Taking Uncertainty Seriously: Adaptive Governance and International Trade: A Reply to Rosie Cooney and Andrew Lang

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Abstract

The use of experts' power in global networks is often concealed by describing it in the register of scientific truths. This text seeks to illustrate the phenomenon by reference to the recent article by Cooney and Lang, 'Taking Uncertainty Seriously: Adaptive Governance and International Trade', which appeared in this journal. The account those authors give of WTO law goes beyond a purely legitimacy-based structure focused on effectiveness. Instead, the question is framed in terms of cognitive achievements by regulators in the member states. The present article uses Cooney and Lang's project and the same example of the WTO in order to evaluate global governance. In so doing it analyses the functionalist style of public law, together with neofunctionalism and the historical phenomena by which increasing areas in the public sphere are attributed to regulators, both national and international. With this article, the author hopes to contribute to the debate about the tensions caused by the legal activity of international organizations in a world of equal sovereigns with unequal access to power. In conclusion it is suggested that, so far as contemporary global governance is concerned, the distribution of jurisdiction through regulation is the sphere in which the usual political struggles between international actors take place.

The use of experts' power in global networks is often concealed by describing it in the register of scientific truths. My intention here is to illustrate this phenomenon by reference to the recent article by Cooney and Lang, 'Taking Uncertainty Seriously: Adaptive Governance and International Trade', in this journal.[1] The article provides a good introduction

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1 Cooney and Lang, 'Taking Uncertainty Seriously: Adaptive Governance and International Trade', 18 *EJIL* (2007) 523.

to that issue, to the extent that it offers a set of strong theoretical assumptions framing global governance as a field of knowledge to be conquered. Thus, Cooney and Lang advocate a leading role for scientific experts in global political decisions. The present article wishes to highlight the absence of accountability of the international experts and how this contributes to the problem of de-politicization in the global sphere.

As the authors state in the introduction, the aim of their project is to address the pervasive uncertainty which confronts decision-makers in international institutions.[2] Focusing primarily on the uncertainty of environmental management, Cooney and Lang put forward the case of the invasive alien species (IAS). A definition of the IAS is offered in the article: virtually all life forms 'which have been introduced into environments in which they do not naturally occur'.[3] The international actor chosen is, predictably, the World Trade Organization (WTO) in its capacity of distinguishing – as well as overseeing and reviewing – legitimate from illegitimate trade-restrictive environmental measures through the mechanism of the Sanitary and Phytosanitary Measures Agreement (SPS Agreement).[4] This mechanism is 'based (in part) on an appeal to scientific expertise as an arbiter of regulatory rationality'.[5]

The core question posed by the authors in the article concerns the implications for the WTO in respect of this task when it faces what they consider to be an unavoidable scientific uncertainty. In this regard a proposal is made for a new policy aimed at the regulators in global governance: adaptive management or adaptive governance. The approach used is borrowed in part from the literature of environmental management of the 1970s, combined with alternatives drawn from social sciences. It is based on continuous learning processes rather than on 'traditional command and control regulatory frameworks'.[6] Policymaking in the context of adaptive governance is considered a repetitive process because scientific knowledge is seen as provisional and subject to review in the light of new information, and thus not definitive or final. The authors' opinion is that 'no single optimal solution to policy problems exists'.[7] They accordingly take the view that the WTO efforts should be aimed at the procedures by which regulatory decisions are made at a national level. The core message of the article is worth quoting for our purposes:

> For us … the point of proceduralization is not primarily to ensure that the WTO interferes less substantively with democratic decisions at the national level, but rather to use the international trade regime in a more positive way to facilitate, and provide an impetus for the development of appropriate governance frameworks at the national level.[8]

[2] *Ibid.*, at 523.

[3] *Ibid.*, at 524.

[4] Roberts, 'Preliminary Assessments of the Effects of the WTO Agreement on Sanitary and Phytosanitary Trade Regulations', 1 *J Int'l Economic L* (1998) 377. The Agreement on the Application of Sanitary and Phytosanitary Measures (the 'SPS Agreement') entered into force with the establishment of the WTO on 1 Jan. 1995. It concerns the application of food safety and animal and plant health regulations. For more information see http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm4_e.htm.

[5] Cooney and Lang, *supra* note 1, at 526.

[6] *Ibid.*, at 533.

[7] *Ibid.*, at 539.

[8] *Ibid.*, at 544.

Cooney and Lang raise two highly provocative points. First, the account they give of WTO law goes beyond a purely legitimacy-based structure focused on effectiveness. Instead, they propose to endow it with a functional aspect: the question is posed in terms of cognitive achievements for regulators in the member states through the influence of WTO law and WTO managerial tasks. Secondly, they describe national and international regulators as being naturally intertwined. Now, to me both these arguments are interesting and important in facilitating an approach from a legal perspective to the meaning of the elusive notion of global governance[9] and – which some consider its leading characters – the regulators.[10]

Furthermore, critical understanding of these two claims made by the adaptive governance project will assist in evaluating global governance; I shall analyse whether the lack of central government which characterizes global governance permits the justification of legal-political decisions as knowledgeable truths in the style of an enlightened ideology – and whether the scientific justification provides a means of avoiding the type of political accountability found in the public national sphere. In order to understand the origins of cognitive theories employed by adaptive governance and the notion of regulators I will, in the same manner as Cooney and Lang, use the concrete example of the WTO, giving a brief description of its emergence in the international public sphere. I shall examine both the appearance and development of what has been called the functionalist style in public law[11] and neofunctionalism. Next, the historical phenomena of increasing fields of public sphere being attributed to regulators, national and international alike, will be outlined. The conclusions on the discussion of adaptive governance as an epiphenomenon of global governance will follow.

1 In the Beginning…

Considered from a strictly structural point of view, the promotion of international cooperation for solving international problems of an economic, social, cultural, or humanitarian character was a founding principle of the United Nations. This was not the case with the covenant of the League of Nations, the jurisdiction of which was confined to the subject of peaceful settlement of disputes.[12] Chapter IX, Article 55, of the UN Charter provides:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

[9] For an attempt to formulate the concept from the perspective of political science see Rosenau, 'Governance, Order and Change in World Politics', in J.N, Rosenau and E.O. Czempiel (eds), *Governance without Government: Order and Change in World Politics* (1992). The closest that Rosenau comes to clarifying the notion of global governance is when he states that 'to presume the presence of governance without government is to conceive of functions that have to be performed in any viable human system irrespective of whether the system has evolved organizations and institutions explicitly charged with performing them': at 3.

[10] To whom Slaughter attributes the name of the 'New Diplomats': see A.-M. Slaughter, *A New World Order* (2004), at 36.

[11] See Loughlin, 'The Functionalist Style in Public Law', 55 *U Toronto LJ* (2005) 361.

[12] M.S. Rajan, *The Expanding Jurisdiction of the United Nations* (1982), at 4.

