

# States, Markets and Beyond: Governance of Transboundary Water Resources

## ABSTRACT

*This article focuses on a comparison of states and markets in the management of transboundary water. Borders are often harbingers of change and areas of innovation. Nation states have struggled mightily to overcome problems of shared river basins and aquifers. Today, the state-centric model is losing its hegemony. Once the article has established the limitations of states as governing institutions, its attention turns to an alternative offered by public choice scholars. Proposals for functional, overlapping, and competing jurisdictions are subjected to critical scrutiny and found wanting. Both of these conceptual frameworks have serious flaws. While the state-centered model poorly captures the emerging complexities of intermestic politics, the market approach fails to incorporate institutions that foster intersectoral cooperation and communication. The article concludes that effective governance of fluid resources is increasingly and necessarily founded on the cooperative interrelationships of various institutions that represent the variety of complementing logics and functions within the transnational water arena.*

## INTRODUCTION

Throughout most of modern history, the state has been central to the development and allocation of water resources. Simply put, water has been viewed as too socially important to be left to private actors.<sup>1</sup> However, in the last two decades the notion that markets are far more effective and efficient than governments in managing water resources has gained momentum. Beginning as a policy idea espoused mainly by resource economists and public choice scholars,<sup>2</sup> privatization of water utilities became common practice in the United States and the United Kingdom.

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1. See generally ARTHUR MAASS & RAYMOND L. ANDERSON, *AND THE DESERT SHALL REJOICE: CONFLICT, GROWTH, AND JUSTICE IN ARID ENVIRONMENTS* (1978); HELEN INGRAM, *WATER POLITICS: CONTINUITY AND CHANGE* (1990); JOHN WALTON, *WESTERN TIMES AND WATER WARS: STATE, CULTURE, AND REBELLION IN CALIFORNIA* (1992).

2. See TERRY L. ANDERSON, *WATER CRISIS: ENDING THE POLICY DROUGHT* xii (1983).

Then, through the influence of such institutions as the World Bank—staffed heavily by resource economists imbued with the latest thinking—markets gained acceptance as water management institutions in many parts of the third world, particularly Latin America. Most recently, the commodity or market view of water has reached the international stage, and in March 1998 the United Nations Conference on Sustainable Development urged that the outmoded concept of water as a public good be cast aside in favor of market-based pricing.<sup>3</sup> In an increasingly globalized world where goods and services are circulating freely, it is logical to suppose that water, which flows from willing sellers to willing buyers within nations, will also flow across international boundaries. Further, the market model has great appeal. Besides attracting academic theorists to their elegance and simplicity, public choice approaches also appeal to the powerful, profit-oriented industrial and economic interests who profit from favorable contemporary changes to free and open trading.

This article focuses upon a comparison of states and markets in management of transboundary water. Borders are particularly attractive as sites for such a study, tending to be areas of opportunity and innovation, and serving as harbingers of more general change. Moreover, transboundary water has long presented problems to nation states due to system-wide impacts of isolated actions on shared river basins and aquifers. Nation states have struggled mightily to overcome the transboundary problem, as reflected in the more than 256 international laws and treaties dealing with water issues.<sup>4</sup> The ineffectiveness of these laws and treaties would provide bright prospects for the utilization of market models were they better suited for these kinds of problems.

In different sections of the article, the fundamental distinguishing features of the state-centric and market models are listed. Both approaches will be evaluated with respect to three criteria:

1. *Explanatory power*: Does it closely model observable real-world processes and institutions?
2. *Problem solving capacity*: Does it provide descriptions and solutions that make problems easier to deal with?
3. *Democratic implications*: Does it provide an adequate perception of democracy and does it facilitate and enhance democratic practices?

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3. See Kirkpatrick Sale, *Liquid Asset*, NATION, May 11, 1998, at 7, 58.

4. See Joseph F. DiMento, *Black Sea Environmental Management: Prospects for New Paradigms in Transitional Contexts*, in REFLECTIONS ON WATER: NEW APPROACHES TO TRANSBOUNDARY CONFLICTS AND COOPERATION 488, 492 (Joachim Blatter & Helen Ingram eds., forthcoming Dec. 2000).

The article starts with the fundamental features of the state-centric model for the governance of transboundary water resources. Through a historical analysis of the development of institutions of transboundary water governance in Europe and North America, it shows that the state-centric model was in congruence with reality until the 1960s. Since then, this approach has failed to capture the increasingly complex web of institutions and interactions that currently characterizes transboundary water politics. Insufficient performance with respect to problem solving and the degree of democratic responsiveness will be identified as the driving forces that have changed the institutional setting in transboundary water politics. The section closes by making the point that the state-centric model is not just losing its hegemony empirically but, from a normative standpoint, is justifiably being replaced due to a failure to provide the conceptual underpinnings for institutions of efficient and democratically accountable governance.

The article will then turn to a more conceptual analysis of the club model, which derives from market based concepts. Lacking actual evidence, it will examine the work of Frey and Eichenberger, prominent public choice scholars who have gotten a good deal of attention in Europe and North America for proposing "functional, overlapping, and competing jurisdictions (FOCJ)."<sup>5</sup> After outlining the general features of this proposal, the article will evaluate FOCJ in terms of our three evaluation criteria. It will find that FOCJ might help overcome some problems of the state-centric approach but probably will have serious negative side effects in respect to problem solving and democratic practices. These side effects consist of deepening local rifts and the undermining of democratic citizenship in favor of pure consumerism. Our conclusion makes a case for more complex models that include a broader variety of political actors, institutions, and modes of water resources governance.

### STATE-CENTRIC APPROACHES

Most of the literature on transboundary water management in the twentieth century has taken for granted that the governments of nation states are responsible for building institutions of governance for transboundary water resources. In this regard, those who support the sovereign state include international lawyers, diplomats, bureaucrats, planners, and technocrats who are influential in adapting institutions to the

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5. Bruno S. Frey & Reiner Eichenberger, *FOCJ: Competitive Governments for Europe*, 16 INT'L REV. L. & ECON. 315, 322 (1996).

changing international order.<sup>6</sup> Moreover, the state-centric model still dominates the thinking of many international water resources specialists, who continue to recommend international water resources basin commissions that are accountable to sovereign governments staffed by bureaucratic experts.<sup>7</sup>

The theoretical foundation of the state-centric approach can be briefly summarized as follows. Institutions of governance are the instruments of political communities to serve the common good. History has led to the dominance of nations as basic units for political communities. The sovereign nation state, which is territorially defined and serves multiple purposes, including representing the will of the people, is the only legitimate actor or agent for the national interest in the international arena. The central government is the hierarchical power capable of implementing international agreements in the domestic arena. While for some purposes power may be decentralized to particular national agencies or to lower levels of government, the formal structure remains hierarchical.<sup>8</sup>

The state-centric approach is deeply entrenched in concepts originating from the Enlightenment. Ideally, the "imagined community" of the nation makes it possible to overcome the old divisions of class and religion and ensures the equality of all citizens. The aggregated will of the people is concentrated in the national center—either by a parliament (the Westminster model) or a president (the Napoleonic model). The national government and the bureaucracy are seen as instrumental to implementing this will of the people and, therefore, have the legitimate monopoly to coerce within the domestic realm and to promote the national interest in the international realm. Even in non-unitarian, federal states like the United States or Germany, the basis for political representation is the territorial unit (electoral districts). In almost all modern nation states, citizenship is defined on the basis of territory; therefore, geographical borders are important lines of demarcation for the political community. They are central for the security and identity of nations and nation states.

Development of the modern nation state has gone hand in hand with the rise of bureaucracy. The coercive power held by the nation state is exercised through trained experts who are bound by rules derived rationally and applied consistently. Concepts of accountability and legitimacy follow a clear-cut, linear logic of representation: from the people

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6. See Joachim Blatter et al., *Emerging Approaches to Comprehend Changing Global Contexts*, in REFLECTIONS ON WATER: NEW APPROACHES TO TRANSBOUNDARY CONFLICTS AND COOPERATION, *supra* note 4, at 1, 6, 17-19.

7. See 1 NURIT KLIOT ET AL., INSTITUTIONAL FRAMEWORKS FOR THE MANAGEMENT OF TRANSBOUNDARY WATER RESOURCES 39 (1998).

8. See Herbert A. Simon, *The Architecture of Complexity*, 106 PROC. AM. PHIL. SOC'Y 467, 481-82 (1962).

to parliament or president, then to the government bureaucracy. Modes of control follow the same linear logic: parliament sets general rules that are applied by the bureaucracy and have to be followed by the citizens. When this linear logic is transferred into the international realm, the chain of indirect representation and control is lengthened. Rather than the directly elected parliament setting the general rules, the officials of the central governments come together and negotiate the principles, norms, rules, and decision making procedures that provide the basis for an international regime.<sup>9</sup> Furthermore, a commission with a legal and technocratic apparatus is created for the day-to-day management. This apparatus works on the basis of the logic of deduction: applying general norms from international law and specific provisions of international treaties, or applying laws of physics through technical solutions. The use of deductive logic helps to overcome nationalistic and egoistic interests of the participating states.

In sum, the formation of preferences in state-centric approaches always begins with territorially defined units. The basis for aggregation of interests as well as the application of rules follows formal hierarchical lines. The arena of cross-border interaction is dominated by diplomats, bureaucrats, and technocrats who are designated by national governments. From the state-centrist point of view, the international activities of sub-national actors are often classified as "deviant behavior"<sup>10</sup> undermining the power of the nation state or threatening to disrupt the conduct of foreign affairs.<sup>11</sup> Involvement in international aggregations is seen as restricting the bargaining flexibility of the national negotiators and as an obstacle to implementing international agreements.<sup>12</sup> Even in federal systems, it has been taken for granted that the state is to speak as one nation beyond national boundaries.<sup>13</sup>

In the following historical overview of the development of transboundary water institutions in Europe and North America, we show the initial strength and later weakness of the state-centric model. While the concept worked well in both a descriptive and prescriptive sense early in the development of transboundary water management institutions, it has more recently lost both explanatory power and prescriptive usefulness. The section closes by evaluating the state-centric model in terms of our three

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9. See the examples in *INTERNATIONAL REGIMES 2-5* (Stephen D. Krasner ed., 1983).

10. See generally Brian Hocking, *Regional Governments and International Affairs: Foreign Policy Problem or Deviant Behavior?*, 41 *INT'L J.* 477 (1986).

11. See John D. Stempel, *Losing It: The Decentralization of American Foreign Policy*, 64 *J. ST. GOV'T* 122, 122-23 (1991).

