. I rather repeat things once and again, even when I know that this is bound to fail from the outset. But it is important for me to make clear what makes sense technically, and to do this again and again.²³

Interviewee II reports a case where—after long and exhausting debates—a particular industry that had blocked further progress gave in when its members finally discovered that the new rule was also in its own best interest.

b. Policy Questions

Ideally, interests can be transformed into policy arguments instead of being pursued by obstruction. This can be achieved by separating

²¹ Interview II.

²² Interview III.

²³ Interview I.

scientific from socio-economic aspects, for example by distinguishing between risk assessment and risk management. Many expert participants in the proceedings draw a distinction between technical and policy questions and try to refer the latter to bodies other than just the technical working groups:

During the negotiations experts are closer to one another than the negotiation chairpersons in relation to their countries, I would say, because the technical problems are always comparable. But there is always a superstructure (*Überbau*).²⁴

However, not all experts make this distinction, instead choosing to blur expertise and policy questions:

My experience from my activities is that the representatives from sectoral authorities in the EU discuss partly openly as experts while partly the policy background smears [*verschmiert*] a bit, I should say. Well, we in Germany always try, and this is in principle also supported by our ministries, to say clearly this is our expert assessment, and if we shall include socio-economic concerns, then this may well lead to another assessment. Yet, it is very important to so to speak clearly distinguish the technical assessment from the political. And unfortunately this is not the case in the EU and the international sphere, and especially it is not so with the North-Americans.²⁵

c. Interest and Power

In transnational negotiations, where there is a need for consensus and technical rather than political matters are at stake, there appears to be little room for power in Max Weber's sense of the possibility of executing one's will even against resistance (Weber 1972: 28). Still, power exists in more subtle or indirect ways, such as by refusing to put a theme on the agenda or by stubbornly maintaining certain discordant positions or vetoing of other proposals. Some of this behaviour was observed in the GHS proceedings, particularly in matters concerning the gap between European and US basic approaches to chemicals regulation:

I believe, well my impression of negotiations by agency officials [of the US, GW], is that they are purely political. This means they in fact are not free at all. Well, I am (laughs), when one in popular saying speaks of the country of unlimited possibilities and one actually realizes how concreted these experts of the US administration are, that is how narrowly they proceed. Ah, that is frightening, I find this utterly frightening—this is my impression. But there are of course nuances, but the proceeding and the intellectual and technical freedom and the utterance of technical positions is very, very restricted.

²⁴ Ibid.

²⁵ Interview II.

And the self-understanding, the American, this is my impression, is us first and then the rest of the world. No, I mean, you can see this in the general US politics and this is also mirrored in the more modest contexts. And when such things come up, then there is first of all an attitude of blocking and, ah, that is more or less intended, not to let the process run too fast. At least, I believe this. And then it is also intended that for the work in the committees they accept only a sort of persons who act very formally (laughs), I would say who react in a way that one can only take very small steps.²⁶

While on the rules on classification and labelling of substances, some kind of agreement or compromise could nevertheless be reached after prolonged negotiations; this has been much more difficult in relation to actual decisions on the restrictions of trade in substances. For instance, specific negotiations conducted within the framework of the Rotterdam Convention concerned whether Cryotile Asbestos should be prohibited, but agreement among technical experts was stymied by those advancing certain interests:

I was in the expert group. In the expert group, there was unanimity, but this did not go through, because Canada said we manufacture asbestos, we like it, and they were so clever to say our [internal, GW] decision-making process has not yet been completed. The Russians also said we manufacture it, and Zimbabwe too said we produce it and we do not want the prohibition. Full stop!²⁷

d. Input from Industry

Industry representatives are quite influential in spite of their mere observer status. Influence comes from feeding documents and proposals into the process. The lack of formal status can be made good by approaching national representatives who have voting rights to support the industry position:

Yes, well, they can take a very active role even in the subcommittee, like, for instance, CEFIC, the European association of chemicals industry. There was, until shortly [name], who is now retired. He played a very active role. As also non-governmental organisations and observers can submit documents, they can make applications, they only do not have a voting right. But in principle they can file applications as they wish, they also do this, for instance, together with a delegation. There can be, for instance, a German association I say I just arrange something with the German delegation.²⁸

As one interviewee states, industry representatives have contributed to the formal quality of the GHS process by condensing and structuring the

²⁶ Interview II.

²⁷ Ibid.

²⁸ Interview III.

often chaotic draft texts. However, they have also sometimes refused the reasonable position and blocked further consensus:

The point is that even on the OECD level you can find in the expert groups, let me say, representatives of certain interest groups, ie, also of the industry, who sometimes have insufficient expertise and defend the industry position. This, of course, makes technical negotiations often very, very difficult (laughing). And this is the case with industry—I do not only experience this on the OECD level, our German industry can very well keep up with others here—that if there are fears that aggravations may come up, and it is not at all understood what the matter is, if the industry is actually not in a position to clarify the problem for itself, what the real problems are, but alone for fear that there may be an aggravation they block things.²⁹

e. Individuals and Institutions

Committed individuals are of major importance to the whole process. Often they initiate harmonisation projects and keep them moving by putting issues on the agenda, providing relevant information and building consensus. Although they are national civil servants, it would be a misunderstanding to speak of lead countries: rather, it is certain lead individuals who often work towards winning the support of their country for their own initiatives. These individuals often strive to become chairpersons, because this position allows them to exert influence over procedure and substance. If they do not succeed in their bid for chairperson, such individuals will often try more indirect ways to push their views through.³⁰

Well, okay, as soon as you have a working group, you need someone who is responsible and in a way coordinates and pushes things forward, and for that you need somebody, whether you call this lead country or chair, or whatever, someone who is simply active and also committed. Well, these are normally specific interests, where specific interests stand behind. Or, if you wish to forward a matter, it of course makes sense that you take the lead position. Then you push things forward. Or, on the other hand, sometimes the US take the lead, so that, ah, then you have only the possibility to—ah—act more modulating, so that things do not go into a direction you do not wish.³¹

The statement shows that active individuals often represent special interests, rather than working towards overarching interests. It also sheds light

²⁹ Interview II.