> a. higher standards of living, full employment, and conditions of economic and social progress and development;
> b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Accordingly, the organization chart of the United Nations (UN) system today includes the WTO as a 'Related Organization' to the specialized agencies of the Economic and Social Council (ECOSOC).[13] Nevertheless, the relationship between the two organizations is not as clear as it seems at first glance. Thus the WTO organization chart does not include any link with the UN.[14] A report prepared by the Global Economic Monitoring Unit of the UN about the current global economic outlook (November 2006) limits itself to laconically stating that '[t]he world trading system suffered a serious setback during 2006 as the *multilateral trade negotiations* under the Doha Round in the World Trade Organization (WTO) were suspended in July. So far, the setback in the world trading system has not generated any visible adverse impact on international trade flows, but it may have created the potential for more trade conflicts in the future'.[15] There seems to have been an evolution, however, in the identity of the WTO as perceived by the UN. A 1995 manual on the basics of the UN produced by the organization listed the WTO in last place among the intergovernmental agencies related to the UN, confiding that 'cooperative agreements are under discussion'.[16] The 2004 version of the same report clearly states that the WTO is not a specialized agency but has cooperative arrangements and practices with the UN.[17]

On the other hand, it is a fact that the UN had a great influence in the historical steps leading to the foundation of the WTO. In 1974, the General Assembly Resolution on Multilateral Trade Negotiations called upon the members of the Trade Negotiations Committee of the General Agreement on Trade and Tariffs (GATT) to take all necessary measures to enter into the substantive negotiations scheduled in the Tokyo Declaration, with a view to supporting developing economies, stressing the importance of avoiding the escalation of restrictions on trade.[18] The Tokyo Declaration was

[13] Available at: www.un.org/aboutun/chart.html.

[14] See the organization chart of the WTO, available at: www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm.

[15] Meeting held from the 30 Oct. to 1 Nov. 2006 at the Palais des Nations in Geneva, Switzerland, co-hosted by the UN Department for Economic and Social Affairs (DESA) and the UN Conference on Trade and Development (UNCTAD), available at: www.un.org/esa/policy/link/.

On UNCTAD and its relationship with GATT see United Nations (UNCTAD), *The History of UNCTAD: 1964–1984* (1985). For many years after the failure of an International Trade Organization (ITO) to come into existence, principally due to the non-ratification of its charter by the USA, UNCTAD coexisted with GATT for negotiating trading rules and principles. Whereas UNCTAD stressed the development approach, GATT promoted a liberal international trading system. This duality gave rise to conflicts of policies and jurisdiction, see at 9; 39.

[16] Department of Public Information of the UN, *Basic Facts about the United Nations* (1995), at 272.

[17] Department of Public Information of the UN, *Basic Facts about the United Nations* (2004), at 63.

[18] See GA Res 3309 (XXIX) of 14 Dec. 1974, available at: www.un.org/documents/ga/res/29/ares29.htm.

produced during the ministerial meeting in Tokyo (12–14 September 1973). It stated that the multilateral trade negotiations were officially open. The first aim of the negotiations was 'to achieve the expansion and ever-greater liberalization of world trade … through the progressive dismantling of obstacles to trade and the improvement of the international framework for the conduct of world trade'.[19] This constituted the first attempt to reform the international trade system as we now know it in the form of the system created with the WTO.[20]

By making a recommendation on state tariffs on imports and exports in 1974, the General Assembly of the UN addressed an area traditionally believed to be within the jurisdiction of the states.[21] In modern international law the state's right and, for that matter, the international organization's right under international law to regulate conduct in matters not exclusively of domestic concern[22] may be regarded as the mark of their sovereign powers. Moreover, when international organizations started to be included as holders of rights to regulate conduct beyond the domestic sphere, the previously strictly unitary character of the sovereignty embodied in states underwent change. Sovereign powers held solely by states themselves in traditional international law over territories begin to be slowly relocated among *different* actors, most prominently states and international organizations, by means of *regulatory* strategies over conducts. In this regard, as one commentator put it more than 20 years ago, the activities under the ECOSOC were but a movement in the process of expanding the jurisdiction of the most important international organization in modern international law during the post-war era, the UN.[23]

[19] Draft declaration of the ministerial meeting in Tokyo, available at: www.wto.org/gatt_docs/English/SULPDF/91870243.pdf. The Tokyo Round extended over the period 1973–1979.

[20] For a good explanation of the pros and cons of the system today see Wolfe, 'Decision-making and Transparency in the "Medieval" WTO: Does the Sutherland Report have the Right Prescription?', 8 *J Int'l Economic L* (2005) 631.

[21] See Rajan, *supra* note 12, at 88.

[22] This, as is well known, is the traditional definition of jurisdiction given by F.A. Mann in his course of lectures in 1964 in the Hague: F.A. Mann, 'The Doctrine of Jurisdiction in International Law' (1964-I) 111 *Recueil des Cours* 9. Mann mentions specifically the international organizations: at 9. Later in the same text he insists, 'Moreover, the connection between jurisdiction and sovereignty is, up to a point, obvious, inevitable and almost platitudinous, for to the extent of its sovereignty a State necessarily has jurisdiction', at 50. For an interesting historical example of the deprivation of Turkey after World War I by modern international law of its right to regulate in the pre-modern era style or, put in other words, the deprivation of its ancient jurisdiction, see the 'Convention Respecting Conditions of Residence and Business and Jurisdiction', 18 *AJIL* (1924) Supp. Official Docs, 67. For a more modern account of jurisdiction see Lowe, 'Jurisdiction', in M.D. Evans (ed.), *International Law* (2006), at 335.

[23] Rajan, *supra* note 12, at 85. See Dapo Akande, 'International Organizations' on *ultra vires* decisions of international organizations, but not touching upon the question of expanding jurisdiction, in Evans (ed.), *supra* note 22, at 277, 292–293. Jan Klabbers examines the question of *ultra vires* decisions of the UN in the light of the International Court of Justice's advisory opinion, *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* [1962] ICJ Rep 151 and confirms that 'given the broad purposes of the UN, it was not lightly to be expected that activities taken by the UN would be *ultra vires* the organization' in Klabbers, 'Checks and Balances in the Law of International Organizations', forthcoming in *Ius Gentium*, at 10, available at: www.helsinki.fi/eci/Publications/JKChecks_and_Balance.pdf.

