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# *Taking Uncertainty Seriously: Adaptive Governance and International Trade: A Rejoinder to Mónica García-Salmones*

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## **Abstract**

*It is always a pleasure and an honour to have a colleague engage with one's work in detail. We are grateful, therefore, to Mónica García-Salmones for her response to our article, and are pleased to have this opportunity to clarify some aspects of our thinking and our approach that may not have been explicit enough in the original piece. Given the limitations of space available, we have decided to put to one side the many points of detail on which we may differ from García-Salmones, and provide simply the broad outlines of a response to the three primary lines of criticism which we understand García-Salmones to be offering.*

## **1 Learning and the Power of Experts**

García-Salmones' primary concern with adaptive governance is that, in her view, it enhances and valorizes the role of experts in international governance, and 'contributes to the problem of depoliticization in the global sphere' (at 168). Our emphasis on knowledge production and continuous learning is, from this perspective, equated with a turn to 'managerial governance' (at 177), in which political decision-making is understood as problem-solving, and policy choices are justified as products of enlightened rationality.

In raising these concerns, García-Salmones locates herself within a well-established and vitally important literature that highlights and critiques the reality of the growing

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‘technicalization’ of global governance.<sup>1</sup> But by directing this criticism at us, it is clear that she fundamentally misunderstands our argument. Indeed, we start with precisely the same aversion to technocratic politics as she does – and with a profound scepticism of hubristic claims to truth-telling which too often are advanced in the name of apolitical expertise.<sup>2</sup> But since we distinguish ourselves from technocratic governance along a different axis from García-Salmones, the ways in which our ideas differ from the kind of managerialism that she critiques may not have been clear.

Our starting point is that structures of knowledge are inseparable from the practice of international politics.<sup>3</sup> The distribution and deployment of political power are always mediated by dominant ways of knowing the world, by particular habits of interpretation, by the background assumptions of governing elites, and so on.<sup>4</sup> The relevant distinction is therefore not between forms of global governance based on knowledge and those that are more ‘politicized’ (a term which is invariably vaguely specified). All involve ‘knowledge’, but all knowledges are necessarily constructed and deployed within a particular social and political context.

Rather, the choice for us is between different ways of ‘doing knowledge’. Adaptive governance is not intended to be a manifesto for increasing the role of experts in international governance. To the contrary, it involves an initial attempt to imagine new ways of doing knowledge in politics and law, predicated on a view of knowledge as multiple, contested, and provisional rather than unitary and finally provable, on an abandonment of the idea that there are usually ‘right’ or ‘rational’ solutions to objectively identifiable problems in any simple sense, on a commitment to the destabilization and *remaking* of knowledge rather than its uncritical dissemination, and above all on an emphatic rejection of the cult of expertise. Like García-Salmones herself, we therefore explicitly make the case for the inclusion of ‘local knowledge’ (at 186) with practices of global governance.<sup>5</sup> We explicitly argue for greater public participation in apparatuses of knowledge production.<sup>6</sup> And our focus on continuous learning is not about an ongoing search for ‘more true’ (at 185) or more ‘enlightened’ (at 169) decisions, but rather about the ongoing destabilization of settled assumptions, taken-for-granted definitions of problems, and the complacent faith of experts and policy-makers in their own solutions. Continuous learning, in other words, is about cognitive *openness*.<sup>7</sup>

<sup>1</sup> See, from among a broad literature, Koskenniemi, ‘The Fate of International Law: Between Technique and Politics’, 70 *MLR* (2007) 1; Kennedy, ‘Challenging Expert Rule: The Politics of Global Governance’, 27 *Sydney J Int’l L* (2005) 5.

<sup>2</sup> The centrality that the concept of ‘fundamental uncertainty’ holds in our argument clearly signals, we hope, our rejection of any simplistic view of scientific knowledge as singular truth.

<sup>3</sup> Adler and Bernstein, ‘Knowledge in Power: the Epistemic Construction of Global Governance’, in M. Barnett and R. Duvall (eds), *Power in Global Governance* (2005), at 294, 295.

<sup>4</sup> See Kennedy, *supra* note 1.

<sup>5</sup> Cooney and Lang, ‘Taking Uncertainty Seriously: Adaptive Governance, Alien Invasive Species and the WTO’, 18 *EJIL* (2007) 523, at 538ff.

<sup>6</sup> *Ibid.*

<sup>7</sup> Picciotto, ‘Democratizing Globalism’, in D. Drache (ed.), *The Market or the Public Domain: Global Governance and the Asymmetry of Power* (2001), at 335, also available at: [www.yorku.ca/robarts/archives/pub\\_domain/pdf/apd\\_picciottofin.pdf](http://www.yorku.ca/robarts/archives/pub_domain/pdf/apd_picciottofin.pdf), at 29.