³⁰ *Ibid.*

³¹ The distinction between a motivation in the 'matter itself' and specific interests may not be 100% clear from this passage but is fortified by earlier passages. Of course, it could be questioned in theoretical terms whether the interest in the 'matter itself' is not also a specific interest. The repeated 'ah(s)' and hesitating phrasing can be interpreted as insecurity of the speaker regarding how far to go in blaming other persons.

on the role of chairpersons, suggesting that there is no practice, nor even an expectation, that the chair must be neutral; most chairpersons have a specific result in mind that they are working towards:

Question: I should like to ask what rules or measures there are or if there are discussions about measures in order to ensure something like the impartiality of the chair.

Answer: no, that does not exist, does not exist! They also act politically, ...³²

f. Bargaining and Consensus Strategies

Since the entire process is based on consensus, consensus building is of utmost importance. One way to achieve this is through negotiations in small informal circles, outside of the more formal working sessions.

Well, I could say, if I exaggerate—but that is, I mean, I do not have so much experience in committees that so to speak what happens during the break or what happens in small groups, ah, has a very, very high importance. Thus, I do not want to say a higher ..., but that actually these agreements, ah, the lobbying and the building of accordance, or that, if you want to effectively bring something through, that one must, of course, do that with much political skill. Or if one wants to block things that this is not treated by open discussion in the session but that is then achieved in other ways.³³

Unassuming and perhaps a bit hesitant, the interviewee seems to struggle when addressing this apparently elusive issue. In addition to more informal discussions outside of the regular meetings, chairpersons can build consensus by intentionally proposing equivocal formulations that leave further clarification to later stages of negotiation or implementation. However, such tactics are risky, because of the potential that ambiguous formulations will be given an unintended meaning:

Sometimes it was indeed so that in the technical negotiations I intentionally left matters unclear. And the lawyers made it clear later on. And out of this came results which we did not want, and since then Mr. S [the lawyer] and I have always precisely arranged the terms that this and that should remain unclear (provided it is also legally undetermined), for this cannot at all be solved in the committee, but we can then proceed, even though this is left open—but that was really a thrill when all of a sudden things were on the table which nobody had intended.³⁴

³² Interview II. The signs of hesitation and consideration show that the interviewee feels as though the issue is of a sensitive nature.

³³ Ibid. The hesitant mode of speaking again indicates the issue is somewhat sensitive in nature.

³⁴ Ibid. The passage is related to negotiations in the framework of the Rotterdam Convention, not of the GHS.

g. Ties with Home States

National officials often have an ambiguous relationship with their home state. To participate in transnational proceedings, they require the approval of their state, normally from the relevant government ministry. However, the home authority does not provide close direction, allowing national officials significant room for manoeuvre. If they are committed to the process and possess tactical skills, national representatives can have significant influence over the overall direction of the proceedings. The German example shows that individual character can be more important than institutional affiliation. For example, the coordinator of the German delegation was a civil servant of a regulatory agency which belonged to the Ministry of Economy and Labour. This ministry was not primarily responsible for chemicals regulation. The competent ministry, the Ministry for the Environment, accepted this because this individual had many years of accumulated experience, as well as recognition and important connections within the transnational field. The trust he enjoyed from the competent ministry was so firm that he could not imagine ever receiving precise and binding instructions:

This would be totally exciting, if I got an instruction. I would be at odds how to handle that. I do act on a mandate from the BMU [Ministry for the Environment], that is the construction, but I belong to the Ministry for Economy and Labour. Therefore, should they [the BMU] give me an instruction—that would be interesting, I am going to wait for that. And there is now even a working group on the issue in the BMU. The BMU is lead agency. But in principle I can act because I have a good standing. Theoretically, this should be done by someone from the BMU departments.³⁵

Before travelling to the meetings of transnational working groups and committees, German officials usually come together or have telephone conversations in order to coordinate the German position among colleagues from the different national authorities affected by the issue at stake. This is particularly the case for non-technical matters with policy implications:

Well, we arrange for a national coordination of positions beforehand and this is so not only for GHS—often in the framework of a so-called consultants circle (*Beraterkreis*). That has been practised at some point in the process. Apart from that, there exists a large e-mail distribution list where of course also representatives of stakeholders are involved. And normally we have for each UN session a meeting where we coordinate ourselves on those topics that are on the agenda of the UN session. Within the OECD it is normally so that because there are continuous telephone conversations we believe, I believe, that there is not always a duty to provide information and to coordinate ourselves, because we discuss a technical question.³⁶

³⁵ Interview I.

³⁶ *Ibid.*

However, the coordination process is not always conclusive. The national representative may then decide to remain silent, but also dare to fill the void by taking action:

We speak with each other beforehand. And at the end normally we agree on something. And this is then what we represent. But if we do not reach an agreement, things become difficult. Then there are two possibilities: either we do not say anything [in the transnational meeting, GW], or I say something taking the risk that I get my ears torn off. When we agree on something I note this in the minutes. This is then distributed, all know this, and when someone does not like it, he can always go to the ministry and ask for an instruction.³⁷

h. Input from Developing States

A serious problem is the under-representation of newly industrialised states, states of transition and developing states. The problem is based on the simple fact that funds for travel are scarce and that many of these states lack expertise and personnel within the given technical area (ie chemical regulation in this case). Even though some support for capacity building is offered (for example by the United Nations Institute for Training and Research (UNITAR)), these few individuals are often heavily overloaded with work:

Developing countries [...] when we look how they operate in intergovernmental meetings and in negotiating meetings, lack, in my view, the real skills to negotiate their vested interest. There is very few of them that have that kind of background or...or expertise. They need [...] to go for a long time through the UNITAR training school for diplomats, you know, the [training on] chemicals management. I fully agree with a person who said there are too many meetings. And I can tell you why. If you look at the countries in economic transition, at developing countries, if, for example, you look at Senegal, the Ministry of Environment, you have two or three professionals that are doing Basel, Stockholm, Rotterdam, climate change, you know, forest...deforestation, everything. They spend their whole time going to international meetings, not doing any work at home. And that's the problem. It's a major, major problem, okay?³⁸

Even within the OECD the work is not evenly distributed. This is mainly due to differences in person-power, providing an advantage to the larger and highly industrialised countries:

Germany is large so that competences are widespread and tasks are more frequently distributed. [...] The workload—especially for the small member states—is very much heavier because they must do everything with a handful of people. [...] I know from colleagues from Finland, for example, that they

³⁷ Ibid.