Crucially, the growing interdependence of countries and of the world's economic development gave GATT an increasingly central role, without requiring the driving force of the UN to achieve this.[24] For example, as the economies of the developed countries were experiencing an increase in the value of services trade ('from about 80 billion dollars in 1967, to nearly 650 billions in 1980'), GATT had to follow up and expand its scope into services trade.[25] The trends of expanding jurisdiction are reproduced in the global sphere constantly. Thus, as has been recently argued, in order to address anti-competitive practices which hinder market access, the WTO also tends to regulate issues beyond the core aspects of its foundational competences. It expands its jurisdiction by laying down regulatory measures in respect of anti-competitive practices which do not affect market access, despite the fact that in the light of its constitutional principles it has neither the need nor the power to do so.[26] In recent years, issues such as trade and the environment, areas of professional and business services or the free movement of investment have attracted the attention of the WTO's expanding agenda, although, as the case of the Multilateral Agreement on Investment (MAI) shows, not always with success.[27]

It is clear that the constitutional aspirations of the WTO were not limited to the aim of facilitating trade. Following the precedents set by the UN, there was also an ambition to further the growth of trade relations among countries, as a means 'to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand' seeking both 'to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development'. These are indeed commendable purposes. In a similar manner to the UN, the WTO lists among its founding principles a commitment 'to positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development'.[28] However, these questions are far from being settled in the life of the WTO. As exemplified by the failure of important attempts to launch negotiations

[24] Jackson, 'Dispute Settlement and the WTO, Emerging Problems', 1 *J Int'l Economic L* (1998) 329.

[25] See generally Gold, 'Legal Problems in Expanding the Scope of GATT to Include Trade in Services', 7 *Int'l Trade LJ* (1982/1983) 281, at 284. On the history of the inclusion of services in GATT see J. Croome, *Reshaping the World Trading System. A History of the Uruguay Round* (1996), at 122–130. Also on the expansion by GATT during these years of negotiation on the substance of intellectual property rights, despite developing countries' repeated argument that the World Intellectual Property Organization (WIPO) and other specialized agencies were the proper place to discuss them; see Croome at 130–138.

[26] Thus Uruena argues that the WTO has actually taken measures against competitive policies not directed against the market, therefore expanding its jurisdiction; see generally Uruena, 'The World Trade Organization and its Powers to Adopt a Competition Policy', 3 *Int'l Orgs L Rev* (2006) 53.

[27] J. Braithwaite and P. Drahos, *Global Business Regulation* (2000), at 182–183. For an economic theory of the politics of MAI negotiations see D. Urban, *Multilateral Investment Agreement in a Political Equlibrium*, CESifo Working Paper No.1830, Oct. 2006, available at: www.CESifo-group.de.

[28] Agreement Establishing the World Trade Organization, available at: www.wto.org/english/docs_e/legal_e/final_e.htm.

rounds,[29] many have been disappointed by the level of real effort made by the WTO to comply with these goals. In particular, the aim of promoting development appears to have been neglected, since the perceived need by the UN to promote economic growth homogenously, all over the world, has not been made a primary goal by the WTO.[30] On the contrary, '[t]rade becomes the lens through which development is perceived, rather than the other way around'.[31] From a systemic perspective it is difficult to question the argument that the politics of international economic law shall have a similar impact when shaping the priorities in its dealing with human rights, environmental or labour issues.[32]

However, the preceding comments on the origin of the WTO might suggest that when the UN took pains in the early 1970s to encourage its members in the negotiations for creating an orderly world trade system, it had in mind a functionalist design for it; in other words, that the promotion of trade law should serve the purposes of the common (global) good in developing terms. That the WTO, as an independent international organization, would soon find itself switching to the role of the active agent which forms plans *itself* for new functions was something to be expected, given the real power with which it was being endowed. All the proposals for the coordination of the work of international agencies and organisations and for the accountability of decisional powers in global governance constitute a sign that once an organization is given independent life and power it simply starts to use it.[33]

An additional doctrinal layer to the latter quasi-structural argument is nevertheless necessary if one wishes to understand why the adaptive governance project is seeking to use WTO law as a tool for improving governance in member nation states. This approach involves an enlightened method of using regulatory power by performing functions in order to achieve certain purposes. Put in those terms, one might note that the vocabulary is not new. It bears significant traces of functionalism; a legal doctrine

[29] See the infamous case of the ministerial meeting in Seattle in 1999 which failed to launch a round of negotiations. In that case, developing countries refused to accept an apparently imposed agenda by high income countries, while small countries felt totally left out of the fora where negotiations for the agenda were taking place; see Hertel, Hoekman, and Martin, 'Developing Countries and a New Round of WTO Negotiations', 17 *The World Bank Research Observer* (2002) 113, at 114.

[30] Hoekman makes a clear point: '[m]any will agree that the WTO is not a development organization and should not become one – this is certainly my view as well'. However, he also considers the backward position of the developing countries in the negotiation system of the WTO to be a matter for concern, and makes a proposal in order to introduce changes in the system of negotiations. Changes which recognize the complexities created by the huge disparities in capacity and priorities of the members of the WTO, beyond the system of *special and differential treatment* see Hoekman, 'Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment', 8 *J Int'l Economic L* (2005) 405, at 423.

[31] Dani Rodrik in a paper prepared for the UN Development Programme, 'The Global Governance of Trade as if Development Really Mattered': at 2, available at: www.servicesforall.org/html/Governance/Rodrik-Trade%20&%20Development.pdf.

[32] For a recent (I gather, serious) use of this notion see the title of the Call for Papers of the American Society of International Law International Economic Law Interest Group (IELIG), 2008 Biennial Interest Group Conference: 'The Politics of International Economic Law: the Next Four Years' and the quotation from Groucho Marx which accompanies the text: 'Politics is the art of looking for trouble, finding it everywhere, diagnosing it incorrectly and applying the wrong remedies.' This is available at: www.asil.org/pdfs/ieligcallforpapers.pdf.

[33] For an example of these concerns and proposals see Held, 'Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective', 39 *Government and Opposition* (2004) 364.

inaugurated more than 100 years ago by Léon Duguit and other French social solidarists.[34] Many things have happened since the publication of Duguit's principal works. Nevertheless, there are important aspects in common between functionalism and adaptive governance. The basic assumption that such harmony of interests exists between the WTO, a trade organization, and the country members as would allow the organization to be a source of knowledge for the evolution of the regulatory capacity of the country members[35] undoubtedly entails the same important *a priori* principle of the French functionalists: the *a priori* referring to an unproblematic harmony of interests between the actors in (global) society.[36]

But the claim of a harmony of interests in the context of the WTO is far from uncontroversial: where a principled conflict of interests occurs – here, we are talking about *trade*, which necessarily involves negotiation – and a dispute about political measures affecting trade is at least potentially possible (as can be inferred from the establishment of the WTO's dispute settlement mechanism) the assumption that with the necessary enlightenment or, as Cooney and Lang put it, with 'continuous learning',[37] the *right* and commonly accepted regulations will be produced amounts to a misconception about an important part of the negotiation process in the WTO. For example, a recent paper by Horn and Mavroidis specifically raises the concern that in the question of national environmental policies 'WTO Members will increasingly dispute the right of their trading partners to regulate particular transactions through recourse to public international law'.[38] Thus the misconception may run even deeper than that and have a bearing on the notion of trade itself.[39] Moreover, the 'continuous

[34] Léon Duguit (1859–1928) was a French legal theorist. He made a radical criticism of state sovereignty and attempted to find an empirical foundation for law with the promotion of the use of sociology: Laborde, 'A Pluralism, Syndicalism and Corporatism: Léon Duguit and the Crisis of the State (1900–25)', 22 *History of European Ideas* (1996) 227, at 228. For the contextualization of Duguit in the tradition see M. Koskenniemi, *The Gentle Civilizer: The Rise and Fall of International Law 1870–1960* (2002), at 297–302.