It may be argued in reply that (whatever its aims) the establishment of adaptive governance will in practice more deeply entrench existing cultures of expertise, and further contribute to depoliticization of international governance. While we do not see this result as inevitable or perhaps likely, the risk is certainly a real one – proposals of this kind can be radically redefined in implementation, and are always in part determined by the contexts in which they take practical shape. Our response to this will have to wait for another day – in this limited space, any reply will inevitably appear glib, and we do not wish to minimize the problem. Suffice it to say that it seems to us impossible to specify in advance the full range of preconditions necessary for adaptive governance to work as intended, so that this problem may best be addressed through vigilant and cautious experimentation.

## 2 Learning and Domination

A second line of concern that García-Salmones expresses has less to do with the depoliticization of global governance, and more to do with the spectre of illegitimate intervention. Here, adaptive governance is understood as a mechanism for the subjection of national policy-makers to international control: ‘continuous learning aims to subject the national regulators to a WTO secretariat provided with the power of a centralized expertise’ (at 179). It is represented as a ‘scheme for the erosion of sovereignty, of this *capacity to regulate*, contained in the sovereign powers of the state’ (at 175). For García-Salmones, such intervention seems objectionable in and of itself, but it is particularly problematic given the ‘structural bias’ (at 178)<sup>8</sup> of the trade regime, which seems to ensure that it will always privilege trade concerns over (say) environmental concerns wherever they come into conflict.<sup>9</sup> Like that of many who share her concerns, her preferred response seems to be to insulate national decision-making as far as possible from international scrutiny by the WTO – particularly in non-trade policy domains – and thereby to help maintain integrity and autonomy of domestic political processes. García-Salmones’ aim is to limit the constraining impact of WTO supervision, and she perceives adaptive governance as advocating a ‘broad expansion of [the WTO’s] jurisdiction in global governance’ (at 178).

In fact, the thrust of our original article is the opposite. Our article contains a quite detailed section setting out our view that WTO law should provide greater freedom for WTO Members to take a precautionary approach when designing and implementing trade-restrictive environmental measures, and showing how this might be achieved.<sup>10</sup> In other words, the abilities of member states to safeguard environmental values are enhanced by our argument, not diminished. In this respect, García-Salmones may underestimate the commonalities between her position and ours. Nevertheless, it is true that we differ quite significantly from her approach, in that we clearly do not posit the ‘autonomy’ of domestic political processes as our primary goal – our focus is not

<sup>8</sup> Koskenniemi, *supra* note 1, at 4.

<sup>9</sup> García-Salmones also notes, for example, ‘institutional trade specialization inevitably determines the particular structural bias for trade of the WTO over any other concern which the organisation might face, be it of environmental or labour issues, human rights or development’. (XX).

<sup>10</sup> Cooney and Lang, *supra* note 5, at 540–542.

on disengaging the WTO from domestic regulatory processes, but rather on imagining a new and different relationship. This is for at least two reasons.

First, we believe that autonomy is an unrealistic goal in contemporary conditions, and has probably always been in part a myth. National regulatory regimes are by now deeply embedded in networks of transnational influence, both formal and informal, legal and extralegal. To suppose that we can insulate domestic processes from international ‘intervention’ – and to equate that with formal legal freedom under WTO law – seems illusory, and fails to recognize the ways in which state practices are always already constituted by international economic and political structures. But more than that, our argument is based on the premise that trade and the trade regime necessarily and inevitably *do* affect environmental outcomes and environmental regulation in significant ways, whether or not these are recognized as within the competence and mandate of the WTO. The regulation of trade liberalization has profound and global environmental consequences, as environmentalists clearly recognize.<sup>11</sup> We are not arguing that the trade regime ought to ‘interfere’ with environmental regulation – still less are we seeking to ‘endow [the WTO] with permanent power to provide for regulation on this [environmental] field’ (at 178) – but rather that it ought to recognize the environmental consequences of its decisions. Put another way, it is not a question of enforcing more strictly the separation between the ‘trade’ and ‘environmental’ policy domains. Such arguments presuppose a clear distinction between the two domains of policy and practice, when we know that characterization of a measure as ‘environmental’ or ‘trade-related’ is in large part a matter of descriptive choice.<sup>12</sup> It is a question of re-instituting the relationship between them.

Adaptive governance is therefore emphatically not about expanding the scope and nature of WTO intervention in domestic regulatory processes. It is about re-imagining the forms that that ‘intervention’ might have, and opening up the possibility of the WTO playing a facilitative and supportive role with respect to information and knowledge dissemination. Our focus on continuous learning is in fact intended as an *antidote* to problems of domination and structural bias. We do not propose a role for the WTO as itself a source of policy advice. Our project is not, contrary to García-Salmones’ criticism, about making the activity of the WTO ‘indistinguishable from the domestic policy of the members’ (at 185), or about disseminating knowledge as ‘enlightenment’ (at 169) – but rather a role as a facilitator of learning, helping to expose national policy communities to alternative ways of approaching issues in other countries, providing an impetus for the destabilization of settled assumptions and frames, as well as a venue for the circulation and remaking of existing knowledge. Continuous learning is offered as a relatively less hierarchical form of interaction between international institutions and domestic regulatory regimes – or, perhaps more precisely, a form of interaction which holds out the promise of destabilizing the hierarchies already embedded within existing forms of knowledge.