³⁸ Interview IV.

have to prioritise. One must say for some issues, I don't do anything about it, one only takes those issues that are regarded as absolutely important.³⁹

As a consequence, third world perspectives are under-represented in GHS discourse:

What astonished me when I stepped into the process (I have negotiated a few conventions) was that the developing countries did not play any role. Zero! ... When we set up the committee I told the EU this cannot be true, that the developing countries are not taken into account. They had already fiddled with each other on the chairs and so on, one American and one European, and I said we must now have a third for the developing countries, and now we have a Brazilian in the chair group... Presently there are about 8 or 9 developing countries involved, Brazil, China, South Africa, Senegal, Chile, maybe eight, nine, ten. But 25 [of the participating states] are OECD countries. And that is a serious problem. The outcome resulting from the process is as I always say 'from the white man for the white man', and then the rest of the world shall take this up and the rest of the world asks itself: why should we and how can I influence it?⁴⁰

Greater participation by other world regions could, for instance, have led to a differentiation of hazard categories reflecting differences in dose-response ratios depending on climate, ecological, health and working conditions. Differences in language, culture and technical expertise could have been reflected in greater variation in labels, precautionary sentences and safety data sheets.

While greater opportunity for representation of developing states is provided in the meetings of the International Programme for Chemical Safety (IPCS), even their shortcomings have been noticed. For example, safety warnings on pesticides are often not read or understood by users of chemicals, or are not respected because of climatic conditions or financial restrictions:

The pesticides industries' standard statement is, that if you follow our use rules, the pesticides can be used safely. The problem is developing countries in the tropics. There, you can't put on the [safety, GW] suits.

And language across borders. For instance, Cambodia. You have green borders there. Everything's in Thai. All the pesticides are going across there. No one can read the label. Nobody knows, what they say. Yet Bayer said 'That's not our problem. It's the problem of the border control.' Can Cambodia control the border? You see you get into these kinds of ethical issues where I say industry can do better.

And pesticides have an entirely different character than other chemicals in relation to the whole development infrastructure, in particular, because in

³⁹ Ibid.

⁴⁰ Interview II.

developing countries the bulk of the economy is usually based on agriculture. [The practice of using pesticides is:] More is better, you know, and that is a different way. When we dealt with acutely toxic pesticides this raised issues of [voluntary, GW] commitments, not obligations. Nevertheless, it was the first time that the pesticide industry said that they were willing to withdraw a pesticide from the market—if it was proven it could not be used safely. You would never have gotten them to make that statement in the Rotterdam or Stockholm Convention. Still, whether they live up to it and honour it remains to be seen.⁴¹

A further problem, often disregarded in GHS discussions due to third world underrepresentation, is the increasing relocation of chemical production to developing countries that lack the personnel and technical infrastructure to ensure tight surveillance:

If you look at the OECD Outlook that predicted what's gonna happen in the chemicals future, you now, I think it's by 2010 most of the what you call generic chemicals, HPV chemicals, that is high-production-volume chemicals, are gonna be manufactured in developing countries, whereas in the OECD countries, you will have the designer chemicals. So where is the infrastructure going to be to ensure the quality and the control of this, you know. These are all recognized problems, but how pressure builds up to...to act on this, I don't know. You know, it's not...you'd never would have the blame game. At IFCS or anywhere else, no. It would be counterproductive. It has to be win-win for everybody who comes to the table.⁴²

v. The Result

The product of the described transnational organisational processes was a comprehensive and precise text of 443 pages.⁴³ It sets out new hazard categories pertaining to physical, health and environmental risks and also establishes new hazard symbols (as a means of communicating the nature of the hazard) and formats for safety data sheets. Chemicals are classified according to hazard type (eg, explosiveness, toxicity to humans, and environmental toxicity) and subtype (eg, human toxicity categories one to five). The text specifies which tests are required and establishes the applicable threshold values for each hazard category. For instance, toxicity for humans is defined as lethality for 50 per cent (LD₅₀) of rats exposed to a dose of up to 50 mg/kg body weight for 48 hours. For mixtures containing hazardous substances, alternative methods of determining the hazard of the entire mixture are set out. The new symbols are pictograms, which alert consumers and users to the inherent dangers of a substance. For

⁴¹ Interview IV.

⁴² Ibid.

⁴³ The 2003 version is available at www.unece.org/trans/danger/publi/ghs/ghs_rev00/00files_e.html (last visited 1 November 08).

instance, a skull with crossed bones means danger to human health due to acute toxicity. Safety data sheets contain information for professional users of substances regarding the hazards of substances and mixtures and precautionary measures.

Discussions and negotiations achieved compromises on the differences in approach between the major players: the European Union and the United States. Sometimes this required the European Union to lower its standards. For instance, in the European Union, the strictest category for acute toxicity used to range up until $LD_{50} < 25$ mg/kg body weight of the exposed rat. Adopting the American approach, the GHS reduced this to $LD_{50} < 5$ mg/kg.⁴⁴ This means that those restrictions that are triggered by the highest toxicity class will now apply to a significantly smaller number of substances.

Yes, it is the smallest common denominator. It is now as we start with the global harmonisation actually that what is acceptable for all. This is the smallest common denominator and certainly not much.⁴⁵

On the other hand, the GHS 'building block' approach produces built-in flexibility, allowing states to set their own standards as long as a minimum threshold is met. For instance, the GHS has five classes of acute toxicity. States are obliged to use the first four classes (Categories one to four ranging from higher to lower toxicity), but are free not to apply the fifth:

Of course you would like to have a worldwide, harmonised system, but I do not achieve a worldwide harmonised system through a very rigid system, a sink or swim, either you take or you leave it. Then the opposition will be too strong. This is the reason for the building block approach contained in the UN-GHS. It shall facilitate implementation on the national level.⁴⁶

The process did not end with the adoption of the 2002 text. The work continued and improvements were added, and a new consolidated version was adopted in 2007.⁴⁷ The major amendment concerns the codification of hazard and precautionary statements.⁴⁸ Two TGD and GHS subcommittees of the ECOSOC TDG/GHS Committee are continually working on further improvements.

⁴⁴ See a draft comparison of the EU and GHS criteria by the EU Commission, DG ENTR G1 REACH, 2005, available at <http://home.hetnet.nl/~MSDS.SAFETYDOCS/downloads/eughcomparisonclassifications.pdf> (last visited 1 November 2008).

⁴⁵ Interview II.

⁴⁶ Interview I.

⁴⁷ Available at www.unece.org/trans/danger/publi/ghs/ghs_rev02/English/00e_intro.pdf (last visited 1 November 2008).

⁴⁸ Laid down in Annex III of the GHS version 2007.