12. See IVO D. DUCHACEK, *THE TERRITORIAL DIMENSION OF POLITICS: WITHIN, AMONG, AND ACROSS NATIONS* 248-51 (1986).

13. See *id.* at 118.

criteria—explanatory power, problem solving capacity, and implications for democracy—and finds the state-centric model to be seriously wanting.

### Sovereign Approaches to Transboundary Water Management

The state-centrist approach is congruent with the emergence of transboundary water resources institutions, at least until the 1960s. As described below, transboundary water management in North America and Europe has been entrusted by the central governments to technical commissions with limited autonomy. These commissions were the first mechanisms for cooperative and joint problem solving, but they were almost always designed to be instruments of central governments. Therefore, their success and failure depend very much on the political will of those central governments.

Once the territorial boundaries of the modern nation states were stabilized (at least in the Western world) and borderlands were no longer at the forefront of military conflict, cooperation across borders began to be institutionalized. In transboundary water resources, we find some of the oldest examples of such cooperation. At the U.S.–Canadian border, the oldest, and most visible and respected joint institution is the International Joint Commission (IJC), founded by the Boundary Waters Treaty of 1909<sup>14</sup>. It was assigned four functions:

1. administrative;
2. quasi-judicial: passing judgment upon applications for permission to use, divert, or obstruct treaty waters;
3. arbitral: making binding decisions with respect to disputes between the two countries; and
4. investigative: examining any differences arising along the common boundary.<sup>15</sup>

At the U.S.–Mexico Border, an International Boundary Commission was established in 1899.<sup>16</sup> The 1944 United States–Mexico Water Treaty<sup>17</sup> changed the name of this commission to the International Boundary and Water Commission (IBWC) and enlarged its powers to include resolution

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14. Treaty Relating to Boundary Waters between the United States and Canada, Jan. 11, 1909, U.S.–Gr. Brit., 36 Stat. 2449.

15. See WILLIAM R. WILLOUGHBY, *THE JOINT ORGANIZATIONS OF CANADA AND THE UNITED STATES* 17-18 (1979).

16. Stephen Mumme, *Innovation and Reform in Transboundary Resource Management: A Critical Look at the International Boundary and Water Commission, United States and Mexico*, 33 NAT. RESOURCES J. 93, 94 (1993).

17. Treaty Regarding Utilization of Waters of Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, U.S.–Mex., 59 Stat. 1219.

of disputes over water use.<sup>18</sup> The functions of the Commission are explicitly defined and technically narrow, falling within three broad categories: (a) administration, (b) adjudication, and (c) liaison-investigation.<sup>19</sup>

In Europe, the initial process of institution building for transboundary issues was interrupted by the World Wars, after the creation of the Central Commission for Navigation on the River Rhine in 1915.<sup>20</sup> For the River Rhine, the major international commissions were set up in the two decades following the Second World War. France and Germany signed treaties that established the Commissions for the Development of the Upper Rhine in 1956 and 1969 with the purpose of maximizing usage of the waters for navigation and electricity production.<sup>21</sup> In 1963 the International Commission for the Protection of the River Rhine against Pollution was created by the national governments of Switzerland, France, Germany, Luxembourg, and the Netherlands.<sup>22</sup> It was assigned the following functions: (a) investigating the scope and sources of pollution, and (b) preparing recommendations and foundations for agreements among the participating states.<sup>23</sup> Similar institutionalization processes can be observed at Lake Constance. Until the 1960s, the fisheries commission, created through a treaty in 1893, was the only intergovernmental institution in the region.<sup>24</sup> In 1960, the International Commission for the Protection of Lake Constance was established as a result of an international agreement among the German *Länder Baden-Württemberg und Bayern*, the Swiss *Eidgenossenschaft*, the Swiss Cantons of St. Gallen and Thurgau, and the Republic of Austria.<sup>25</sup>

### Sovereignty and the Criterion of Explanatory Power

Beginning in the 1960s, state-created transboundary water institutions have faced a variety of criticisms. Most can be traced to the perceived incapacity of existing transboundary institutions to solve problems. More fundamentally, these criticisms have been fueled by

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18. See Stephen C. McCaffrey, *Transboundary Environmental Relations between Mexico and the United States*, in TRANSATLANTIC COLLOQUY ON CROSS-BORDER RELATIONS: EUROPEAN AND NORTH AMERICAN PERSPECTIVES 191, 191-93 (S. Ercmann ed., 1987).

19. See Mumme, *supra* note 16, at 95.

20. JOACHIM BLATTER, GRENZÜBERSCHREITENDE ZUSAMMENARBEIT IM GEWÄSSER-UND AUENSCHUTZ AM OBERRHAIN 10 (1994).

21. See *id.*

22. See *id.* at 11.

23. See *id.*

24. See HEINZ MÜLLER-SCHNEGG, GRENZÜBERSCHREITENDE ZUSAMMENARBEIT IN DER BODENSEEREION, BESTANDESAUFNAHME UND EINSCHÄTZUNG DER VERFLECHTUNGEN POLITISCH-ADMINISTRATIVER UND ORGANISierter PRIVATER GRUPPIERUNGEN 122-23 (1994).

25. See *id.* at 123.

expressions of broad democratic values from emerging grassroots environmental movements that challenge existing technocratic policies.

Scientific and public controversy revolves around the question of whether a more integrated, supra-national regulation of transboundary watercourses is necessary and feasible. Ecologists, planners, and many international lawyers support a system of more autonomous supra-national agencies having much broader mandates. Dworsky and Utton, for example, advocate central control and "a binational institution to administer and implement the control and regulation of water pollution."<sup>26</sup> Other "realistic" scholars in political science and law, as well as practitioners, stress the importance of the commitment of the sovereign nation-states and prefer depoliticized technical co-operation and carefully limited increases in the scope of the mandates.<sup>27</sup>

Neither of these positions has been supported by real-world experiments. Attempts in the seventies to install central supra-national agencies failed. The European Commission made such a proposal for the River Rhine, but it was neglected by the European Council.<sup>28</sup> Equally disturbing, analysts found little correlation between the legal authority of institutions to solve problems and their performance in doing so. At least on paper, the International Boundary Waters Commission (IBWC) is among the most powerful transboundary water management institutions in the world. However, the waters under its jurisdiction were steadily degraded over a number of years<sup>29</sup> until the situation emerged as a "crisis" during the NAFTA side-agreements debate in the U.S. Congress.

On the other side, the position advocating depoliticized diplomacy by technical experts came under more and more pressure.<sup>30</sup> Sanchez states, "it is more evident every day that the isolated, autonomous, and authoritarian operations of the Commission [IBWC], do not meet the current demands and needs of the border communities."<sup>31</sup> Ingram and White criticize the IBWC for operating under a cloak of diplomatic secrecy, which limits opportunities for local citizens—exposed to contamination and water shortages—to either understand or act to ameliorate these

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26. Leonard B. Dworsky & Albert E. Utton, *Assessing North America's Management of Its Transboundary Waters*, 33 NAT. RESOURCES J. 413, 427 (1993).

27. See Alan M. Schwartz & Joseph T. Jockel, *Increasing Power of IJC*, INT'L PERSP., Nov.-Dec. 1983, at 3, 3-4.

28. See BLATTER, *supra* note 20, at 14.

29. See Helen Ingram & David R. White, *International Boundary and Water Commission: An Institutional Mismatch for Resolving Transboundary Water Problems*, 33 NAT. RESOURCES J. 153, 153, 157 (1993).

30. See generally Roberto Sanchez, *Public Participation and the IBWC: Challenges and Options*, 33 NAT. RESOURCES J. 283 (1993).

31. *Id.* at 285.



problems.<sup>32</sup> A study on environmental cooperation at Lake Constance concluded that there was no cross-border policy; in its stead was found only a cross-border administration of environmental problems.<sup>33</sup>

In place of such weak state-centered approaches, other cross-boundary relationships have begun to evolve in ways not at all anticipated by state-centrist theory. A dense web of interactions across borders is leading to networks and ties that are proving to be the backbones and the muscles for innovative management of transboundary resources. Several elements have contributed to this process.

First, new agreements were signed, introducing wide-ranging programs: in the Great Lakes region, the Water Quality Agreements of 1972 and 1978 and a Protocol in 1987;<sup>34</sup> and, for the Rhine River, the 1976 Working Program and the Rhine 2000 Action Program in 1987.<sup>35</sup> The signing of guidelines for the Protection of Lake Constance in 1967 and their revision in 1987 were milestones in that region.<sup>36</sup> The introduction of an ecosystem approach in the late eighties enlarged the programmatic scope of the water commissions significantly. Notably, the impetus for such agreements has not come largely from a process of bureaucratic planning but from NGOs.

Second, complex and comprehensive structures evolved within and around the commissions. The International Commission for the Protection of the River Rhine against Pollution provides an impressive example. The Commission itself contains an assembly, a secretariat, a president, a coordinating group, several working groups, and even more specialized sub-groups. Parallel and complementary mechanisms are the Conference of the Ministers of the Riparian States on the international level and coordinating commissions, such as the *Deutsche Kommission zur Reinhaltung des Rheins* and the *Arbeitsgemeinschaft der Länder zur Reinhaltung des Rheins* in Germany, on the national level.<sup>37</sup>

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32. See Ingram & White, *supra* note 29, at 156.

33. See ROLAND SCHERER & HEINZ MÜLLER, *ERFOLGSBEDINGUNGEN GRENZÜBERSCHREITENDER ZUSAMMENARBEIT IM UMWELTSCHUTZ, DAS BEISPIEL BODENSEEREION* 125 (1994).

34. See Leonard B. Dworsky, *Ecosystem Management: Great Lakes Perspectives*, 33 NAT. RESOURCES J. 349, 351 (1993).

35. See BLATTER, *supra* note 20, at 11.

36. See 1 INTERNATIONALE GEWÄSSERSCHUTZKOMMISSION FÜR DEN BODENSEE, *RICHTLINIEN FÜR DIE REINHALTUNG DES BODENSEES* (1967); 27 INTERNATIONALE GEWÄSSERSCHUTZKOMMISSION FÜR DEN BODENSEE, *RICHTLINIEN FÜR DIE REINHALTUNG DES BODENSEES* (1987).