[35] Cooney and Lang, *supra* note 1, at 551. For a classical critique of a utopian application of the economic principle of harmony of interests in international politics see E.H. Carr, *The Twenty Years' Crisis, 1919–1939* (1939), at 54–80. Interesting in this regard is the quotation by Carr from the League Conference of Economic Experts (1927): '[every country will (then) know that the concessions it is asked to make will be balanced by corresponding sacrifices on the part of the other countries. It will be able to accept the proposed measures, not merely in view of its own individual position, *but also because it is interested in the success of the general plan laid down by the Conference*' (emphasis in the original).

[36] Koskenniemi, *supra* note 34, at 300.

[37] Cooney and Lang, *supra* note 1, at 551.

[38] Horn and Mavroidis, 'The Permissible Reach of National Environmental Policies', IFN Working Paper No. 739, Apr. 2008; Research Institute of Industrial Economics, Stockholm, Sweden. The study is part of the ENWINED – Environment and Trade in a World of Interdependence project, available at: www.naringslivsforskning.se/web/739.aspx.

[39] We are reminded by van Ittersum of the historical fact that trade and opposition of interests often go together. In a subchapter with the title, 'No Trade without War', in her book on Hugo Grotius's De Iure Predae, she tells the story of Grotius writing in the spring of 1606 on behalf of the *Vereenighde Oostindische Compagnie* (VOC or United Dutch East India Company) to the Dutch Estates General in order to entreat Their High Mightinesses to take responsibility for the war in the East Indies. His proposal was the establishment of an *aerarium militare*, a special fund which 'would derive its income from the federal tax on VOC booty and spend it exclusively on the armed conflict in Asia': M.J. van Ittersum, *Profit and Principle. Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies (1595–1615)* (2006), generally 177–188; quotation at 177.

learning' argument contains a scheme for the erosion of sovereignty, of this *capacity to regulate*, contained in the sovereign powers of the state. In order to clarify this latter statement, in the following section a closer approach is made to the main ideas underlying the concrete project of adaptive governance, by means of a brief survey of functionalism and neofunctionalism.

2 Functionalism and Neofunctionalism

Martin Loughlin identified several basic elements of the functionalist style of thought in domestic public law which may be worth highlighting here. First, and most important, the institutions and practices of public law can and should be designed to promote human improvement. He also notes that functionalists conceive of humans as social creatures, and therefore regard the basic function of society as being the promotion of social solidarity. In the context of functionalist doctrines, law is not a transcendent or metaphysical phenomenon which provides for values and standards against which society has to be measured, but a *function* of society, which must develop as society develops. Thus, law has to be 'interpreted purposively (i.e. with regard to its function)', and from this it follows that lawyers must concern themselves with the substance of the law rather than with its form. Rights are promoted only in so far as their recognition promotes the common good – 'the parts are thus interpreted as a function of the whole'.[40] Finally, to make sense of the precedent elements, an embracing sociological conception of public law, constituting a particular way of living, has to be adopted. The political ideology of this functionalism belongs to a reformed liberalism, described by Loughlin as a mixture of liberalism and socialism. An important consequence of this legal-sociological theory is that the notion of the state becomes blurred: 'the State has no personality of its own, being no more than a group of individuals having in their control forces that they must employ to secure public services'.[41]

Interdependence is the magic word for functionalism and a popular mantra of global governance.[42] It is no accident that power in the global realm has been defined

[40] Loughlin, *supra* note 11, at 363–364.

[41] *Ibid.*, at 394.

[42] For a classic account see: the modern fact of interdependence requires a political order which takes that fact into account, while in reality the legal and institutional superstructure, harking back to the nineteenth century, assumes the existence of a multiplicity of self-sufficient, impenetrable, sovereign nation states': H.J. Morgenthau, *Politics Among Nations. The Struggle for Power and Peace* (1985), at 8. Another classic of international relations, to which, unfortunately, I could not have full access is R.O. Keohane and J.S. Nye, *Power and Interdependence* (2000). The book starts with the following statement: '[w]e live in an era of interdependence'. In questions of development strategies, the international financial architecture must reflect the interdependence of macroeconomic and financial, with structural and social and human concerns': J.D. Wolfensohn, *A Proposal for a Comprehensive Development Framework* (May 1999), available at: http://siteresources.worldbank.org/CDF/Resources/cdf.pdf. On the practical complexities of promoting interdependence (as a means for liberal peace) through trade while at the same time trying to protect other core values, such as the environment, see J. Klabbers, *Forest Certification and the WTO: A Discussion Paper*, report to the Certification Information Service, Nov. 1999, available at: www.efi.int/attachments/dp_07.pdf.

as the ability to manipulate or escape the coercion of an *interdependent* relationship at low cost.[43] In this definition the connotations of the concept of interdependence are ambiguous: it is undeniably present but does not have win-win status. It appears that the state which manages to avoid such interdependence to the greatest extent goes furthest, independence being the (unattainable) ideal. This was not so for Duguit, who found the real basis of public law in social interdependence, for both individuals and social groups. In this regard he never distinguished between private and public, or between national and international, law.[44] Moreover, Duguit was convinced that sovereign power could no longer be conceived as a subjective right to command, and believed that the holders of power were simply managers of the nation's business.[45] In his time, the emphasis which the French solidarists placed on the accountability of governmental institutions and regulators, as provider of services, on the basis that 'there is no longer a discretionary act of government that is beyond the reach of law',[46] was groundbreaking.

While remaining in its pure form an important doctrinal line of international law,[47] the functionalist approach evolved later into different versions. Significantly, Loughlin detects the influence of Duguit on, among others, Harold Laski – who translated the main works of the French author into English. This influence can also be seen in the emergence of juristic forms of analysis which are influenced by Luhmann's system theory – such as Gunther Teubner's,[48] which embraces the evolutionary and scientific characters of functionalism.[49]

For all its sociological connotations, there is, however, an important point in Duguit's functionalism: it is expressed through, and works in, a juristic systemic style and the product of his political theory is a legal product.[50] This fact provides us with

[43] Keohane and Nye, 'Power and Interdependence in the Information Age', 77 *Foreign Affairs* (1998) 81, at 86.

[44] Koskenniemi, *supra* note 34, at 298–299. This fact testifies to the principled liberalism of functionalism. Compare Slaughter, 'International Law in a World of Liberal States', 6 *EJIL* (1995) 503: '[t]he first liberal assumption is that the primary actors in the international system are individuals and groups acting in domestic and transnational civil society', at 508. She also lists among the attributes of the liberal states 'a blurring of the distinction between domestic and foreign issues', at 510.

[45] Loughlin, *supra* note 11, at 370–371.

[46] *Ibid.*, at 371.