While the GHS aims at harmonising the rules of classification and labelling, it has not gone further and harmonised the classification and labelling of individual substances. The European Union proposed this as a next step, but the United States opposed this proposition:

The next step the EU took was to say, okay, we have harmonised the rules how everybody must classify and label but because different people produce different test results we must also harmonise the actual classification, and the EU has set up a list of classified substances. There is therefore a substance list in the EC on which the administrative bodies work meticulously, and they then say substance A is flammable, carcinogen, category 1 or 2. This costs much, much work. This is intentionally left out of the GHS, because the Americans did not want it. That is a European invention. ... But if I was a developing country—and I tell this them all—I would ask for such a list.⁴⁹

vi. Implementation

Many states have worked on transposing the GHS into national law. A 2007 OECD study shows that the OECD countries were at different stages of implementation.⁵⁰ Most of them planned to adopt GHS in all of the four main sectors: transport, industrial/workplace, consumer products and agriculture/pesticides. Several countries indicated that they did not plan to implement the GHS in certain sectors, or hazard classes and categories, taking the building block approach as provided under the GHS.

The EU Commission submitted a proposal for an implementing regulation in June 2007.⁵¹ It was (in record time for a document of not less than 1355 Official Journal pages) adopted by co-decision of the Council and European Parliament as Regulation (EC) 1272/2008.⁵² The Regulation is directly binding in the Member States. Almost all of the hazard classes, labels, hazard and precautionary statements and safety data sheet requirements of the GHS were adopted. However, the European Union made use of the building block approach, for instance, introducing more hazard categories than provided under the GHS. For some categories the level of health and environmental protection is lowered. Heavy costs for industry and public administration are expected from the changing from the old to the new classification and labelling system. These were

⁴⁹ Interview I.

⁵⁰ OECD 2007.

⁵¹ Commission (EC), 'Proposal for a Regulation of the European Parliament and of the Council on classification, labelling and packaging of substances and mixtures, and amending Directive 67/548/EEC and Regulation (EC) 1907/2006' COM (2007) 355.

⁵² Regulation (EC) 1272/2008 of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006 [2008] OJ L353/1.

considered to be worth the advantage of worldwide standardisation. Overall, the legislative bodies felt that they had no choice than to adopt GHS in full, retaining regional particularities only insofar as the GHS provided for this. As the EU Economic and Social Committee (EESC) stated in its comment on the Commission proposal:⁵³

The EESC also notes the views expressed by the Commission in its Legislative Financial Statement that 'the legislative proposal relates to the implementation of an international agreement. Even a negative ex-ante evaluation would not result in the Commission not putting forward a legislative proposal since other policy options do not exist. A negative ex-post evaluation would not induce the Commission to withdraw from its commitment to implement the internationally agreed system of Classification and Labelling.' Simply put, the Commission believes it had no choice but to put forward the proposal, whatever the calculated or actual balance of costs and eventual benefits.

III. THEORISING ON THE CASE

A. Summary of Characteristics

The characteristic features of the case study can be summarised as follows:

- Differences between states in the classification and labelling of chemicals are perceived to hinder free transnational trade. Many states do not operate any classification and labelling system.
- Plans to harmonise and adapt national systems appear on the international agenda.
- Soft law resolutions and memoranda of understanding of international organisations, often initiated by committed individuals, prepare the ground for further negotiations.
- Networks of national experts emerge who act for their home states, but enjoy significant room for manoeuvre. They develop into a complex set of transnational committees, subcommittees and working groups. International organisations provide these structures with symbolic backing and secretarial support.
- A few states (or rather their civil servants) take a lead position. Representatives from developing, transitional and newly industrialised states have very little impact.

⁵³ Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council on classification, labelling and packaging of substances and mixtures, and amending Directive 67/548/EEC and Regulation (EC) No 1907/2006 COM (2007) 355 final [2008] OJ C204/47.

- Industry representatives are very active, feeding information and assessments into the process, but also sometimes obstructing it. They do not have a right to formal vote.
- NGO representatives acting for the public interest are invited to participate, but are largely absent.
- Documents are made publicly available online, but only with the intent to inform about the results achieved and not to solicit comments from the public at large.
- Ongoing discourse is based on scientific argumentation, but is also characterised by policy disputes centering on the balancing of interests between industry and health/environmental protection, as well as between divergent regulatory philosophies in the United States and the European Union.
- In addition to scientific and moral discourse, the proceedings are characterised by bargaining and power play.
- The outcome is a comprehensive text, which harmonises standards sometimes at a low common denominator and provides some limited discretionary margins of state implementation. For many states, the outcome is a higher level of protection, but for others, such as the European Union, standards will in certain respects be lowered.
- Due to underrepresentation of developing interests some fundamental issues have received little attention, such as a differentiation of standards according to differences in climatic, ecological, cultural and technical conditions.
- While the transnational structures have produced proposals for regulation of classification they have not ventured into the classification of individual substances. This would have been helpful, especially for developing states, which lack the technical infrastructure to generate data and carry out risk assessments.
- The transnational network sought approval of the resulting text from ECOSOC, a global body that spans sectors and regions. ECOSOC endorsed the text, but did not make it binding. The text can therefore be regarded as a form of global soft law.
- This global soft law was later incorporated into the law of a growing number of states and regional communities, such as the European Union. The EU felt that they had no choice other than to adopt the scheme in full. There are deviations only to the extent allowed by the text.

B. Organisational Setting

The organisational setting that generated the resulting text could be characterised as a transnational network of national and international

personnel and institutions. It is important to note, however, that the transnational arrangement was relatively developed and sophisticated. A number of layers consisting of formal bodies and informal working groups and contact systems were incorporated into the process. As a result, the setting was more stable than the notion of network would suggest. While loose networks may be found in other transnational structures, our case is better characterised as a transnational committee system. Alluding to a similar phenomenon in the European Union, I suggest speaking of a transnational comitology, although it must be kept in mind that the GHS committee system is more fluid and autopoietic than the legally pre-formed EU comitology (Falke and Winter, 1996; Joerges and Vos 1999; Savino 2006). In particular it is much less controlled by mandates from states and international organisations than EU comitology is in relation to Member States and the EU Commission. The transnational comitology of our case embraced:

- formal councils like ECOSOC;
- committees such as the coordination group established by ECOSOC;
- semi-formal committees like the committee of experts on GHS established by Memorandum of Understanding between the sectoral international organisations;
- a multitude of issue-specific working groups;
- parallel working groups of regional organisations like the OECD;
- parallel expert rounds within states;
- parallel working groups within transnational industry associations and single companies;
- parallel working groups within public interest NGOs;
- last but not least, networks of individuals cross-cutting all of these formal and informal structures.