37. See BLATTER, *supra* note 20, at 10-11. The importance of sub-national influence in formally international commissions and negotiations has also been shown by Mumme. See Stephen P. Mumme, *State Influence in Foreign Policy Making: Water Related Environmental Disputes along the United States-Mexico Border*, 38 W. POL. Q. 620, 621 (1985). See also Helen

Third, a certain kind of identity among the participants and across national backgrounds evolved during the process. Haas labels this phenomenon an "epistemic community," which he defines as "a specific community of experts sharing a belief in a common set of cause-and-effect relationships as well as common values to which policies governing these relationships will be applied."<sup>38</sup> Experts were not alone in forming cross-border communities and in leading the way towards joint action. Growing cross-border relationships between environmental NGOs have been recognized in Europe and North American, and their importance—especially as agenda setters, producers of innovative ideas, and monitors of actual events in the field—is widely acknowledged.<sup>39</sup>

Fourth, and most important, many new transnational and cross-border linkages and institutions emerged. In Europe, the sixties and the early seventies brought a first wave of cross-border contacts and institutions of sub-national actors. In the Upper Rhine Valley the best known institution, the *Regio Basiliensis*, was founded in 1963, followed in 1972 by the creation of intergovernmental commissions, the *Comité Tripartite* (French-Swiss-German) and the *Comité Bipartite* (French-German).<sup>40</sup> Although these commissions were created by an exchange of letters between the central governments, their members are sub-national governmental units of the three nation states.<sup>41</sup> These intergovernmental commissions installed several working groups that later fused into the Upper Rhine Conference.<sup>42</sup> Within the working group "Environment," a committee of experts was formed to work on the topics of water quality and hydro-biology.<sup>43</sup> During the 1960s, the water utilities along the Rhine

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M. Ingram & Suzanne Fiederlein, *State Government Officials' Role in U.S./Mexico Transboundary Resource Issues*, 28 NAT. RESOURCES J. 421 (1988); NEIL A. SWAINSON, *CONFLICT OVER THE COLUMBIA: THE CANADIAN BACKGROUND TO AN HISTORIC TREATY* (1979); JOACHIM BLATTER, *GRENZUEBERSCHREITENDE ZUSAMMENARBEIT IM GEWAESSERSCHUTZ AM BODENSEE* 39 (1994) [hereinafter BLATTER-BODENSEE].

38. Peter M. Haas, *Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control*, 43 INT'L ORG. 377, 384 (1989).

39. See generally HELEN INGRAM ET AL., *DIVIDED WATERS: BRIDGING THE U.S.-MEXICO BORDER* (1995). See also ROLAND SCHERER & JOACHIM BLATTER, *PRECONDITIONS FOR SUCCESSFUL CROSS-BORDER COOPERATION ON ENVIRONMENTAL ISSUES: RESEARCH RESULTS AND RECOMMENDATIONS FOR A BETTER PRACTICE* (1995); Mimi Larson Becker, *The International Joint Commission and Public Participation: Past Experiences, Present Challenges, Future Tasks*, 33 NAT. RESOURCES J. 235 (1993).

40. See James Wesley Scott, *Transborder Cooperation, Regional Initiatives, and Sovereignty Conflicts in Western Europe: The Case of the Upper Rhine Valley*, *PUBLIUS*, Winter 1989, at 139, 144.

41. See *id.*

42. See *id.*

43. See *id.*

formed international associations to lobby for better protection of water quality.<sup>44</sup>

The late 1960s and early 1970s witnessed the creation of new cross-border commissions at Lake Constance: a regulatory body for shipping/navigation on the lake and a commission for land planning.<sup>45</sup> The commissions were established by international treaties or exchanges of notes between the respective federal governments. Together with the Austrian Land of Vorarlberg, the commission for land planning produced the *Internationales Leitbild für das Bodenseegebiet* (a comprehensive development program for the Lake Constance area) during the early eighties.<sup>46</sup> This program gave much attention to water issues. Furthermore, in 1972 the government of Baden-Württemberg called a meeting of the political leaders of the Länder and Cantons in Konstanz that gave birth to the *Internationale Konferenz der Regierungschefs der Bodenseeländer* (IBK)—a conference without any formal agreement or parliamentary ratification.<sup>47</sup> The IBK developed a more sophisticated structure in the late seventies, with a standing committee and working groups. During its first 15 years, the IBK was mainly concerned with water issues.<sup>48</sup>

Expanded cross-border links and institutions emerged in the climate of change at the end of the 1980s. Stimulated by continental integration processes like the European Internal Market (1992),<sup>49</sup> private and public actors in border regions were looking for alliances and partners—and discovered the other side of the border. Public-private regional associations were strengthened (as in the Upper Rhine Valley) or newly founded (like the *Bodenseerat* at Lake Constance). Continental integration also brought the INTERREG-initiative by the European Union in 1991.<sup>50</sup> This program provides money for regional cross-border projects. To receive money from the INTERREG-initiative, the border regions must present operational programs, and new organizational structures have been established to decide which projects will be funded. The steering committees for the INTERREG II programs consist mainly of regional officials, but the federal governments and the EU commission also

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44. See BLATTER, *supra* note 20, at 12-15.

45. See BLATTER-BODENSEE, *supra* note 37, at 39.

46. See *id.*

47. See *id.*

48. See *id.*

49. See Joachim Blatter, *Explaining Crossborder Cooperation: A Border-Focused and Border-External Approach*, J. BORDERLANDS STUD., Spring & Fall 1997, at 151, 160.

50. See Joachim K. Blatter, *Entgrenzung der Staatenwelt? Politische Institutionenbildung in grenzüberschreitenden Regionen in Europa und Nordamerika* 113-14 (1998) (unpublished Ph.D. dissertation, Martin Luther Universität Halle-Wittenberg) (on file with author).

participate.<sup>51</sup> All these new linkages and institutions are strongly concerned with and involved in transboundary water issues.

Similar developments at the national borders occurred in North America. The longest tradition of sub-national cross-border cooperation exists in the eastern U.S.–Canadian border region and at the Great Lakes.<sup>52</sup> However, attempts to establish institutionalized linkages between sub-national units were initiated at the U.S.–Mexican border as early as 1964, when the Commission of the Californias was founded.<sup>53</sup> In the early seventies, the cities of San Diego and Tijuana developed closer contacts, a process which culminated in the founding of the cross-border association *Fronteras de las Californias* 1976.<sup>54</sup> Finally, the Border Governors Conference was established in 1980. This group of sub-national leaders developed later into a permanent institution holding annual meetings and setting up several working groups.<sup>55</sup> As in Europe, these sub-national linkages gained real momentum with the introduction of and subsequent debates about free trade regimes on a continental level; for example, with the Free Trade Agreement (FTA 1988) between Canada and the United States<sup>56</sup> and the North American Free Trade Agreement (NAFTA 1994) between the United States, Canada and Mexico.<sup>57</sup> Even in border regions where attempts to form sub-national cross-border linkages had previously failed, new initiatives and institutions have sprouted and taken root. This was the case in the Pacific Northwest where many activities to create a cross-border region called Cascadia occurred in the late 1980s and early 1990s.<sup>58</sup> A meeting of legislators from the Canadian provinces of British Columbia and Alberta and the U.S. states of Alaska, Washington, Oregon, Idaho, and Montana resulted in the founding of the Pacific Northwest Economic

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51. See *id.* at 114.

52. See generally Elliot J. Feldman & Lily Gardner Feldman, *The Impact of Federalism on the Organization of Canadian Foreign Policy*, *PUBLIUS*, Fall 1984, at 33. See also Martin Lubin, *The Routinization of Cross-Border Interactions: An Overview of NEG/ECP Structures and Activities*, in *STATES AND PROVINCES IN THE INTERNATIONAL ECONOMY* 167 (Douglas M. Brown & Earl H. Fry, eds., 1993); Donald K. Alper, *Recent Trends in U.S.–Canada Regional Diplomacy*, in *ACROSS BOUNDARIES: TRANSBORDER INTERACTION IN COMPARATIVE PERSPECTIVE* 119, 120 (Oscar J. Martinez ed., 1986).

53. See T. ZANE REEVES, *THE U.S.–MEXICO BORDER COMMISSIONS: AN OVERVIEW AND AGENDA FOR FURTHER RESEARCH* 4 (Center for Inter-American & Border Studies, 1984).

54. See Blatter, *supra* note 50, at 177.

55. See XII BORDER GOVERNORS' CONFERENCE : UNITED STATES–MEXICO, PHOENIX, ARIZONA 4 (MAY 25–27, 1994).

56. See Donald K. Alper, *The Idea of Cascadia: Emergent Transborder Regionalism in the Pacific Northwest–Western Canada*, *J. BORDERLANDS STUD.*, Fall 1996, at 1, 9.

57. See Blatter, *supra* note 49, at 160.

58. See Alper, *supra* note 56, at 7.

Region (PNWER) in 1991.<sup>59</sup> Focused mainly on economic issues, PNWER also created working groups concerned with water-relevant issues like environmental technology, tourism, and agriculture.<sup>60</sup> Many other activities followed in the wake of a failed proposal by two national legislators for a Cascadia Corridor Commission.<sup>61</sup> This commission was envisioned as an advisory body with the authority to establish a forum to coordinate consideration of regional issues in the Cascadia region by local, state, provincial, regional, and national governments and to develop a strategic plan for environmentally sound economic development in the Cascadia region.<sup>62</sup> Washington State and British Columbia resisted the installation of such a commission because they feared a too powerful federal involvement.<sup>63</sup> Instead they established an Environmental Cooperation Council in May 1992.<sup>64</sup>

On the U.S.-Mexican border, NAFTA employed side-agreements to establish two new institutions to focus on the border and on water issues. These were the Border Environmental Cooperation Commission (BECC) and the North American Development Bank (NADBANK), both established in 1994.<sup>65</sup> Their responsibility is to address problems related to water supply, wastewater treatment, and municipal solid waste management on the U.S.-Mexico border.<sup>66</sup> The NADBANK's task is to facilitate financing for the development, execution, and operation of projects that have been environmentally and technically tested and certified by the BECC.<sup>67</sup> Both institutions have advisory boards and processes that

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59. See *id.* at 5-7.

60. See *id.* at 6.

61. See *id.* at 9.

62. See *id.*

63. See *id.*

64. See Jamie Alley, *The British Columbia/Washington Environmental Cooperation Council: An Evolving Model of Canada/U.S. Interjurisdictional Cooperation*, in ENVIRONMENTAL MANAGEMENT ON NORTH AMERICA'S BORDERS 53 (Richard Kiy & John D. Wirth eds., 1998).

65. See Blatter, *supra* note 49, at 161.

66. See Border Environment Cooperation Commission, *BECC'S Functions* (visited Feb. 1, 2000) <<http://www.cocf.org/antecedentes/ing43.htm>>; North American Development Bank, *General Overview* (visited Feb. 1, 2000) <[http://www.nadbank.org/english/about\\_bank/Overview/Overview\\_Text.htm](http://www.nadbank.org/english/about_bank/Overview/Overview_Text.htm)>. Both organizations are operating under a November 1993 agreement between the United States and Mexican governments. Agreement Between the Government of the United States of America and the Government of the United Mexican States Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, Jan. 1, 1994, U.S.-Mex., T.I.A.S. No. 12, 516.