<sup>11</sup> See, e.g., Esty, ‘Bridging the Trade-Environment Divide’, 15(3) *J Economic Perspectives* (2001) 113.

<sup>12</sup> Koskenniemi, *supra* note 1, at 7.

### 3 Learning and Functionalism

García-Salmones also makes the claim that we fall within a functionalist tradition of thinking about international law and international regimes, and makes much of the references that we make to the work of Ernst Haas. While we are not fully convinced that we are more indebted to Haas' work (or the functionalist tradition in general) than to the range of other material we cite, we are glad to have been prompted to think in a more focussed manner about the ways in which our thinking both derives and differs from functionalist thought as García-Salmones describes it.

For García-Salmones, functionalist thinking is notable (and problematic) in part because it tends to imagine law in an instrumental fashion – as a tool to be deployed to further ‘the public interest’ – rather than as a source of ‘values and standards against which society has to be measured’ (at 175). There is more than an echo here of Koski-enniemi's criticism of what he calls the managerial mindset in international legal scholarship, in which the language of international law loses its normative ‘bite’, and international lawyers take on the role of ‘fully instrumentalized cog[s]’ serving the particular projects of their specialized regimes.<sup>13</sup> It is true, at least to some extent, that international institutions are represented in our article in part in instrumental terms, as tools for the promotion of ‘learning’, and not (or not directly) as critical political practice. While we do not think the two are necessarily mutually exclusive, to the extent that this way of talking contributes to a broader process through which international law as critical practice is crowded out or obscured, we agree that it is crucial to find ways to counteract this tendency.

That said, we would distinguish between the representation of law in instrumental or purposive terms and the wholesale adoption of a managerial or functionalist approach. The essence of functionalism – or at least the origins of the link between functionalism and managerialism – is in the way that *particular* purposes of international regimes and *particular* definitions of the public interest are taken for granted or predetermined. Managerialism, in other words, is not (just) a mindset that sees law as an instrument to achieve common objectives, but more importantly a mindset that takes the definition of those common objectives as given and self-evident. It is characteristic of much functionalist writing that the functions which public institutions and international regimes are said to perform seem to be relatively easily and unproblematically described. And it is here that we very clearly part company with it.

We do not believe that the purposes of the trade regime are self-evident or uncontested. Quite the opposite: processes of continuous learning as we imagine them are meant precisely to contribute to the *destabilization* of existing assumptions about the underlying purposes of trade law and the trade regime, and to help prompt broader reflection on how they might be revised in response to competing claims and priorities.<sup>14</sup> Nor, contrary to the García-Salmones' claim, do we assume an ‘unproblematic

<sup>13</sup> *Ibid.*, at 26.

<sup>14</sup> For a development of this theme by one of us see Lang, ‘Reflecting on Linkage: Cognitive and Institutional Change in the International Trading System’, 70 *MLR* (2007) 523.

harmony of interests between the actors in (global) society' (at 174). In our view, actors' interests are in part constructed by dominant forms of knowledge – and both harmony of interest and political conflict are in part constituted by underlying knowledge structures. Further, the construction and entrenchment of knowledge in the WTO, as in other arenas, represent an important locus for political conflict. Continuous learning is about subjecting those underlying knowledge structures to revision – it is therefore a process by which actors' interests (both collective and individual) and prevailing definitions of collective problems are continually re-imagined. Adaptive governance, in other words, is not about how better to achieve certain pre-existing goals, but also about revisiting the goals themselves.<sup>15</sup>

## 4 Conclusion

Our proposition for adaptive governance begins with recognition of the fundamental and often irreducible uncertainty surrounding many environmental aspects of trade, and the need to take such uncertainty seriously. Our emphasis on continuous learning flows directly from this. While our approach emphasizes the role of knowledge production and dissemination, it does not seek to valorize experts and 'technicalize' decision-making, but rather highlights the need for cognitive openness and continual review of knowledge. While we posit the possibility of the WTO playing an enhanced role in influencing national decision-making, the extension we envisage is enabling and supportive, rather than dominating. While we view the WTO as a policy arena that can be used for enhancing learning, the possibility of such learning does not in our view imply unproblematic harmony between actors' interests. We in fact share many of the concerns raised by García-Salmones about 'the use of experts' power in global networks' (at 1). But resistance to expert rule has many faces, and we hope we succeeded here in more clearly articulating our vision of how adaptive governance destabilizes the claims to settled truth of expert power.

<sup>15</sup> Cooney and Lang, *supra* note 5, at 534.