C. Procedures

It is noteworthy that the ongoing proceedings involve a multifaceted reasoning characterised by scientific argumentation and policy deliberation, but also sometimes ill-founded assertions, a stubborn refusal to learn, bargaining, compromising, tactics, collusion, and even blockades. In more theoretical terms, a peculiar *mélange* of four styles can be identified in this case study: scientific argument, policy-oriented reasoning, bargaining and power play.

The concept of deliberation does not fit comfortably within this *mélange*. As a result, the case cannot be taken as an example of directly deliberative democracy or deliberative polyarchy as proposed by Joshua Cohen and Charles Sabel (Cohen and Sabel 2005). Deliberation

emphasises the use of argument⁵⁴ and underrates the role of bargaining and power (Möllers 2005: 382). While the preconditions of deliberation—such as freedom from external and internal pressure—did to some extent materialise in this case, many other and less discursive behavioural patterns were also present.⁵⁵

Another way of characterising our case study is to draw on what is called the Open Method of Coordination (OMC). OMC was introduced in the European Union as a means of coordinating Member State policies in areas where the European Commission only has a coordinating function, and no regulatory powers (eg, social, education and immigration policies) (European Commission 2001: 21; Devetzi and Platzer 2009). The same situation exists in many areas of transnational administration, including the harmonisation of chemicals regulation. In this respect, the GHS process is one example of OMC. However, the heuristic value of OMC is undermined by the fact that the OMC has failed to produce a concept of structures and processes that may be used as a blueprint for comparison.⁵⁶

The concept of *negotiated order*, as proposed by Anselm Strauss, may also be consulted in the search for concepts that are less idealistic than the theory of deliberative democracy. This concept conceives of bargaining and power as core characteristics of interactions within organisations, in addition to technical and moral communication. Taking hospitals as their case, Strauss and his collaborators analyse conflict scenarios between doctors and staff to develop a complex picture of various styles of communicative and negotiative problem-solving (Strauss et al 1990: 189).

There are clear differences between Strauss's hospital study and our case, in particular because the treatment of patients is a service, not a

⁵⁴ See Cohen and Sabel 2005: 779: 'Deliberation subjects the exercise of collective power to reason's discipline, to what Habermas famously described as "the force of the better argument", not the advantage of the better situated. Questions are decided by argument about the best ways to address problems, not simply exertions of power, expressions of interest, or bargaining from power positions on the basis of interests.'

⁵⁵ Although it is not a prevalent idea in Western thought, the concept of *palaver* comes to mind as an alternative framework (for an exemplary anthropological case—the palaver of the Ndendeuli in Tanzania—see Gulliver 1969). Stripping it of its pejorative meaning, handed down from 'developed' cultures, palaver has been a constructive approach to solving conflicts in traditional African societies. It is now being studied as a concept for modern societies in Africa and elsewhere, Hegenbarth 1980: 55–58; UNESCO 1979; Richard 2008. Its appeal consists in that it allows for and integrates different kinds of reasoning and conduct that tend to be dissected and rationalised in 'developed' rules of discourse. In contrast to the approach in 'developed' literature and practice, this style does not distinguish between moral, instrumental, scientific, bargaining and strategic rationality. All features are intermingled. It is not far-fetched to consider transnational rulemaking under the GHS as a case of palaver. However, even the more modern conceptions of palaver seem to be more suited to resolving conflicts that are deeply rooted in culture, ideology and tradition, such as religious, racial or ideological wars, Koudissa 2004.

⁵⁶ I leave out as EC-specific the quest of the Commission that it should play a guiding role, and that the European Parliament should be kept informed, European Commission 2001.

regulatory undertaking. Still, there are also significant similarities. In both cases bargains between economic interests and concerns of a general public (or patients) have to be struck besides scientific or technical expert deliberations. Expertise alone does not guarantee conclusive solutions. Therefore, it appears to me that the notion of bargaining should be systematically integrated into concepts of deliberative democracy. Blending the work of Cohen/Sabel and Strauss, one might speak of negotiative deliberation, or—stressing the transdiscursive element of trading positions even further—‘bargaining deliberation’.

The product derived from these structures and processes can be termed negotiated or bargained consensus, reflecting the compromise that bridges the conflicting interests within societies and between states: in terms of health and environmental concerns, the result marks a relatively high level of protection; in terms of economic concerns, the costs of introducing the system are probably outweighed by the benefits of eased transnational trade; and in terms of national traditions, the marked difference between the US risk approach and the EU hazard approach was bridged. The achieved order leaves discretionary margins for implementing states and remains under permanent revision and improvement. There are also serious flaws due to the neglect of developing world interests. Nevertheless, the concept is broad enough to grasp such flaws, which resulted from the underrepresentation of developing world participants and their lack of bargaining power in the negotiations.

D. Implementation

In regards to implementation, it is noteworthy that the comprehensive GHS document was fully incorporated into EU law, without checking either the health and environmental impacts, or the economic costs of the system change. While the legislative procedure was correctly executed, the transnational product was not subjected to any democratic deliberation at the EU level. As the incorporating EU Regulation is directly applicable in Member States, there was no possibility of democratic control on the national level.

IV. THE QUESTION OF LEGITIMATION

A. Performance and Legitimation

The primary concern of much of the literature on global administrative regulation is legitimation (Möllers 2005; Kingsbury, Krisch and Stewart 2004/2005). This focus rests on the assumption that transnational

governance is likely to usurp hidden power, ie to establish itself as 'techno-crazy', whose activities must be tamed (*cf* Dahl 1989: 252; Habermas 1992: 385). Indeed, there are examples of usurpation and technocracy in the transnational arena. The International Monetary Fund (IMF) has often been blamed for transgressing its original mandate of guaranteeing the stability of the international monetary system. Despite this, IMF bureaucrats have incrementally expanded their mission into conditionalities and local politics reform (Barnett and Finnemore 2005: 45–72, 155–73).⁵⁷ The World Bank has also been criticised for its neo-liberal approach to health policies (Aginam 2005). Further examples include the aspirations, and failure, of the Basel Committee on Banking Supervision to prevent the credit crunches (Balin 2009) and the ongoing clandestine negotiations for an Anti-Counterfeiting Trade Agreement (ACTA), which works toward strengthening the intellectual property regime (Latrive 2010).