67. See Border Environment Cooperation Commission, *BECC'S Functions* (visited Feb. 1, 2000) <<http://www.cocf.org/antecedentes/ing43.htm>>; North American Development Bank, *General Overview* (visited Feb. 1, 2000) <[http://www.nadbank.org/english/about\\_bank/Overview/Overview\\_Text.htm](http://www.nadbank.org/english/about_bank/Overview/Overview_Text.htm)>.

provide for broad representation and participation of all levels of government, private investors and environmental groups.<sup>68</sup> The debate on NAFTA and the existence of BECC and NADBANK stimulated many cross-border activities at the U.S.-Mexico border. One example is the 1993 signing of a Letter of Agreement between the City of Tijuana and the City of San Diego, constituting a Binational Planning and Coordinating Committee and a close working relationship in many fields, such as water and sewage systems.<sup>69</sup>

These expansionary developments were not what many state-centered experts on transboundary water management had envisioned. Dworsky and Utton, for example, declare, "One of the objectives of the search for a strengthened boundary region institution is to avoid or restrain the proliferation of institutions designed to meet unmet or evolving problems in the region."<sup>70</sup> For Caldwell it is a "fundamental paradox" that, while it is acknowledged that goals are "achievable only through a degree of coordinated action that existing institutional arrangements are unlikely to provide," the role of sub-national and national actors in their implementation is growing.<sup>71</sup> It might well be that more autonomous supra-national agencies for managing transboundary water issues would be helpful. But the advocates of such autonomous agencies are too narrowly focused on the formal power of these institutions and fail to capture the reality of complex integrated governance in spaces of intermestic politics.

These examples from the field of transboundary water management clearly illustrate how far existing structures have moved from the models of international politics in which central governments act on behalf of monolithic nation states and in strategic defense of the national interest. The world has witnessed an increasing complexity in definitions of problems and interests, accompanied by both a multiplication of

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68. See Border Environment Cooperation Commission, *BECC Organization and Management* (visited Feb. 1, 2000) <<http://www.cocef.org/antecedentes/ing45.htm>>; North American Development Bank, *General Overview* (visited Feb. 1, 2000) <[http://www.nadb.org/english/about\\_bank/Overview/Overview\\_Text.htm](http://www.nadb.org/english/about_bank/Overview/Overview_Text.htm)>. See also Stephen P. Mumme, *The North American Commission for Environmental Cooperation and the United States-Mexican Border Region: The Case of Air and Water*, TRANSBOUNDARY RESOURCES REP., Summer 1995, at 1, 1-3; Raul Hinojosa-Ojeda, *The North American Development Bank, Forging New Directions in Regional Integration Policy*, 60 J. AM. PLAN. ASS'N 301, 301-04 (1994).

69. See Letter of Agreement between the City of Tijuana and the City of San Diego in the Field of Binational Planning and Coordination, Apr. 14, 1993, San Diego, Cal., U.S.-Tijuana, Mexico.

70. Dworsky & Utton, *supra* note 26, at 447.

71. Lynton K. Caldwell, *Emerging Boundary Environmental Challenges and Institutional Issues: Canada and the United States*, 33 NAT. RESOURCES J. 9, 17 (1993).

involved actors and by the differentiation of institutional systems within and across national boundaries. When territorial boundaries lose significance, international and domestic politics become more and more interwoven. This cannot easily be interpreted as centralization or decentralization: globalization and internationalization go hand in hand with "localizing (of) foreign policy"<sup>72</sup> and the emergence of intermestic politics. The resulting complexity and confusion provide a fruitful ground for discussion and proposals that would aim to restore some ordering principles and some form of re-integration to the art of governance.

### **Sovereignty and the Problem Solving and Democracy Criteria**

The inability of the state-centric model to adequately capture reality was explicitly addressed in the foregoing historical analysis of transboundary water institutions in Europe and North America. In this section we will more directly examine the criteria of problem solving capacity and enhancement of democracy. They will be considered jointly because they are inextricably intertwined. Briefly stated, the essential problem of a model based only on nation states and their international interactions and institutions is the trade off between the goals of problem solving and democratic responsiveness. International institutions that become more effective decision making systems by gaining more autonomy also tend to become technocratic regulatory regimes, a fact that limits democratic participation. Regulatory regimes may well be en vogue and may have some legitimacy in specific fields.<sup>73</sup> Nevertheless, there is a great danger that such autonomous regulatory regimes will rely on old technocratic paradigms and become insulated from innovative concepts and emerging new interests.

On the other hand, if autonomy is withheld from transboundary management institutions and sovereign and democratic states continue to exercise their authority, then many problems will not be effectively addressed. All participating democratic states, which will be forced by their nation-wide constituencies to act in an egoistic manner, will have veto rights and only win-win situations will result in joint activities. Each of the older binational or international water commissions we describe is a specific version of a compromise between the effectiveness/democracy poles and is often unable to fulfill either of those criteria. Thinking only in terms of sovereign hierarchical political entities, either on the national level or on the international level, does not lead us out of the dilemma between

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72. See BRIAN HOCKING, *LOCALIZING FOREIGN POLICY: NON-CENTRAL GOVERNMENTS AND MULTILAYERED DIPLOMACY* 31-69 (1993).

73. See GIANDOMENICO MAJONE, *REGULATING EUROPE* 1-5 (1996).

the apparently antagonistic goals of effective governance and democratic governance.

The possibility of grassroots democracy arising from a regional binational or multinational consensus in favor of some water related action is also thwarted in the state-centric model. Cross-national regional opinion may not weigh heavily in the larger framework of nation state relations. Regional issues may never make it onto the necessary agendas, and even if nation states focus on subjects with strong grassroots backing, decisions may not be made on the basis of the interests of border region citizens.

### THE MARKET APPROACH: FOCJ

The antithesis of the centrist model for managing transboundary natural resources and other intermestic problems is provided by public choice scholars. Explicitly or implicitly, they propose three fundamental transformations:

1. from historically determined government structures to ones efficiently constructed through citizens' free choice,
2. from territory to function as the focal point of political integration or governance, and,
3. from hierarchies to markets as the main mechanism of integration or mode of governance.

These ideas have been elaborated upon by scholars in both Europe and North America.<sup>74</sup> Reasons for their appeal include the sponsorship of economics, which is considered theoretically advanced among social science disciplines, and the backing of commercial and developmental interests. Further support derives from the critiques to which the centrist model has been subjected. The public choice model, at least at first glance, appears to better fit reality. Moreover, it effectively responds to criticisms that existing transboundary water resource institutions are closed and undemocratic.

For clarity and simplicity of analysis, we have chosen to focus on one particular formulation advanced by two Swiss scholars as a proposal for a future European Constitution. Frey and Eichenberger propose "functional, overlapping, and competing jurisdictions (FOCJ)."<sup>75</sup> They develop their concept based on normative economic theories promoting individual choice and competition as principal elements for future forms

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74. See, e.g., DAVID J. ELKINS, *BEYOND SOVEREIGNTY. TERRITORY AND POLITICAL ECONOMY IN THE TWENTY-FIRST CENTURY* (1995).

75. Frey & Eichenberger, *supra* note 5, at 322.



of governance.<sup>76</sup> Essentially, they build on Buchanan's theory of clubs in neo-classical public finance and the economic theory of federalism.<sup>77</sup> They present FOCJ as a basis for a European system of governance. The central idea is to establish an "open and competitive (market for politics)."<sup>78</sup> Such a market for politics should be established by constitutionally providing the right of citizens to form FOCJ within and across national boundaries. FOCJ can be defined as:

- *Functional* (the new political units extend over areas defined by the tasks to be fulfilled);
- *Overlapping* (many different tasks exist within the crisscrossing boundaries of corresponding governmental units);
- *Competing* (individuals and/or communities may choose, via initiatives and referenda, which governmental unit they want to join); and
- *Jurisdictions* (established units are governmental, having enforcement power and can, in particular, levy taxes).<sup>79</sup>

According to their proponents, the size and geographic scope of FOCJ are functionally defined and are, therefore, especially efficient. FOCJ emerge in response to diverse geographic spaces of specific problems/tasks, but also to exploit "economies of scale."<sup>80</sup>

FOCJ need not be geographically separated and can actually overlap in two ways: (a) two or more FOCJ catering to the same function may geographically intersect, or (b) FOCJ catering to different functions may overlap.<sup>81</sup> Competition within and between FOCJ is the mechanism that ensures that FOCJ governments conform closely to their members' preferences.<sup>82</sup> The possibility that members may leave mimics market competition and the right to vote establishes political competition.<sup>83</sup> The geographically non-exclusive and functionally specific nature of FOCJ permits voluntary departure from the organization to play a significantly greater role than in conventional forms of federalism. The former aspect allows citizens and communities to change their membership without

76. See *id.* at 315-16. The German version of their proposal starts with the following sentence: "Wettbewerb schafft Wohlstand" (competition creates welfare). See Reiner Eichenberger, *Eine "fünfte Freiheit" für Europa: Stärkung des politischen Wettbewerbs durch "FOCJ,"* 45 ZEITSCHRIFT FÜR WIRTSCHAFTSPOLITIK 110, 110 (1996).

77. See Alessandra Casella & Bruno Frey, *Federalism and Clubs: Towards an Economic Theory of Overlapping Political Jurisdictions*, 36 EUR. ECON. REV. 639, 640-44 (1992).

78. Frey & Eichenberger, *supra* note 5, at 315.

79. See *id.* at 316.

80. See *id.* at 317.

81. See *id.*

82. See *id.* at 318.

83. See *id.*

moving physically; the latter makes partial secession possible.<sup>84</sup> For these reasons, people served by FOCJ should directly elect those managing them. Furthermore, they should be given the right to initiate popular referenda.<sup>85</sup> We have criticized the state-centrist theory for providing neither an adequate description of reality nor a useful model for improvement of transboundary water management. Now, a similar examination of FOCJ is in order.