[47] On the general influence of French solidarism in International Law see Koskenniemi, *supra* note 34, at 266–348. The most renowned student of Duguit was Georges Scelle; see Simma, 'The Contribution of Alfred Verdross to the Theory of International Law', 6 *EJIL* (1995) 1, at 13. On the current influence of functionalism see Klabbers, *supra* note 23.

[48] For an example of this see Fischer Lescano and Teubner, 'Regime-Collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Michigan J Int'l L* (2004) 999. Together with Fischer Lescano, Teubner describes the way in which the normative concept of networks of legal regimes works.

[49] Loughlin, *supra* note 11, at 391–397 and 402. See also Laborde, *supra* note 34, at 228.

[50] Loughlin, *supra* note 11, at 371. For a similar argument on the failure of functionalism as the sole tool in analysing the international organizations as political actors see generally Klabbers, *supra* note 23.

further evidence, as if in opposition, of the need to look for other influences of adaptive governance. The reason for this is that this type of managerial governance, despite its appeal to a purposive (functionalist) element of regulation, is not presented as a systemic legal theory. Instead, adaptive governance appears as part of a systemic theory of international organizations.

In this regard, Ernst B. Haas stands out in the relevant literature used by Cooney and Lang. A major theoretician of international organizations, Haas has always been linked with so-called neofunctionalism.[51] Generally, neofunctionalism is concerned with integration in the global sphere.[52] As Ruggie, a former student of Haas, put it, '[n]eofunctionalism was framed to detect the possible emergence of state-like political community above the level of nation state. It was, in short, a theory of supranational integration, not of international integration more generally conceived.'[53] Neofunctionalism recognizes the importance of nation states in the foundation of organizations and at later moments in their lives, but it attributes the main role to two sets of non-state actors in providing the dynamic for further integration: (1) the 'secretariat' of the organisation involved; and (2) those interest associations and social movements that form around it. Haas developed the concept of 'spill-over', which is crucial in the understanding of the origins of adaptive governance. In Haas's opinion a resourceful and active secretariat in the organization, supported by those affected by the decisions in question, can bring about a situation in which 'national governments might (fitfully) learn and (reluctantly) agree to change their original positions'.[54] Interests groups at the sub-national level interacting with an international organization 'would come to appreciate the benefits from integration and would thereby transfer their demands, expectations, and even their loyalties from national governments to a new center'.[55] In adaptive governance terms this 'new center' could be the WTO secretariat. In a timely article based on the drafting of the Convention of the Law of the Sea, Haas also focused on the notion of interdependence in the world system.[56] He conceptualized the method by which interdependence should be managed in four steps. These were as follows: the perception of the great inefficiency of autonomous action; the high costs of autonomous action; the actor's perceptions of the high *uncertainty* of the autonomous action; and finally the high level of deprivation which many may suffer if one single actor

[51] Schmitter, 'Ernst B. Haas and the Legacy of Neofunctionalism' (2005) 12 *J European Public Policy* 255, at 255.

[52] Concentrating on regional integration, Haas famously published *The Uniting of Europe* (1958), setting out a neofunctionalist theory of regional integration. See also Pollack, 'Theorizing the European Union: International Organization, Domestic Polity, or Experiment in New Governance?', 8 *Annual Review of Political Science* (2005) 357, at 360.

[53] J.G. Ruggie, *Constructing the World Polity. Essays on International Institutionalization* (1998), at 42, footnote omitted.

[54] Schmitter, *supra* note 51, at 257.

[55] Pollack, *supra* note 52, at 361.

[56] UN Convention on the Law of the Sea (UNCLOS), UN Doc. A/CONF.62/121, done 21 Oct. 1982, entered into force 16 Nov. 1994, reprinted in 21 ILM (1982) 1261.

is permitted to dictate to the rest the conditions under which the new technologies may be used.[57]

The combination of the three core elements of functionalism and neofunctionalism – the highlighting and encouragement of the attribute of interdependence, purposive law, and the importance of a strong supranational organization working in close connection with the regulators in the country members – permits reflection on Cooney and Lang's project of adaptive governance. Few could question, for instance, that it is necessary and desirable to gain continuous knowledge of complex biological systems in order to avoid inflicting irreversible harm on global ecological environments.[58] But the question whether this would be an important task (function) for the WTO to pursue is more doubtful. Institutional trade-specialization inevitably determines the particular structural bias for trade of the WTO over any other concern which the organization might face, be it of environmental or labour issues, human rights or development.[59] Thus, conferring on the WTO management of (national) environmental issues would imply giving this trade organization a more prominent political role than it has now, indeed, a broad expansion of jurisdiction in global governance, in order to encourage and promote the interdependence of national and the WTO regulators. The WTO would also necessitate a stronger supranational secretariat. Such promotion constitutes in itself a political decision, or a political attitude *in favour of* an international intergovernmental trade organization[60] monitoring the national regulation on environmental issues. Patently it is one thing for the WTO to be obliged to make a decision when faced with an environmental issue on a dispute settlement,[61] and a very different thing to endow it with permanent power to provide for regulation on this field. One feels the absence of this debate in the project presented by Cooney and Lang. Perhaps their doctrinal commitments with a purposive law are what render the adaptive governance undiversified. Or it may be that it is the promotion of the interdependence in global governance which limits the alternatives and forecloses the free deliberation over different political choices in the possible ways of action on the environmental question on a global sphere. This brings me to the second point raised by Cooney and Lang about opening a line of hierarchical regulatory collaboration between international and national regulators. For this purpose a conceptual explanation of regulation and the regulators will be outlined in the following section.

[57] Haas, 'Is there a Hole in the Whole? Knowledge, Technology, Interdependence, and the Construction of International Regimes', 29 *Int'l Org* (1975) 827, at 863–864.

[58] Cooney and Lang, *supra* note 1, at 534.

[59] See *Report on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, UN Doc A/CN.4/L.682, 13 Apr. 2006, at 247.

[60] On the character of intergovernmentality of the WTO see Charnovitz, 'Opening the WTO to Non-Governmental Interests', 24 *Fordham Int'l LJ* (2000) 173.

[61] See generally Howse, 'From Politics to Technocracy – and Back Again: the Fate of the Multilateral Trading Regime', 96 *AJIL* (2002) 94.