There are also cases of a more benign technocracy in transnational administrative rulemaking. By and large our case belongs to them, notwithstanding the shortcomings of the system with respect to US-EU compromises and developing world disregard. Therefore, before following the common emphasis on legitimation, it should be acknowledged that something surprising has been achieved by the fragile fabric and negotiative deliberation of transnational administration: it brought about economic and environmental harmonisation. The case shows that soft structures, processes and norms have the potential to be more expedient than their formal international counterparts. Consensus of the sort achieved in the transnational field appears to be a powerful problem-solving tool.

Given that the world is always in need of this kind of negotiated consensus, case studies of different transnational administrations could provide an explanation of how such processes are facilitated (Keohane and Nye 2000: 26). Such studies may also reveal why some initiatives are helpful and others turn out to be detrimental or counterproductive. Favourable conditions include the following:

- Conflicting interests pushing for harmonised rules (in casu: economic and environmental costs of diverse legal systems).
- A public awareness of the problem within the transnational sphere (in casu: the campaign in the late 1980s alleging 'toxic ignorance' of hazardous chemicals⁵⁸).
- The symbolic backing by international institutions (in casu: the Rio Conference and its Agenda 21).

⁵⁷ Refuting this allegation in part, see Head 2005: 78. For more examples of such so-called mission creep, see Stewart 2005.

⁵⁸ The campaign was based on a report published by the US Environmental Defense Fund in 1998. For impacts on EU politics, see Winter 2000: 177.

- The support of a number of individuals to act as policy entrepreneurs (in casu: experts from national sectoral administrations).
- The broad participation of many states, with a small number of states taking the lead (in casu: the United States and European Union).
- The participation of international organisations that are willing to provide logistical support (in casu: ILO, WHO, and OECD).

Returning to the examples of the IMF, the World Bank, the Basel Committee and ACTA, their counterproductive result may be explained by the closed shop style of their proceedings.

The search for effectiveness and constructive output must not be confounded with the normative question of legitimation. A resulting rule may be helpful for the resolution of a problem and thus be factually 'accepted', but this alone does not make it legitimate, ie 'acceptable'. To make it acceptable, the rulemaking procedure must respect certain safeguards, providing input legitimation. The content of the rule must also respect certain substantive yardsticks that guarantee output legitimation. Normally, procedural and substantive legitimation ensures the effectiveness of procedures and quality of output. In our case, for example, the text of the GHS could have been much improved in these terms by looking more specifically at third world conditions of human and environmental exposition to chemicals had the third world representatives had a better presence. Fair procedures may cost additional time, and the need to find compromises sometimes leads to sub-optimal results. These are the costs of democracy and respect for fundamental rights in exchange for the social cohesion and long-term welfare they provide. In the following section, I concentrate on procedural legitimation, leaving aside questions of fundamental substantial rights.

B. Practices and Criteria of Legitimation

When examining procedural legitimation, we should first of all specify what phenomenon ought to be legitimated. Legitimation in the traditional sense presupposes power and provides means to domesticate it. In the transnational sphere, however, power is not evident. Three aspects are relevant here, as follows:

- 'Public authority' has been suggested as a common characteristic of transnational public administration (Bogdandy, Dann, and Goldmann 2008). This notion shall capture the transnational informal rulemaking by a legal concept that triggers questions of law, and in particular democratic constitutional principles which require the legitimation of any public authority. The authors' intention to contrast the 'external' view on law of politological concepts (eg, governance, networks, etc) with an 'internal' legal concept of authority is, I believe, highly commendable.

- The notion of public authority must, however, be well understood in order to fit our case and many other cases of transnational networks and comitology. It should not presuppose some kind of centre that represents authority and is separated from a constituency. International organisations may be centres of this sort. However, in the transnational arena, administrative structures are normally highly fragmented and held together by weak connections. The GHS process is an example of such complex setting. Thus, authority in transnational networks and comitology is decentred and diffused.
- Authority in the transnational sphere is often based on consent. In our case, individual and state participants in the GHS bargaining process reached a consensus—if only in the sense customary in international frameworks, ie that there is no expressed dissenting opinion. They did not have to accept the command of others without their agreement. Thus, if power means the possibility to induce certain behaviour in a person against that person's will (Weber 1972: 28), there is no power relationship, and thus no need for additional legitimation (Lepsius 2007: 356). However, not all affected and interested parties were able to participate, including developing states, the public at large and NGOs representing it.

Looking for criteria of legitimation of diffuse authority in the transnational sphere, it has been suggested that principles of national administrative law should be scaled up to the transnational sphere (cf Stewart 2005). Traditional administrative law requirements for domesticating power are referred to as the three rules of 'natural justice' in English common law or procedural due process in US law. These are the rules against bias of decision-makers, the right of affected persons to be heard, and the duty of decision-makers to give reasons.⁵⁹

These rules are, however, not an exact fit because they are liberal concepts, presupposing identifiable sources of public authority, while transnational authority is diffuse and consent-based. While the duty to give reasons is also suitable for transnational arrangements the rule against bias is of questionable benefit, because there is no deciding body that is detached from conflicting parties. Chairpersons are certainly expected to ensure that the proceedings are fair, but they are not required to be unbiased and keep a distance from a substantive position. On the contrary, progress depends on them taking an active role; often they use their position to drive the process in a certain direction. Likewise, the right to be heard does not fit well. It is based on the notion that individuals are directly and legally affected by a decision. This was not the case due to the general and soft law character of the rules resulting from the transnational proceedings.

When looking for better-suited rules of procedure the very practice and meta-rules observed in the GHS can serve as a source of inspiration.

⁵⁹ Wade 1982: 413–20, 486. Sometimes, only the first two (*nemo iudex in re sua and audiatur et altera pars*) are counted as the core elements of natural justice, and the duty to give reasons as a later achievement, Wade 1982: 486.

Indeed, the process of ‘bargaining deliberation’ observed in the GHS case study did not advance without rules of procedure. The rules established by IOMC and the Coordination Group⁶⁰ indicate which procedural problems need to be addressed. According to the IOMC rules, committees must have a clear mandate, a defined number of members and observers, a chair and their own rules of procedure. They were also required to report to the IOMC body. Moreover, a practice—although imperfect—emerged to separate questions of science from questions of policy, and refer them to different bodies. These requirements and practices were a response to potential risk that consensus-building structures would become diffuse in terms of task, membership and procedure.