### Explanatory Power

We turn first to the explanatory power of the concept. Does it provide a model that closely resembles the new processes and institutions we can observe in reality and does it identify the critical variables that drive those institution-building processes?<sup>86</sup> On first inspection, the new institution-building processes in cross-border water related policy areas appear to fit the model well. Not only are they distinguished by a diversity of geographic foci, these institutions have been created with reference to functional imperatives and they overlap in ways described by Frey and Eichenberger.<sup>87</sup>

Two sorts of functional orientations occurred early on. First, international commissions formed boards on a watershed basis. For example, while the IJC has a mandate for the entire U.S.-Canadian border that encompasses a multitude of separate problems, it has installed special boards for different water systems along the border. Second, special utilities like sewage treatment plants have been built and maintained on a cross-border basis. Hydrological conditions and economics of scale were the motivations to create a cross-border sewage treatment plant in the

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84. See *id.*

85. See Eichenberger, *supra* note 76, at 115.

86. Since the authors primarily introduced their model for prescriptive purposes, the issue must be addressed as to whether it is fair to impose the realism standard. However, Frey & Eichenberger emphasize that theirs is "a realistic concept." See Frey & Eichenberger, *supra* note 5, at 320. Another question might be whether it is correct to use the field of transboundary water resources as a test case. The most compelling justification for doing so is Eichenberger and Frey's own statement: "Besonders geeignet sind 'FOCJ' sodann für eine grenzüberschreitende Zusammenarbeit." Bruno S. Frey & Reiner Eichenberger, *Eine "fünfte Freiheit" für Europa, Stärkung des Föderalismus durch "FOCJ,"* NEUE ZÜRCHER ZEITUNG, Feb. 6, 1996, at 2. In the following parts of their newspaper article they mention "Polizeilicher Umweltschutz" (environmental regulation) at Lake Constance and sewage treatment as examples where FOCJ are especially useful. See *id.*

87. See Frey & Eichenberger, *supra* note 5, at 318-19.

western part of the Lake Constance region.<sup>88</sup> There are several other arrangements in the region in which neighboring municipalities joined forces to treat their sewage.<sup>89</sup> Considerations for hydrological conditions proved strong enough to overcome nationalistic attitudes and to result in a joining of forces in the U.S.-Mexican borderlands. This is the case in Ambos Nogales, a twin city at the border between Sonora and Arizona,<sup>90</sup> as well as in the Tijuana River Valley, where the neighboring cities of San Diego and Tijuana, together with the IBWC, set up an international sewage treatment plant.<sup>91</sup>

Until recently, these cross-border cooperations were characterized by a strong involvement of national or binational agencies. More recently, there have been some major changes. For instance, in the spring of 1996, an international treaty was signed in Karlsruhe that allows municipalities to create cross-border special districts based on public law.<sup>92</sup> Additionally, at the U.S.-Mexican border, municipalities receive more responsibilities and the capacity to deal with their common local affairs through BECC and NADBANK.<sup>93</sup>

Other developments go further in applying a functional approach toward institution building. Some of them have been guided by notions of bio-regions and watersheds, which appeal strongly to environmentalists. The British Columbia-Washington State Environmental Cooperation Council, the International Marine Science Panel and the Puget Sound/Georgia Basin International Task Force are defining their areas of activity on a watershed basis.<sup>94</sup> Others refer to concepts of regional economics like "innovative milieu"<sup>95</sup> and "regional networks"<sup>96</sup> and are

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88. See MÜLLER-SCHNEGG, *supra* note 24, at 172. Typical of the pragmatic approach to cross-border cooperation in the Lake Constance region is the fact that the municipalities first formed two special districts on each side of the border and signed a contract based on private law. See *id.* Several years later the governments signed an international treaty that officially legitimized the joint activity. See *id.*

89. See *id.* at 172-73.

90. See Ingram & White, *supra* note 29.

91. See Mumme, *supra* note 16, at 116-17 n.108.

92. See Blatter, *supra* note 50, at 118.

93. See Border Environment Cooperation Commission, *BECC Organization and Management* (visited Feb. 1, 2000) <<http://www.cocof.org/antecedentes/ing45.htm>>; North American Development Bank, *General Overview* (visited Feb. 1, 2000) <[http://www.nadbank.org/english/about\\_bank/Overview/Overview\\_Text.htm](http://www.nadbank.org/english/about_bank/Overview/Overview_Text.htm)>.

94. See SHARED WATERS: THE VULNERABLE INLAND SEAS OF BRITISH COLUMBIA AND WASHINGTON 2 (Puget Sound Water Quality Authority & British Columbia Ministry of the Environment 1994).

95. See generally Denis Maillat, *Territorial Dynamic, Innovative Milieus and Regional Policy*, 7 ENTREPRENEURSHIP & REGIONAL DEV. 157 (1995).

96. See generally REGIONAL NETWORKS, BORDER REGIONS AND EUROPEAN INTEGRATION (R. Cappelin & P.W.J. Batey eds., 1993).

stimulated by concepts like "the rise of the region-state."<sup>97</sup> In Cascadia there are several initiatives in this direction and each of these commerce-driven institutions has a different geographic locus. The Cascadia Corridor Task Force and the Cascadia Economic Round Table focus on Cascadia Main Street, a corridor linking Vancouver, Seattle and Portland; the Pacific Northwest Economic Partnership brings together the province of British Columbia and the state of Washington; and the Pacific Northwest Economic Region contains four U.S. states and two Canadian provinces.<sup>98</sup>

The cross-border institutions at Lake Constance and in the Upper Rhine Valley also correspond to what FOCJ would expect. The territorial loci of the regional cross-border institutions are very diverse. Figure 1 depicts a few of the cross-border institutions that have had an impact on transboundary water management. Only the institutions with a clear focus on Lake Constance are included; the overall picture on cross-border institutions in the region is even more diverse.<sup>99</sup> The oldest institution is the *Internationale Gewässerschutzkommission für den Bodensee* (IGKB).<sup>100</sup> This commission for protecting Lake Constance against pollution is oriented towards the entire watershed of the lake.<sup>101</sup> In comparison, the *Internationale Schifffahrtskommission für den Bodensee* (ISKB), the commission for shipping and navigation, is responsible only for the lake itself.<sup>102</sup> The *Deutsch-Schweizerische Raumordnungskommission* (DSRK), the land planning commission, deals with the entire border between Germany and Switzerland.<sup>103</sup> The *Internationale Bodenseekonferenz* (IBK) and the *Bodenseerat* focus their activity on the *Euregio*.<sup>104</sup> The newest institution, the steering committee for the INTERREG-program *Alpenrhein-Bodensee-*

97. See generally Kenichi Ohmae, *The Rise of the Region State*, FOREIGN AFFAIRS, Spring 1993, at 78.

98. See Blatter, *supra* note 49, at 160-61. For a map of the Cascadia region, see Internet site: <<http://www.cascadianet.com/images/cascadia.map.gif>>.

99. See BLATTER-BODENSEE, *supra* note 37, at 156.

100. See *id.*

101. The Swiss Cantons of Graubünden and Appenzell as well as the Fiefdom of Liechtenstein have been included informally into the activities of the Commission. See *id.* at 6, 37. By this expansion the Commission includes de facto all relevant jurisdictions within the watershed. See *id.* See also 27 INTERNATIONALE GEWÄSSERSCHUTZKOMMISSION FÜR DEN BODENSEE, *supra* note 36, at 11. In a special section of these "Guidelines" the commission addresses the problems of the inflows into Lake Constance. See *id.*

102. See MÜLLER-SCHNEGG, *supra* note 24, at 116.

103. See Blatter, *supra* note 50, at 147.

104. See Horst Sund, *Begrüßung und Einleitung*, in VOM BODENSEE-FORUM ZUM BODENSEERAT 156, 161 (Horst Sund et al. eds., 1992).

*Hochrhein*, again has a different territorial definition and an overlap with the neighboring INTERREG-program areas.<sup>105</sup>

It seems obvious that notions like "variable geometry" constitute a central characteristic of the new architecture of intermestic politics as indicated by Frey and Eichenberger. But it is less clear which functional logic is used to define the "geography of the problem," i.e., the geographical space adequate for addressing the problem or for providing a public good in an efficient manner. Frey and Eichenberger give the impression that there exists a single correct "geography of the problem."<sup>106</sup> For them it is not a physical, cultural, or social construct but is instead defined by economic rationales of "fiscal equivalence" and "economies of scale."<sup>107</sup> Avoiding "spillover" is not seen as the elimination of service spillover from one territory to another territory but as a congruence of the people who benefit from a particular public service and the people who pay for it (fiscal equivalence).<sup>108</sup> Since the people who pay for the public service demand its effective supply, the government is stimulated to exploit economies of scale and the size of FOCJ is determined endogenously by the benefits and costs to the members.<sup>109</sup> Thus, it makes sense to accept new members as long as this reduces the average price for the public good. That means that the objective necessities of the production process determine the size of FOCJ. For example, the economies of scale (and any elements which influence costs) determine the best size of a sewage treatment plant and sewer system, and the consumers will help to find this best size by choosing between different governance units that offer connections to sewer systems. Such a conception stipulates that there is one best size or geographic area for specific service policies. Rationally calculating consumers will lead the way to finding this ideal size.

Frey and Eichenberger ignore the multidimensionality and interrelatedness of public policies/goods that dictate priorities based on

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105. See SEKRETARIAT DES BEGLEITENDEN AUSSCHUSSES BEIM REGIERUNGSPRÄSIDIUM TÜBINGEN, GESCHÄFTSORDNUNG DES BEGLEITENDEN AUSSCHUSSES ZUM INTERREG II-PROGRAM: "BODENSEE-HOCHRHEIN" (1995); GESCHÄFTSORDNUNG DES BEGLEITAUSCHUSSES DER INTERREG PROGRAMME OBERRRHEIN MITTE SÜD I UND II.

106. See Frey & Eichenberger, *supra* note 5, at 317. Although the FOCJ concept is in line with neoclassical argumentation and does not take into account any aspects of territory or location directly, at least in the field of transboundary resources it seems obvious that, independent from the logic of definition, a governance unit (e.g. for sewage treatment, for shipping regulations and for setting drinking water standards) has geographic boundaries.

107. See *id.*

108. See *id.*

109. See *id.*

socially constructed goals and values.<sup>110</sup> They are biased in favor of a "users pay" definition of public goods.<sup>111</sup> This public choice logic is only one possible way to define the "geography of the problem" and the size of the governing unit, respectively. Real world transborder institutions usually do not apply this logic in defining their geographical scope and their membership size. Indeed, there is a trend towards more functional solutions in the field of intermestic politics governing transboundary water resources, but even in cases of strong local involvement, there is no clear fiscal equivalence between those who benefit and those who pay. In the Lake Constance case, one can assume that all people who live downstream profit from the investment in sewage treatment plants. Those people do not pay for sewage treatment, or pay only indirectly because the Land of Baden-Württemberg helped the municipalities with a financial program for sewer systems. In addition, there is no fiscal equivalence since all taxpayers in Baden-Württemberg had to contribute, not just those using downstream water. Here, one could argue that all inhabitants of Baden-Württemberg profit from the protection of the waters in Lake Constance and the Rhine River because both watercourses are important for tourism. But there are further inconsistencies. Lake Constance and the Rhine serve not only the people of the riparian states as places of tourism; they also serve people from all over the world. So, the specific function at issue (e.g., use as potable water, as sewer, as weekend escape, or as global tourism spot) determines where jurisdictional boundary lines should be drawn.