3 On Regulation and Regulators

A *A Right to Regulate … What?*

In the national public law arena, the core conception of regulation is placed in the context of the privatization of utilities, when the public interest passes into the domain of the market. The increase of regulation is caused by the privatization of the public.[62] The definition of regulation given by Toni Prosser, author of one brilliant book on the relationship of the regulators and law, takes elements from various meanings and different usages in Europe and the United States. According to him, regulation 'consists of public interventions which affect the operation of markets through command and control'.[63] In this regard it is useful to note that Cooney and Lang shared with Duguit the rejection of 'traditional command-and-control regulatory frameworks',[64] and as an alternative propose the experimentalist governance of *continuous learning*. Learning is thus the core of adaptive governance. Its further characteristics: policymaking as experimentation; avoiding irreversible harm; a monitoring process which should routinely be fed back; and the stress on pluralism and process, which consists in mapping out alternative certainties in areas of uncertainty, follow from the focus on learning in the decision-making process.[65] While the traditional 'command and control' manifestly pertain to the categories of power and submission, continuous learning seems to be free of those negative features. But what does *continuous learning* mean in practice? Observed as a means to improve environmental political decisions, resort to *continuous learning* amounts almost to a platitude since it is stating the evident: the need to learn from past failures and successes. However the project of adaptive governance goes manifestly beyond that. And it is in its condition of regulatory design that the option of continuous learning is a form of construction of reality.[66] As such it also involves power and submission. Continuous learning aims to subject the national regulators to a WTO secretariat provided with the power of a centralized expertise. However, when the question of knowledge is at stake, one should reflect on the fact that lack of applicable technical knowledge is one of the main reasons which even prevent developing countries from participating in the dispute settlement mechanism of the

[62] Brathwaite, Coglianese, and Levi-Fur, 'Can Regulation and Governance make a Difference?, 1 *Regulation & Governance* (2007) 1, at 3.

[63] T. Prosser, *Law and the Regulators* (1997), at 4.

[64] Cooney and Lang, *supra* note 1, at 533.

[65] *Ibid.*, at 534–538.

[66] I have drawn here a parallel with the following evaluation given by Kingsbury for the international law sphere: that 'a preoccupation with analytic description [of law] is a form of construction of reality and has diverted the academy from the essential project of ethical evaluation, normative criticism and prescriptive social construction': Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law', 19 *Michigan J Int'l L* (1998) 345; at 372.

WTO[67] or influencing effectively crucial negotiations of the WTO system.[68] Therefore, in the context addressed by the adaptive governance project, that of the WTO, knowledge and learning are deeply politically loaded concepts. Unless continuous learning is used as a euphemism for political domestication, the proposal to share/impose knowledge and expertise for creating regulation on the national environmental policy, should tackle the unequal access of country members to possibilities of producing and testing knowledge and technology which affects the WTO system.

Returning to Prosser's definition of regulation, one discovers that it contains the following apparent paradox: with increased privatization comes increased juridification. This statement starts to make sense if it is taken into account that one of the roles of regulators in recent decades has been 'to create and to police markets where they would not arise or continue spontaneously',[69] in order to cover the necessary public service (imagine, for example, the case of a remote village in need of the telephone service provided by a private company). Moreover, market economies rely for their survival and proper working on a wide array of non-market institutions which perform regulatory, stabilizing, and legitimizing functions.[70] Therefore, the three major tasks of regulation are, according to Prosser, as follows:

[67] See, e.g., that the pre-case assistance necessary due to the growing complexity of WTO agreements requires an in-depth (legal) knowledge of how to use the system in the concrete case. Many developing countries are not able to perform the task of identifying cases on the basis of national trade policy interests and needs. See Alavi, 'African Countries and the WTO's Dispute Settlement Mechanism', 25 *Development Policy Review* (2007) 25, at 31–32. For statistics in the WTO Dispute Settlement proceedings, see Alavi at 27; see also the statistics in the study of Maton and Maton, 'Independence under Fire: Extra-legal Pressures and Coalition Building in WTO Dispute Settlement', 10 *J Int'l Economic L* (2007) 317; at 329, 332, and 334, on complainants' success in Dispute Settlement Mechanism (DSM) rulings. They conclude that there is little evidence from the figures to infer 'any potential institutional bias in the structure of the WTO in favour of powerful Member States, or theories which claim that the very premise of a legalized multilateral trade system is grounded in Western legal and political theory, and that developed countries therefore enjoy a dominant position in the system, at an abstracted theoretical level'. However, one only has to combine the result of the analysis of the figures that '[t]he only apparently significant result is that greater experience of the DSM on the part of the Complainant increases the percentage of arguments won by the Complainant in Panel proceedings' with Alavi's study on the lack of knowledge in less powerful states in order to draw a conclusion contrary to theirs. See for general statistical analysis of WTO dispute settlement Leitner and Lester, 'WTO Dispute Settlement 1995–2006 – A Statistical Analysis', 10 *J Int'l Economic L* (2007) 165; also Shaffer, 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies', available at: www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf, at 62.

[68] Alavi, *supra* note 67, explains how NGOs which assist developing countries in their relations with the Geneva institutions 'have been successful in establishing networks and producing policy papers, [but] they have not given developing countries the necessary platform to be able to affect the negotiations, for example by providing them with sufficient, consistent and applicable technical knowledge and support in the day-to-day negotiations', at 31.

[69] Prosser, *supra* note 63, at 5. See also McHarg, 'A Duty to be Consistent? *R v Director General of Electricity Supply, ex p Scottish Power, plc*', 61 *MLR* (1998) 93, at 93 (footnote omitted): '[o]ne notable consequence of privatisation for the major utility industries is not that their relationship with the state has thereby ceased, but that it has been legalised or juridified'.

[70] Rodrik, 'Institutions for High-Quality Growth: What They Are and How to Acquire Them', Studies in Comparative International Development, available at: http://ksghome.harvard.edu/~drodrik/institutions.pdf.

1. The regulation of monopolies by reproducing the effect of market forces, by control of prices and of quality of services.
2. The regulation of competition, by making possible the conditions under which competition can occur and policing them to ensure their continuation. This task may be very well exemplified by the work that the WTO actually carries out on an international level.
3. Social regulation. The main point in this case is that the rationale behind regulation is not primarily *economic efficiency*. Instead, its aim is to ensure the provision of proper public service, of which environmental issues are a significant dimension.

Put in abstract terms, these three regulatory tasks are unproblematic and easy to generalize about. However, the ability of the forms of regulation adopted in different states to promote a well-functioning market is open to political discussion, and there is no single formula applicable to all of them. The benefits of politics in regulatory decision-making are numerous: preference for public participation as a means to enhance government legitimacy,[71] the possibility of having control over, e.g., access to resources; and of criticizing unequal expectations to those resources; increase of transparency and thus accountability; broadening of the range of concrete alternatives; higher degree of effectiveness. The result of this politics is that '[t]he American style of capitalism is very different from the Japanese style of capitalism. Both differ from the European style.'[72] Blueprint measures do not produce blueprint regulation and institutions. In turn, local capabilities and needs require a long process of analysis in order to be the source of effective regulation and reliable institutions.[73] In this respect, it has been argued that the focus on and sometimes even the obsession of some powerful international organizations, which promote uniform measures by changing the local, misses the point.[74]

In a significant manner, what Rodrik also makes apparent with the claim that different capitalism is produced when pro-capitalist regulation is applied to different circumstances is that the strengthening of capitalism and the increase of regulation

[71] On this topic see Epps, 'Reconciling Public Opinion and the WTO Rules under the SPS Agreement', 7 *World Trade Review* (2008) 359, at 361–369.