A number of rules were, however, missing from the GHS process that would be essential for fair proceedings. They may be drawn from what is called the second generation administrative law. While the first generation provides liberal rights in view of potential misuse of power, the new generation strives to democratise public administration, reacting to the fact that the bilateral relationship between authority and the individual has been replaced by multipolar constellations (Harlow 2006).

One issue to be taken care of is the limiting of powerful interests and the representation of weaker interests. Both the IOMC and Coordination Group neglected to establish any precise rules on the roles of participants in meetings. Although there was a rough distinction between observer and voting status, the rules did not specify where observation ends and voting begins. This is a question of crucial importance to prevent the capture of regulators by the regulated. Moreover, there were no rules to ensure that weaker interests are taken into account—either in the social dimension (health and environmental protection), or in the regional dimension (developing countries, countries in transition, newly industrialised countries).

Another issue is the bargaining and obstruction element in real world discourses: there were no rules for dealing with unbridgeable differences of interests that may lead to destructive tactics or bargaining. One minimum rule, somewhat domesticating such non-deliberative aspects of the proceedings, would be that the political question and achieved compromise should be laid open and explained.

Most significantly, there were no rules in place to ensure public transparency, such as access to information and notice and comment procedures. However, caution is appropriate as to the simple transfer to the transnational realm of national principles of second generation administrative law. The fragility of the transnational fabric should be taken into account: the proceedings were already so complex and information-loaded that to allow for more openness and to seek further input could jeopardise

⁶⁰ See above II. C. iii.

progress. After all, the consensus rule practised in the proceedings hardly precluded anyone from participating. Of course, candidates had to make an effort to enter the game.⁶¹

What then would be a concept of transparency reflecting the peculiarities of the transnational realm? Transnational administrative arrangements are often highly accessible via the internet. GHS negotiators have made numerous documents available online. However, acting committees, working groups and networks have complete discretion as to whether they will operate a website and what information will be posted. Instead, transnational administrative comitology should provide a right of access for all, and public participation should be facilitated. Given the concerns about information overload, this right can certainly not expose every move to public notice and comment. However, notice should be given and comments invited at strategic points, eg on draft terms of reference, draft membership, organisational and procedural rules, and major intermediate draft reports. In addition, exemption rules can be established denying access to state or trade secrets or privacy information.

In conclusion, we have seen that liberal conceptions of administrative law are incompatible with models of transnational proceedings that potentially include everybody, and operate by 'bargaining deliberation'. New rules of structures and procedures that aim to build consensus, and not majority decision-making, must be developed. The content of this new regime should include rules on determining membership, mandates, reporting, separation of technical and policy discourses, access to information, transparency of reasons and interests, public notice and comment at strategic and other stages.

C. A Role for the State?

How could these rules be elaborated, agreed upon and made binding? There are three strands of thought answering this question, one relying on informal self-regulation, the second on legal framing by state-based law, and the third on legal framing by international law.

i. Informal Self-Regulation

The first strand believes in a global law without the state (Teubner 1996, 2003; Fischer-Lescano and Teubner 2007). They trust that the transnational sphere will autopoietically develop its own means of self-control, through practice and—incrementally—informal meta-rules of procedure

⁶¹ Lange in chapter two.

and substance. A very optimistic version of this thought can be seen in a statement by Cohen and Sabel (2005: 296):⁶²

Suppose, in particular, a deepening of global administration in a wide range of areas of human concern, including security, health, education, environment, and conditions of work and compensation. Suppose, too, that such global rulemaking is increasingly accountable: preceded by hearings, shaped by participation of affected parties, subject to review, and defended by reference to what are commonly cognized as reasons in an emerging public reason of global political society. And suppose that accountable administration, in its deliberative polyarchic form, has a substantial, constructive impact on human well-being. We should venture to design a new network-related model which links different public and private actors beyond and within the state in a productive way. [...] Couldn't this all be true? Even without a global state? And if so, is it plausible that dispersed peoples might come to share a new identity as common members of an organized global populace, and not only in the humanitarian sense that all are human beings cohabiting the same planet, or the spiritual sense that all are living from dust to dust, or the utilitarian sense that we are all mutually interdependent?

Likeable as this proposition appears, there are too many examples, and foremost the stranding of self-control in the recent credit crunch, that advise against full trust in the self-organisational potential of the transnational sphere. The potential does certainly exist and should not be disregarded, but it must be critically checked.

Therefore, according to the second and third school, formal law is necessary to push informal law-making ahead. The state appears to be the only institution able to do this. Even if permeated by manifold external interferences, it still possesses, as a potential and last resort, the power of filtering out what shall be law and what shall not.

While both 'formal' schools of thought rely on the law-making power of the state, they differ with regard to degrees of internationalisation, one proposing a concept of 'society of states' (*Staatengesellschaft*) and the other a concept of 'community of states' (*Staatengemeinschaft*) (cf Paulus 2001; Roeben 2005; Sanson 2008). While the first stresses the power of the state controlling the entry of norms into its internal sphere (Giegerich 2009), the other emphasises the possibilities of international lawmaking (Fischer-Lescano 2005).

ii. State-Based Entry Control

Those that advocate entry control inquire into how the state might provide legitimation for transnational administrative rulemaking at the point at which transnational rules are integrated into national law.

⁶² Similarly dithyrambical, see also Ladeur 2004: 16.

a. Legislation

As yet, state-oriented scholars have not been very creative in designing models of how states could provide for fair procedures within the transnational realm. The orthodox approach is to channel inter- and transnational rules, once adopted, through national legislation to provide ex post facto legitimation. The constitutions of many states require that the legislature must, by law⁶³ or other decision,⁶⁴ consent to an international treaty before it can be ratified and become binding upon the state. In addition, for states belonging to the dualist tradition, a further legal act (which may be combined with the ratification law) is required to incorporate the international treaty into domestic law.⁶⁵

However, such (dual) involvement of the legislature is concerned with binding international and subsequent binding national law. When the international level is not aiming at making binding international rules, a law for ratification is not needed. Moreover, as transnational soft law does not oblige states to incorporate it, states are constitutionally not obliged to introduce incorporation laws. Indeed, in the GHS case, the aim was not to conclude binding international obligations, as ECOSOC only took a resolution recommending the GHS for implementation by states.