It is more realistic to see the geographical size of a governing unit as being defined by a process of social constructions and power struggles (e.g., about problem definitions), than as a market process where rational consumers lead the way to the most efficient and objective solution.<sup>112</sup> And

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110. Any definition of the nature of a problem encompasses a value laden social construction, as the considerable literature about "framing" of issues illustrates. See, e.g., DEBORAH A. STONE, *POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING* (1997). To adopt one set of boundaries is to downplay another. Even among environmental definitions there are conflicts. Watersheds may fit poorly with habitat for plants and animals or with flood plains. Whatever boundaries are chosen, management in some area is either fragmented among jurisdictions or fails to embody important spillover effects.

111. See Frey & Eichenberger, *supra* note 5, at 317.

112. See Casella & Frey, *supra* note 77, at 643-44 (showing that defining the dominant function and the corresponding optimal geographic area of a public good is a matter of social construction). They state, "the optimal club size depends on the characteristics of the specific public good we are discussing. A good example is the identification of optimal currency areas. If money is viewed mainly as a means of transactions, then it is a fully non-rivalrous collective good: more people using the same currency increase the benefits to the original users. In this case, the optimal size is as large as possible. However, if money is viewed as a source of budget finance, or as a tool for stabilization, then the optimal size of the monetary club is given by the requirement that preferences over the use of money be

indeed, at Lake Constance, such a power struggle occurred between two international commissions over standards for motor boat exhausts on Lake Constance.<sup>113</sup> The Swiss Federal Agency for Navigation fought for equal standards on all Swiss lakes, applying the functional argument that Swiss boaters should be able to easily move their boats from one lake to another.<sup>114</sup> The members of the International Commission for the Protection of Lake Constance against Water Pollution argued, also functionally, that a common standard for the international lake is necessary to protect the water quality.<sup>115</sup> This example of taking the long way towards a decision (20 years)<sup>116</sup> makes clear how difficult it is to integrate different functional goals or demands when there is no territorial congruence between the constituents of these demands and no hierarchically integrated governance structure.

Among all of the characteristics of FOCJ, the identification and definition of jurisdictions deviate most sharply from real world experience in cross-boundary water management. The new institutions in cross-border regions are not jurisdictions because they have no direct authority over the citizens within their territorial range and no power to tax. Furthermore, they do not have the elements of popular democracy and direct democratic legitimacy envisioned in the FOCJ concept. Instead, most institutions are intergovernmental, dominated by the executive branch and bureaucrats. Examples include all international water commissions and many of the regional committees and councils such as the Upper Rhine Conference, the Lake Constance Conference, the Tijuana-San Diego Planning and Coordination Committee, and the British Columbia-Washington State Environmental Cooperation Council. The members of these institutions are indirectly legitimated by national, state or local elections. Other cross-border initiatives do not have any democratic legitimation whatsoever. The Regio-associations in the Upper Rhine Valley, the Lake Constance Council, the Foundation for Border Progress (San Diego), and the Cascadia Task Force are private groupings, although they include many publicly elected

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somewhat homogeneous within the club." *Id.* They proceed with the proposition that "if the optimal club size depends on the specific public good, then all consumers...should be divided in a complex system of overlapping jurisdictions." *Id.* at 644. What they appear not to see is that one has to make a decision about whether one wants a larger or a smaller currency area. Therefore, a decision about the different values of those functions must be made. This dilemma results from the fact that many public goods are multifunctional and are not divisible.

113. See Joachim Blatter, *Lessons from Lake Constance: Ideas, Institutions and Advocacy Coalitions*, in REFLECTIONS ON WATER: NEW APPROACHES TO TRANSBOUNDARY CONFLICTS AND COOPERATION, *supra* note 4, at 186, 186.

114. See *id.* at 201, 207-09, 214.

115. See *id.* at 204-05, 214.

116. See Blatter, *supra* note 113, at 195-97, 212-15.

members. While the new cross-border institutions do not follow Frey and Eichenberger's concept of popular democracy, they do have other elements of democratic legitimacy. For example, there are parallel cross-border linkages of democratically elected legislatures almost everywhere. At Lake Constance, some members of the sub-national parliaments around the lake meet regularly, as do the presidents of those parliaments.<sup>117</sup> In the Upper Rhine Valley, the parliamentarians meet as the *Oberrheinrat*.<sup>118</sup> In Cascadia, the state and provincial legislators were pivotal in the creation of the Pacific Northwest Economic Region (PNWER), and the city legislators meet as the Cascadia Metropolitan Caucus.<sup>119</sup>

In contrast to FOCJ, even those institutions with the strongest regulatory leverage, such as the International Commission for the Protection of Lake Constance (IGKB), have no direct authority over the inhabitants in the lake area. The guidelines of the commission have to be transferred into sub-national law and enforced by the authorities of the participating riparian jurisdictions. All institutions for transboundary water management and all institutions for regional cross-border cooperation rely on the financial contributions of their members—none has the power to levy taxes.

Competition fares no better than the other aspects of FOCJ in correctly describing what has occurred. Reality differs in two respects from the form of competition envisioned by the proponents of FOCJ: (a) the competition between institutions is not about membership but about problem definitions, responsibilities and funds; and (b) usually the individuals/communities are members in several overlapping institutions that are charged with promoting the same public good. Memberships are not exclusive in the sense that communities or agencies have to make a decision to belong to one or the other institution—often they belong to both.

In reality, there is no direct opportunity for "vote" and "exit" by citizens within existing institutions such as NADBANK and IBWC. In this sense, the market choices that are the key to competition do not exist. However, there is political competition, which is poorly captured by economics-derived public choice models. As Blatter describes, competition between different political arenas is crucial.<sup>120</sup> Tensions between center and periphery in nation states, rivalry between different layers of government, competition between political parties and other divisions within the very differentiated modern governmental system provide incentives for political

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117. See Blatter, *supra* note 50, at 151-52.

118. See, BLATTER, *supra* note 36, at 118.

119. See Alper, *supra* note 56, at 4-10.

120. See Blatter, *supra* note 49, at 156-60, 168.



activists to search for alliances across national borders. The result can be greater responsiveness of the cross-border institutions towards the public. An example is the U.S.-Mexican International Boundary and Water Commission. After the creation of BECC and NADBANK, the IBWC changed its character significantly. It became much more open regarding public information and involvement and more dynamic and effective in terms of new projects initiated.<sup>121</sup> The case of Lake Constance shows that the most intensive form of competition is based on rival interests and functional goals related to water use. This example involved a twenty-year battle between the IGKB (commission for water protection) and the ISKB (commission for navigation) about regulations for boats and ships on the lake.<sup>122</sup>

In summary, while FOCJ appear to capture some aspects of reality, the driving factors identified are all ill chosen. The world of intermestic politics is already characterized by strong functional orientations, various overlaps, and political competition but not by directly democratic jurisdictions. Instead, we find many transboundary regimes organized around intergovernmental commissions, as well as networks and communities focused on specific policies and grouped as advocacy coalitions.<sup>123</sup> It is never the individual consumer and only at times an economic functional logic that drives institution building and change. FOCJ fail the tests of realism and identification of causal inference.

### Problem Solving Capacity

We turn now to the problem solving capacity of FOCJ. Do they provide descriptions and solutions that make problems easier to manage? Are they a recipe for effective governance? There are several serious flaws that prevent FOCJ from making meaningful advances in resolving transboundary water resources problems.

First, they lack sufficient understanding of the nature of common-good problems like water management. The public choice perspective treats public policy issues such as governance and the production of public goods as if they were public service industries. This perspective neglects essential features of the problem and, therefore, produces flawed solutions.

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121. In interviews, the IBWC commissioners proudly provide favorable comparisons of their accomplishments in relation to those of BECC and NADBANK. Interview with John Bernal, Commissioner, International Boundary Water Commission, in Bellagio, Italy (June 5, 1997); Interview with Arturo Herrera Solis, Commissioner, International Boundary Water Commission, in Bellagio, Italy (June 5, 1997).

122. See Blatter, *supra* note 113, at 195-97, 212-15.

123. See generally Paul A. Sabatier & Hank C. Jenkins-Smith, *The Advocacy Coalition Framework: An Assessment*, in *THEORIES OF THE POLICY PROCESS* 117 (Paul Sabatier ed., 1999).

As demonstrated, common goods such as water are multidimensional (drinking, shipping, power generation, irrigation, recreation, ecological functions, economic development, et al.). For this reason, the principle of fiscal equivalence does not work very well as an instrument to define the one best size of a geographical area for governing water. Instead of applying economic criteria or markets to the task of creating boundaries, a political process of trading values off against one another must take place. It is necessary to determine the most important function(s), create the government structure(s) corresponding to these functions, and find some mechanisms to deal with the interdependencies and spillovers between these functions.

The tasks associated with water management contain features that typically result in market failure. For example, adequate water planning requires a long time horizon. Given uncertainties of global climate change upon water supplies, looking a century ahead is not too farsighted. The customers of water utilities, given the choice between long-term rationality and immediate benefits to their water rates, can be expected to look to the short term. Because water impacts virtually all systems, including patterns of human settlement, habitat for species, and long-term economic productivity, multi-objective planning that takes into account the possible negative and positive side effects of proposed water projects is necessary. In a competitive market, water utilities that cut out such expensive analysis and hiring of analysts will likely attract the most customers.