[72] Rodrik, 'The Global Governance of Trade as if Development Really Mattered', available at: http://ksghome.harvard.edu/~drodrik/UNDPtrade.PDF.

[73] Rodrik, *supr*a note 70, at 19.

[74] See Alvaro Santos, who analyses the World Bank internal groups and the Bank's different projects of judicial and legal reform in developing countries. As Santos proves, the reforms have not helped to improve the economies of those countries. The point here is that '[t]hese projects reinforce the belief that the cause for a country's economic stagnation is always local': Santos, 'The World Bank's Uses of the "Rule of Law" Promise', D.M. Trubeck and A. Santos, *The New Law and Economic Development. A Critical Appraisal* (2006), at 253, 299. The so-called 'Washington Consensus' which codified neoliberal programmes for developing and transition countries is today viewed with scepticism due to its poor results in terms of economic growth. See Trubek and Santos, 'Introduction', in *ibid.*, at 6. On the 'Washington Consensus' see the paper by the author of the term, John Williamson, 'A Short History of the Washington Consensus', presented to the conference entitled 'From the Washington Consensus towards a new Global Governance', available at: www.iie.com/publications/papers/williamson0904-2.pdf.

are causal-effect phenomena.[75] However, once regulation has started in a certain legal environment we may live in a persistent change in which regulatory and de-regulatory shifts happen continuously: what Ayres and Brathwaite called the era of regulatory flux.[76]

An intriguing doctrinal question hangs over the notion of regulation in the domestic realm. This relates to the 'capacity of formal law to influence day-to-day regulatory decision-making'.[77] As some would argue, regulation in the national context is not law, or at least it fits into mainstream legal analysis only with great difficulty.[78] To take an example mentioned in the study by Prosser, in the history of British regulation there was a turning point in the understanding of the notion of regulation when, as a result of a political decision, the *personalization* of regulation took place. The legal powers were transferred from regulatory commissions to a single individual Director General, who started personally to produce regulatory measures.[79] According to Aileen McHarg, professor of public law, the line drawn in this case between law and non-law in a narrower or broader manner is connected with one's political preference. The question whether the relevant regulatory value is purely effectiveness or effectiveness constrained by a set of values categorized as 'Rule of Law' values ('regulatory implementation should be authorised by law; certain and stable; accountable and transparent; procedurally fair; and proportionate, consistent and rational'[80]) marks the difference, in the national sphere, between a non-liberal and a liberal conception of regulation.[81]

To summarize, the increase of privatization and the promotion of well-functioning markets bring with them a growth of regulation which, according to a liberal perspective, *has* to be categorized as law in order to be proper regulation.

B *And Who Are They?*

What Prosser has to say about regulators in the context of national public law differs in a characteristic manner from, say, Anne-Marie Slaughter's understanding of

[75] Prosser also relates the increase of regulation with the economic liberalization impetus in the 1980s: Prosser, *supra* note 63. For an example of a regulatory proposal to reduce the risk of global financial crisis see E. Avgouleas, *Financial Regulation, Behavioural Finance, and the Global Credit: In Search of a New Regulatory Model* (2008), available at: http://ssrn.com/abstract=1132665.

[76] See, I. Ayres and J. Brathwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992), at 4. The authors present an analysis of the regulatory flux in the years of the Reagan Administration at 7–10. By responsive regulation Ayres and Brathwaite mean 'that regulation should respond to industry conduct, to how effectively industry is making private regulation work. The very behaviour of an industry or the firms therein should channel the regulatory strategy to greater or lesser degrees of government intervention', at 5.

[77] McHarg, 'Review of Karen Yeung, "Securing Compliance: A Principled Approach", Oxford, Hart Publishing, 2004', 68 *MLR* (2005) 708, at 711.

[78] *Ibid.*, at 712.

[79] That was the case of British Telecom, which, after reform of the regulation, was to be regulated instead of by a group of ministers by the sole Director General of Fair Trading: Prosser, *supra* note 63, at 46.

[80] McHarg, *supra* note 77, at 709.

[81] *Ibid.*, at 709.

regulators in the international sphere: officials or career civil servants with a special expertise, deeply engaged in transgovernmental networking.[82] In Slaughter's perspective, regulators are concerned with foreign affairs issues which, in practice, may cover any number of different fields which contribute to the complex interdependence of the modern world. Examples include industry, finance, criminal law, and security.[83] The sympathetic core feature which Slaughter identifies in the task that falls to these international networks regulators is that they 'talk a lot' among themselves.[84] While this observation may appear at first sight irrelevant, it acquires significance when we consider the way in which decisions are taken in key international organizations such as the WTO, where sometimes the means to resolve an impasse lie in an 'appellate Body decision, but in other circumstances a dinner in Geneva restaurant solves the problem'.[85] In this regard, the point that Slaughter wants to stress in her descriptive approach to the new international regulators is the informal nature of their networks. As a project, her method focuses more closely on empirical description of the world we are facing than on formulating a proposal for global governance. The title she gave to a 1997 text in which she dealt with these issues is revealing: 'The Real World Order'. There she shared with readers her observations on an emerging transgovernmentalism; a product of a disaggregation of the state in what was already termed *networking* between courts, regulatory agencies, executives and legislatures.[86]

As mentioned above, from a theoretical perspective her account of regulators is profoundly different from Prosser's. The question which arises is whether the difference between them lies in the fact that one author is describing international and the other national regulators, or whether the difference is in the method used rather than the object of study. In my opinion, with all the value to be attributed to Slaughter's appraisal, her stress on the fluidity of these new regulators is problematic, since it produces a blurring picture of them. With her emphasis on the network she apparently neglects the fact that those regulators are working for someone else – governments, organizations, institutions – and are dependent on someone else: their salaries are not paid by the network, and it is not the network to which they are held accountable.[87] Indeed, she seems to forget that she is ultimately talking, about – regulators. Arguably, when Prosser concentrates on the expanding landscapes in which regulators – that is to say, people representing the public interest – are acting, as a consequence of the increasing liberalization of the last 20 years in Britain, he may be producing a more real picture of what is going on in the world order than Slaughter's.

Notwithstanding this critique, Slaughter is making an important point when she directs our attention to the fact that internationally there *exist* networks of regulators.

[82] Slaughter, *supra* note 10, at 38.

[83] *Ibid.*, at 39.

[84] *Ibid.*, at 51.

[85] Wolfe, *supra* note 20, at 639.

[86] Slaughter, 'The Real New World Order', 76 *Foreign Affairs* (1997) 183, at 184.

[87] Although it is true that the network may occasionally provide for beneficial changes of position. See the example of individuals who have held positions in their national governments and who, when their contracts finished, entered the World Bank and vice versa in Santos, *supra* note 74, at 296.

Hence her proposal for accountability mechanism specifically designed for network control.[88] From the recognition of the network also originates the usefulness of the concept of spill-over developed by Haas.