Therefore, in principle, domestic administrative bodies are constitutionally allowed to apply soft law on their own initiative, albeit within the framework of existing laws. Administrative decisions can, however, trigger constitutional protection where they encroach upon the individual rights of citizens or are deemed otherwise essential (eg, where manufacturers are asked to observe GHS rules when selling chemicals, or consumer health is endangered from misclassification of chemicals). For such cases state constitutions sometimes contain a 'legislative reservation' requiring legislation as a basis for administrative action. This is a constitutional requirement both under German⁶⁶ and EU⁶⁷ law. In conclusion,

⁶³ In Germany, for instance, a parliamentary law is required. See art 59 para 2 sentence 1 of *Grundgesetz*.

⁶⁴ In the EU the Council is responsible in approving a treaty. The European Parliament must inter alia give its consent in those areas which belong to the realm of co-decision of the Council and the Parliament. See art 218 TFEU.

⁶⁵ Dualism is much relativised by constitutional practice. In Germany, for instance, although a parliamentary law is in principle required for this purpose, the task of incorporation can be simplified in the following ways: (a) The law may empower government to incorporate treaties of a certain category by regulation. (b) If the treaty is sufficiently precise it may even directly be applied (the so-called self-executing treaties); the ratification law is then interpreted to contain a command of incorporation besides allowing ratification of the treaty.

⁶⁶ Thus, the German constitutional legislative reservation (*Gesetzesvorbehalt*). See Ladeur 1996 on its design and origin.

⁶⁷ The European Court of Justice (ECJ) has developed a doctrine reserving 'essential elements' of a policy to the decision of the legislative institutions (the European Parliament and

while a law is neither required for the ratification of transnational soft law nor for its incorporation into national law, it may well be necessary, if implementing decisions interfere with individual rights.

This raises the question of how much legitimation is in fact provided by this mechanism. Concluded in the transnational sphere without direct state involvement, the GHS does not leave much room for states to decide. States can refuse to adopt the GHS rules altogether, but, given the level of harmonisation that has been achieved, it would be extremely unwise to refuse transposition or make amendments beyond the discretionary margins allowed under the text. Proponents of the view that the state is still the master of the game disregard this factual dimension. Therefore, given that national legislators are not free to reject or modify soft law standards, the legitimation provided by incorporating soft law standards into domestic law must be regarded as a fiction.

b. Scaling Up Procedural Standards

An alternative approach would be to formulate a national policy that aims at making transnational rulemaking more transparent and participative. This could be accomplished in three ways:

- States might ask their representatives to promote these principles when acting in the transnational sphere.
- States could introduce safeguards to ensure that their representatives publish information on important aspects of transnational negotiations and invite public comments before negotiating in the transnational sphere.⁶⁸
- States could introduce a policy or legislative requirement that technical rules cannot be transposed into national law unless certain procedural safeguards have been met (Stewart 2005). Although this requirement could only be enforced at the transposition stage, it may have a prejudicial effect on the transnational negotiations, ensuring transparency and public involvement from the outset.

iii. *International Lawmaking*

State-based entry controls are problematic in that the transnational achievements may be wasted if states insist on copious control in order to

the Council), see for instance Case C-156/93 *European Parliament v Commission of the European Communities* [1995] ECR I-2019. cf *Triantafyllo* 1996. The principle was later codified in Art. 290 (2) TFEU.

⁶⁸ A legal provision in that direction was proposed by a German expert committee called the Risk Commission in a report of 2003 (www.bfs.de) saying that German positions in European and international rulemaking procedures of essential importance must be published beforehand. Along the same lines, see Stewart 2005.

accomplish de facto legitimation. It is therefore interesting to explore the possibility of making transnational rules of legitimation binding on the international level.

This process of juridification could be based on the self-organising potential of transnational structures. Our case shows that committees and transnational networks have themselves established certain procedural rules, for instance, subcommittees and working groups must have clear terms, they must regularly report on results, NGOs can participate but not vote, etc, although this potential is likely to be limited (Schmidt-Assmann 2008). In our case, a number of rules were lacking, such as rules on how to deal with conflicts of interests of participants, what documents shall be published, what documents shall be accessible to the public, what drafts shall be subjected to notice and comment procedures, what compensatory measures could be taken to ensure representation of disadvantaged, poor parties and NGOs. It is notable that transnational networks in other areas have generated more elaborate rules of procedure. For instance, technical committee members working under the Codex Alimentarius Commission framework are required to declare possible conflicts of interest.⁶⁹ On the whole, however, more ambitious rules must be developed.

Such achievements can be expected from horizontal transfers and the mutual learning of practices between different policy areas. Given the wide range of transnational administrative negotiations, binding international law might be developed to crosscut sectoral policy areas. Based on frequent practice and an emerging *opinio iuris*, and keeping in mind parallel developments within the national arena, international customary law or general principles of international law in the sense of article 38 lit b) and c) of the Statute of the International Court of Justice may emerge concerning a minimum set of procedural rules.⁷⁰

More ambitious rules could be laid down in an international convention. Following the path of the Aarhus Convention, such an agreement could concentrate on specific policy areas (eg environmental policy) and later be extended to other fields. Alternatively, a general approach that crosscuts different policy areas could be adopted. Its frame of reference would be the Vienna Conventions on the Law of Treaties between States and International Organisations and on the Representation of States in their Relations with International Organizations of a Universal Character.⁷¹ Of course, as these draft conventions create rules between states and international organisations, they are not applicable to more

⁶⁹ FAO/WHO Framework for the Provision of Scientific Advice on Food Safety and Nutrition, available at www.fao.org/ag/AGN/agns/files/Final_Draft_EnglishFramework.pdf 18–19. See Arnold and Herwig in chapters five and six respectively.

⁷⁰ The UN International Law Commission might be given a mandate to compile such a set.

⁷¹ Drafted by the UN International Law Commission and not yet in force.

informal networks between sub-state units and transnational structures. However, they could serve as a starting point for further conventions that structure the transnational realm.

D. Conclusion

Although an analysis of the three theoretical strands—autopoiesis, state entry control and international law—help to understand differences in constructing transnational administrative law, all of them must be combined if a viable solution is to be found. This is somewhat disenchanting from a theoretical perspective, but is in a way typical for the handling of practical problems. In the real world of transnational administrative rule-making, self-evolution, state input and international law coexist. Thus, three things must come together to improve transnational comitology:

- first, as evolving rules in the transnational space, an emerging practice of procedural and substantive self-control,
- secondly, as requirements by states, the postulate that transnational regulatory output is only accepted if derived from fair proceedings and obedience of minimal standards, and,
- thirdly, the gradual development of international principles and agreements on fair transnational procedures.

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