Furthermore, Frey and Eichenberger seriously misunderstand the process of institution building, and the extent to which resilient and sustainable institutions must have sufficiently general portfolios or substantial jurisdictions to balance benefits and costs and maintain long term support. In general, we are quite sympathetic with Frey and Eichenberger's conceptualization of the emergence of functional differentiation and institutionalization as an endogenous process from the bottom up through the choices of citizens and communities (i.e., people cause institutions to play different roles). This process is especially likely to take place when tasks are productive in character (e.g., the building of sewer systems and sewage treatment plants). However, voluntary cooperation and association are far less likely to emerge when tasks are predominantly regulatory or redistributive.<sup>124</sup> With respect to redistribution, Frey and Eichenberger acknowledge that there may be problems. They propose reliance upon centralized government or the establishment of a FOCUS, defined as a democratically elected

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124. See ARTHUR BENZ, *KOOPERATIVE VERWALTUNG: FUNKTIONEN, VORAUSSETZUNGEN UND FOLGEN* 298-99 (1994). See also Theodore Lowi, *Four Systems of Policy, Politics and Choice*, 32 *PUB. ADMIN. REV.* 298 (1972).

governmental agency with taxing power specializing in interregional redistribution.<sup>125</sup> This hardly solves such problems since a governmental form without the ability to distribute benefits and left only with the redistributive burden of imposing costs would not be very stable. In that case, a FOCUS would not emerge at all because the citizens or communities who would have to pay would have no incentive to stay. The same is true for many regulatory tasks like the setting of standards for water quality. There is no reason to believe that a FOCUS would emerge to bring together downstream and upstream interests, because the latter would have no incentive to restrict their activities. Even for productive public policies there is a need to restrict the freedom of citizens or communities to avoid the "free rider" problem that is acknowledged by Frey and Eichenberger.<sup>126</sup> With the exclusion of many tasks and the restricted freedom of choice in many remaining fields, the FOCJ concept loses much of its claim to better resolve problems.

Even more damaging for the problem solving capacity of FOCJ, such entities are likely to make fundamental problems more serious while appearing to efficiently solve simple tasks. Assuming that territorial spillovers are minimized through the endogenous process Frey and Eichenberger prescribe, optimal sizes and territorial ranges of FOCJ are arrived at in the sense of reducing spillovers between people who benefit and those who pay. However, what would be gained? In comparison to the present governance institutions, we would have reduced the need for interterritorial coordination, but the price being paid would be the deepening of interfunctional/intersectoral divisions (e.g., between economic and environmental goals).

Frey and Eichenberger argue that intersectoral coordination or interfunctional bargaining would be enhanced since the political managers of FOCJ have a stronger incentive to bargain than do the classic bureaucrats.<sup>127</sup> In their view, the direct internal accountability of FOCJ governments and the presence of a competitive, market-like system among FOCJ would produce better-coordinated results than a hierarchically integrated bureaucracy.<sup>128</sup> This conclusion contrasts sharply with some of the findings of scholars in the field of interlocking politics (*Politikverflechtung*), who stress that the rules of parliamentary democracy reduce the bargaining flexibility of executives in interjurisdictional

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125. See Frey & Eichenberger, *supra* note 5, at 319.

126. See *id.* at 317-19.

127. See *id.* at 320.

128. See *id.*

interactions.<sup>129</sup> The need to run for election within a jurisdiction induces its government agents to behave in an egoistic manner. The possibilities for integrative solutions or compromises consequently shrink. The infusion of even more direct democracy further restricts interjurisdictional problem solving. Referenda, for instance, which are much more specific than the programs of elected representatives, leave fewer possibilities for package deals, side payments and issue linkages in interterritorial or interfunctional negotiations. This is more true where there is less congruence among the geographical spaces of different functional jurisdictions, because voters are not multiple selves who can discount their various functional goals. For example, if a member of a FOCUS that is providing potable water by long distance pipelines is also a member of another FOCUS that specializes in water protection in his/her home area, he/she will press the government of the first FOCUS to provide cheap and clean water, but will rationally advocate only modest measures for protection of the water when at home.

To summarize the capacity of FOCJ to solve problems, a government system that is structured basically along functional lines and which operates mainly through competition leads to a situation where intersectoral or interfunctional divisions and conflicts are predominant. It is intersectoral coordination and integration that we are missing most in modern times.<sup>130</sup> Before we throw away traditional mechanisms like territorially based bureaucracies and substitute intergovernmental regimes and networks that provide at least a certain degree of integration, we should look carefully at the realistic alternatives.

### Implications for Democracy

The last criterion for an evaluation is the democratic implication of such a model: Does it provide an adequate definition of democracy? Does it facilitate and enhance democratic practices? One of public choice theorists' most serious flaws is to define democracy too narrowly as a mechanism to provide public goods efficiently according to consumers' preferences.

We start from a dual and complementary understanding of democracy.<sup>131</sup> First, there is government for the people (common good, efficiency, justice, and enlightenment); this is an output-oriented

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129. See Arthur Benz, *Mehrebenen-Verflechtung: Verhandlungsprozesse in verbundenen Entscheidungsarenen*, in *HORIZONTALE POLITIKVERFLECHTUNG: ZUR THEORIE VON VERHANDLUNGSSYSTEMEN* 147, 175 (Arthur Benz et al. eds., 1992).

130. This is why the notion of sustainable development, which integrates economic, ecological and social goals, has gained so much attention in the 1990s.

131. See FRITZ SCHARPF, *DEMOKRATIETHEORIE ZWISCHEN UTOPIE UND ANPASSUNG* 21 (1970).

definition.<sup>132</sup> Second, there is government by the people (authentic representation, participation, and governmental responsiveness); this can be called an input-oriented definition. In both dimensions, public choice theorists apply definitions<sup>133</sup> that are too narrow in scope.

In the output-oriented dimension, the role of democracy is not simply to solve problems effectively and efficiently in economic terms; it is also to educate, enlighten and empower citizens. Democracy creates public spaces or forums where citizens can engage in discourse that develops their capacity for empathy and heightens the possibility of agreement upon actions to promote the common good as opposed to narrow self interest.<sup>134</sup> FOCJ not only enhance further segregation and an unequal distribution of wealth,<sup>135</sup> they also structurally undermine public awareness of interfunctional interdependence and the acceptance of integrated policy approaches.

The public choice theorists have a strongly instrumentalist view of institutions, governance, and democracy. In their eyes, institutions are purposely created tools to efficiently implement collective tasks according to the preferences of the constituent individuals. In a world requiring complex, multiple, and continual discussions, what people expect from their government may be less the economists' notions of efficiency than the reduction of uncertainty and the limitation of the necessity for continually

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132. See *id.*

133. See Casella & Frey, *supra* note 77, at 641 (discussing public administration as a complex of "public services industries").

134. See ANNE LARASON SCHNEIDER & HELEN INGRAM, *POLICY DESIGN FOR DEMOCRACY* 5-7 (1997). See also JOHN S. DRYZEK, *DEMOCRACY IN CAPITALIST TIMES: IDEALS, LIMITS AND STRUGGLES* (1996); BRUCE ALAN WILLIAMS & ALBERT R. METHANY, *DEMOCRACY, DIALOGUE AND ENVIRONMENTAL DISPUTES* (1995).

135. FOCJ would lead towards an even more unjust society. This is because the concept relies heavily on the mechanism of "exit" to reach an effective government. See Frey & Eichenberger, *supra* note 5, at 318. As Hirschman has argued, this can, but does not have to, result in attempts by governments to improve their performance. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 3-5 (1970). Exit might strip the government of the crucial memberships necessary to reach a better performance. See *id.* at 4, 21-29. And that is exactly what happens in the real world. Frey and Eichenberger's example of American special districts is illustrative: it might be that those special districts are efficient; that does not mean they are effective. What are more obvious are the side effects of a local government system where "exit" is rather easy: racial and economic segregation. It is not that public choice theorists refuse to acknowledge this phenomenon. Casella and Frey write, "[to] reach the correct club size, segregation is optimal" and note that this might be "possibly disturbing on political grounds...." Casella & Frey, *supra* note 77, at 642. It seems that it cannot really disturb them since from their theoretical perspective, segregation is a result of different endowments and tastes. They imply that people segregate because they like doing so—which may certainly be true for citizens in municipalities like Beverly Hills or Bel Air.

making choices and expressing preferences about policy choices.<sup>136</sup> Frey and Eichenberger acknowledge that this might be an issue when they discuss "overburdened citizens" and "overburdened consumers,"<sup>137</sup> i.e., people with too many choices and too little time. Their solution—that citizens can rely on intermediating institutions that reduce the "burdens of choice"<sup>138</sup>—is not viable if the prescriptions they offer undermine such institutions. Political parties, which they think can fulfill this function, are characterized by the bundling of functional goals and interests because they are integrated along ideological lines. A functionally segmented political system would invite the fragmentation of multisectoral institutions. They might disintegrate into single-issue groupings. Interest groups who previously have had to broaden their appeal to get on the agenda of governmental institutions might be encouraged to focus more narrowly, thereby increasing divisiveness among citizens.

From the perspective of an input-oriented definition of democracy, good governance can be reached only when the institutional setting provides opportunities for several kinds of inputs. First, there must be receptivity to popular opinion. This might be organized through direct electoral procedures (which give money and the media the most power to shape preferences and opinions), or through more representative procedures (which allow parties to shape and bundle those inputs). Second, in a complex modern society, good governance relies on expertise provided by a routinized bureaucracy and by scientists in interest groups and universities. Third, modern societies are differentiated and integrated through specialized organizations.<sup>139</sup> These collective and corporate actors serve as pressure groups for their specific interests in the public realm, but also as integration mechanisms with respect to their members.<sup>140</sup> Good public governance relies on such intermediate actors in many respects.<sup>141</sup> Balancing ideologies, expertise, and interests is the major challenge for democratic and sustainable institutions of governance. Public-choice based concepts, in contrast, have a much more narrow-minded conceptualization of inputs for democratic governance. This conceptualization leads to simplistic proposals like FOCJ.

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136. Note that we are not advocates of a paternalistic government. We simply want to demonstrate that there is much more ambivalence and paradox in the "brave new world of free choice" than proponents of clear-cut solutions acknowledge.

137. See Frey & Eichenberger, *supra* note 5, at 324-25.

138. See *id.*

139. See Renate Mayntz, *Policy-Netzwerke und die Logik von Verhandlungssystemen*, in *POLICY-ANALYSE: KRITIK UND NEUORIENTIERUNG* 39, 42-43 (Adrienne Héritier ed., 1993).

140. See JAMES S. COLEMAN, *POWER AND THE STRUCTURE OF SOCIETY* 15 (1974).

141. See generally GERHARD LEHMBRUCH & PHILIPPE C. SCHMITTER, *PATTERNS OF CORPORATIST POLICY-MAKING* (1982).

## CONCLUSION

Periods of transition are times of ambiguity, full of uncertainty and danger but at the same time capable of producing great creativity. As the case of transborder water management confirms, a proliferation of new, imaginative, innovative, and more democratically responsive institutions has come about. The present political world is witnessing the demise of the nation state as the incontestable dominant actor in resolving cross-boundary problems. Yet scholarship has lagged behind such events. Much of the diplomatic, bureaucratic, environmental and legal literature dealing with transboundary natural resources continues to take state-centered models as a given. However, the alternative model with the greatest scholarly appeal and ideological support presents its own problems. The public-choice paradigm (oriented toward markets) challenges the hegemony of centrist models but is itself hegemonic. The strong bias that underlies its assumptions closes off, rather than invites, the conceptual creativity necessary for scholarship that might advance the design of transnational boundary institutions.