Depending on whether one's perspective is that of the state or that of the organization, the appraisal of the network will be different. The main institutional price for the state posed by this culture of 'clubs of international regulators' is accurately articulated by Howse: there are costs generated whenever the regulators themselves have interests which may be different – whether consciously or unconsciously – from those held by the principals they are working for.[89] To put it in a contra-Habermasian fashion, public access to the immense flow of communication among regulators is literally impossible.[90] Problems of accountability therefore increase. However, national public lawyers are also today more concerned with the new public management revolution provoked by liberalization, and the resulting fragmentation of the public sector. With the decentralization of public tasks caused by the liberalization, the accountability of national regulators is also in need of a design of alternative accountability models.[91] Perhaps a greater degree of intensity attaches to issues of regulators' accountability in the sphere of global governance, but new and challenging questions have arisen at national and global levels alike.

From the perspective of the organization again Howse divides the regulators into the categories of insiders and not real insiders, taking the concrete case of the WTO.[92] The true insiders are those who, perhaps not even holding an official position, form part of the epistemic community; that is, those who possess a dominant way of looking at social reality, who share similar responses to the legitimacy challenges facing the WTO, and who have mutual expectations and mutual predictability of intention.[93] The definition of epistemic communities given by Peter Haas is useful in this context: 'a network of knowledge-based experts or groups with an authoritative claim to policy-relevant knowledge within the domain of their expertise'.[94] The true insiders are those who, when government regulation aims at the protection of the environment, would start to suspect 'that what must be driving such policies was protectionism, more or less hidden'.[95] A textbook example of this type of reaction occurred in the *United States – Restrictions*

[88] Slaughter and Zaring, 'Networking Goes International: An Update', 2 *Annual Review of Law and Social Science* (2006), at 211, 224. Also on networked regulation see Brathwaite, Coglianese, and Levi-Fur, *supra* note 62, at 4.

[89] Howse, *supra* note 61, at 106.

[90] For a similar argument, this time referring to negotiators of treaties, see Benvenisti, 'Exit and Voice in the Age of Globalization', 98 *Michigan L Rev* (1999) 167, at 200.

[91] See generally Scott, 'Accountability in the Regulatory State', 27 *J Law & Society* (2000) 38. For the international networks of regulators see Slaughter and Zaring, *supra* note 88.

[92] Howse, *supra* note 61, at 98.

[93] The term *epistemes* seems to have its origins in Foucault: see Ruggie, *supra* note 53, at 55.

[94] Haas, 'Introduction: Epistemic Communities and International Policy Coordination', 46 *Int'l Org* (1992) 1, at 3.

[95] Howse, *supra* note 60, at 104. Howse interprets the shift which took place between the *Tuna/Dolphin* panels and the *Shrimp/Turtle* decision as an irruption of politics in the trading regime, dominated until the *Shrimp/Turtle* case by the mentality of the insiders' networks: a way of thinking in isolation, based on the principles of a coherent and close trade system, which could not be infected by environmental or other political issues.

on Imports of Tuna (Tuna–Dolphin) case in 1991 when the GATT panel handed down its decision holding that a US conservation law violated GATT rules.[96]

Regulators who belong to an international network or to an international organization may well have a particular opinion on certain political questions – that held officially in the network. This political standpoint may in turn be different from that held by those regulators standing closer to the political centre of the state affected by the issue. Apparently it is not difficult to argue that in both cases their standpoint can be considered a political one.

4 Conclusions

If we apply evolutionary, sociological theories to the decisions that are taken in the regulators' networks, such as the theory of adaptive governance, there is no doubt that those decisions and regulations would very much resemble scientific products.[97] What is more doubtful is whether this process will transform decisions, such as those taken in the negotiating fora of the WTO, into objective truths, or gradually into *more* true decisions. I am sceptical about this. In this article I have tried to disentangle the issues displayed by Cooney and Lang's useful article, which contains positive and sensible proposals in respect of crucial environmental issues, but which were, intriguingly, linked to an international trade organization, the WTO, and to its politics of expertise.[98] My intention was also to try to make sense of a feature perceived in global governance: its becoming a realm of increasing regulatory interdependence.

One conclusion in this regard is that fostering interdependence through sharing or imposing knowledge on environmental issues in order to influence specific political decisions, as in adaptive governance, or through other means is in itself a liberal political project of erosion of national sovereignty presented as *continuous learning*. Despite the possible valuable results of knowledge transfer between a (hierarchical) chain of regulators, the process of managerial knowledge-sharing is part of this political project. The transfer itself becomes a political project when it should become the deciding factor of national regulation, that is, when the policy of the WTO should become indistinguishable from the domestic policy of the members.[99] Moreover, the structural bias (for trade) of the WTO findings on recommendations when overseeing

[96] Charnovitz, *supra* note 60, at 175.

[97] There is, nevertheless, a high improbability that the scientific product will avoid the economic and political conflict. Thus in the context of the SPS agreements, the justification for a measure is put precisely on the ground of scientific evidence, and the cause of a dispute on the lack of that kind of evidence. So, e.g., in the *Hormones* case, the disagreement faced was *on science*. The USA and Canada claimed that the EU's ban on meat products was 'without scientific evidence': Roberts, *supra* note 4, at 383, 388. For the interesting argument that the very notion of 'scientific' may provide political room for the states in the WTO system see generally Epps, *supra* note 71.

[98] For an exploration of this concept see Kennedy, 'Challenging Expert Rule: The Politics of Global Governance', 27 *Sydney Law Review* (2005) 1. In the conclusion, at 24, Kennedy states: 'we remain subjects of an invisible hand – not that of the market, but of expertise which denies its politics'.

[99] See Slaughter, *supra* note 44.

and reviewing trade-restrictive environmental regulation of its Members is not something which the organization could be blamed for. Finally, the value of its scientific achievements for the global environment is also debatable from a scientific viewpoint, since local knowledge is often crucial knowledge.[100]

Another suggestion is that the global public sphere may more easily trigger the type of political project which tries to appropriate political decisions in the name of science. This happens because the international realm is still in many respects virgin territory. When the Westphalian sovereigns fought against each other to conquer the virgin lands of America, Oceania, and Africa, they did so chiefly to increase their sovereign powers by extending their jurisdiction over new territories.[101] When in modern international law the powers of sovereignty are gradually turning into regulatory capacities, each regulatory field is a new conquest for the state or for the organization in question, and each regulatory power a new extension of jurisdiction for the interested actor. As a result, global governance ends up being, after all, the *gentle civilizer's* territory.[102]

[100] See also Klabbers, who attributes the difficulties in regulating environmental issues internationally mainly to different opinions on what the 'good life' is, but also to the lack of 'reliable knowledge concerning the environmental effects of proposed regulations': Klabbers, *supra* note 42, at 8.

[101] R. Tuck, *The Rights of War and Peace* (1999). Patently, they did so too in order to exploit the resources of the new territories.

[102] That is, the territory where nowadays the civilizing mission takes place. For the history of international law as a story of a civilizing mission see Koskenniemi, *supra* note 34.