Our discussion of models of governance has taken the following line of argument. First, we briefly introduced the basic assumptions of state-centered models and pointed to the mismatch between these models and evolving reality in transboundary water resources management. Our examples of cross-border institutions dealing with transboundary water resources in Europe and North America made very clear how far reality has moved from a model that sees the nation state as a sovereign actor and an impermeable barrier between the fields of domestic and international politics. A broad diversity of cross-border linkages and institutions involving many sub-national and non-governmental actors has emerged during the last decades. Central governments still play major roles in both fields, but they are neither the only powerful hierarchical actors in domestic politics nor the sole representatives of a monolithic national interest in international politics. The state-centered model fails not only to capture the present realities but is unable to solve contemporary contradictions. It is an inappropriate model for the future because it is trapped in a trade-off between technically effective and democratically responsive institutions.

We then turned to the most daring contemporary proposal to deal with the emerging world of intermestic politics. Public choice scholars see the demise of the nation state as positive and are optimistic that other forms of governance provide better opportunities for improved resolution of problems and democracy. They are making provocative and refreshing contributions. Yet we are concerned that their dominant concepts, so appealing to social scientists for their theoretical simplicity, will overwhelm

serious appraisal of other more complex, realistic, and helpful conceptions. Consequently, our argument tackles the markets or public choice perspective head on.

Focusing on the "functional, overlapping and competing jurisdictions" (FOCJ) model proposed by Frey and Eichenberger,<sup>142</sup> we admit that this public choice idea captures many aspects of real institution building processes in cross-border regions better than do state-centered models. However, we demonstrate that it is still not a model that adequately explains those processes. Measured against the tests of explanatory power, problem solving capacity, and the fostering of democracy, we find FOCJ to be lacking.

We have demonstrated that a simple model proposing a transformation from territorially defined units with hierarchical coordination to functional jurisdictions with market coordination will lead neither towards a better understanding of a world of intermestic politics nor towards effective and democratic governance. We are now left to characterize the direction better theories should take. This direction involves three basic insights.

First, the principal actors in transboundary water policies and in the sphere of intermestic politics are, in general, neither unitary states nor individual consumers, but collective and corporate actors, including agencies from different sectors and levels of government, non-governmental organizations, corporations, and scientific communities. Consequently, the aggregation of interests and values is a complex web of interactions fragmented along a number of dimensions without a central actor or arena for decision-making processes. Therefore, notions like "network,"<sup>143</sup> "multi-level governance"<sup>144</sup> (for Europe), or "multi-layered diplomacy"<sup>145</sup> (with examples from the United States, Canada and Australia) have to be reflected in models capturing the world of intermestic politics. Such complex analytical models are not what advocates of clear-cut deductive logic would prefer.<sup>146</sup>

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142. See Frey & Eichenberger, *supra* note 5.

143. See generally Patrick Kenis & Volker Schneider, *Policy Networks and Policy Analysis: Scrutinizing a New Analytical Toolbox*, in POLICY NETWORKS 25 (Bernd Marin & Renate Mayntz eds., 1991).

144. Gary Marks et al., *European Integration from the 1980s: State-centric v. Multi-level Governance*, 34 J. COMMON MKT. STUD. 341, 347 (1996).

145. See HOCKING, *supra* note 72, at 31-69.

146. See, for example, the statement of Williamson, who had so much influence on how economists (and other social scientists) think about institutions and modes of governance: "Parsimony, after all, is what science is after." OLIVER E. WILLIAMSON, *THE MECHANISMS OF GOVERNANCE* 6 (1996).



Second, it is important for models to incorporate the wisdom of organizational theory and institutional analysis. Institutions are historically and contextually contingent and cannot be easily adjusted towards imperatives of effective production.<sup>147</sup> Instrumental views that ignore organizational imperatives also incorrectly neglect other functions of institutions, such as constructing identities.

Third, models of governance cannot be built upon simplistic action theory. Rational choice notions of human behavior must be supplemented with concepts that are based on values and social norms. In the world of intermestic politics, political actors face complex and dynamic environments in which it is impossible to base choice on rational calculations and strategies. Thus, symbols, images, and social constructions become very important. Any model that would offer a more accurate understanding of collective political action must be based upon "normative-cognitive ideas" as focal points for joint action<sup>148</sup> or "adaptive systems," where interaction is based on similarities between the actors, must have a central place.<sup>149</sup> This is shown, for example, by Blatter,<sup>150</sup> who explains the strict regulation of motorboats on Lake Constance by the rise of a cross-border Euroregion. Fostered by the introduction of the Single European Market in 1992,<sup>151</sup> the notion of a Euroregion has stimulated politicians on all sides of the border to look for joint tasks. The spillover of ideas from economics into transboundary water politics explains the timing and strictness of this regulation better than can functional necessity or strategic actions by involved parties. It is not clear how far we can put into effect these insights for better cross-border water management, but such approaches are certainly necessary for a better understanding of the

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147. See Ellen M. Immergut, *The Normative Roots of the New Institutionalism: Historical-Institutionalism and Comparative Policy Studies*, in *BEITRÄGE ZUR THEORIEENTWICKLUNG IN DER POLITIK—UND VERWALTUNGSWISSENSCHAFT* 325, 325 (Arthur Benz & Wolfgang Seibel eds., 1997).

148. See Judith Goldstein & Robert O. Keohane, *Ideas and Foreign Policy: An Analytical Framework*, in *FOREIGN IDEAS IN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE* 3, 3-30 (Judith Goldstein & Robert O. Keohane eds., 1993).

149. See ROBERT AXELROD, *THE COMPLEXITY OF COOPERATION: AGENT-BASED MODELS OF COMPETITION AND COLLABORATION* 3-5, 82-85, 146-49 (1997).

150. See Blatter, *supra* note 113, at 205, 218-20.

151. See Blatter, *supra* note 50, at 160.

"turbulent world"<sup>152</sup> that accompanies the process of "debordering the world of states."<sup>153</sup>

Our final message is a call for variety instead of simplicity in approaching the challenges of intermestic politics. In a dynamic and complex world filled with uncertainties, an adequate governance system for any resource must encompass a broad range of governance modes. For example, Scharpf differentiates the notion of modes of governance into structural and process dimensions.<sup>154</sup> He calls the first "institutional setting" and distinguishes between hierarchies, assemblies, associations, joint-decision systems, networks, regimes, markets, and fields.<sup>155</sup> The second is labeled "modes of interaction" and comprises the following: hierarchical direction, voting, negotiation, and unilateral action.<sup>156</sup> We would add a third dimension in differentiating governance models. Institutions can be built around different focal points including territory (cities, states, or nations), scientific expertise (regulatory regimes), consumer choices (organizations for special services), cultural identities (communities), and others.

In the future, transboundary water politics will be increasingly influenced by the flows of information across territorial boundaries and by direct interdependencies of global and local forces. Which considerations should dominate institutional designs depends very much upon context. We would expect particular kinds of institutions to work well in some contexts and not others; therefore, models must be tailored to match circumstances. The emerging world order is likely to be characterized by an enormous variety of institutional forms. What may be lacking is not sufficient competition between functionally or sectorally differentiated institutions, as the public choice theorists would lead us to believe, but, conversely, institutions that foster cooperation and bridge various divisions through communication. We need to construct institutions that unite people and enhance their sense of a common stake in issues as important as water.

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152. JAMES N. ROSENAU, *ALONG THE DOMESTIC-FOREIGN FRONTIER: EXPLORING GOVERNANCE IN A TURBULENT WORLD* xvii (Cambridge Studies in International Relations No. 53, 1997).

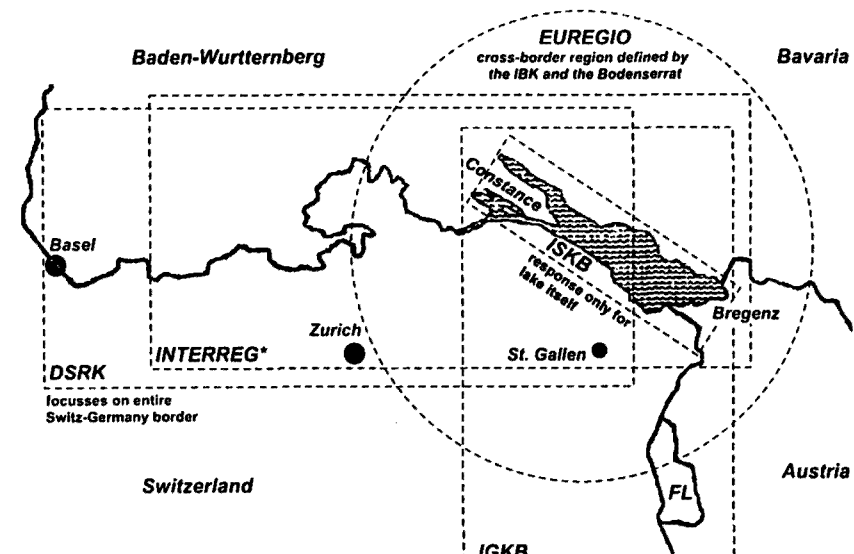
153. Mathias Albert & Lothar Brock, *Debordering the World of States: New Spaces in International Relations*, NEW POL. SCI., Spring 1996, at 69, 69. See also Mathias Albert & Lothar Brock, *Debordering the World of States: New Spaces in International Relations*, in *CIVILIZING WORLD POLITICS: SOCIETY AND COMMUNITY BEYOND THE STATE* 19, 19 (Mathias Albert et al. eds., 2000).

154. See FRITZ W. SCHARPF, *GAMES REAL ACTORS PLAY: ACTOR-CENTERED INSTITUTIONALISM IN POLICY RESEARCH* 47 (1997).

155. See *id.* at 46.

156. See *id.* at 47.

CROSS-BORDER INSTITUTIONS AT LAKE CONSTANCE



**\*INTERREG-PROGRAM**

Setup by the European Union to finance cross-border studies, projects, and infrastructure

**IBK**

Meeting of government leaders; comprehensive agenda; focussed on EUREGIO

**BODENSERRAT**

Private association of local business and political leaders and scholars; defined cross-border region (EUREGIO)

**FIGURE 1**