

**BEYOND THE BORDERS: GLOBALISATION,  
SOVEREIGNTY AND EXTRA-  
TERRITORIALITY**

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## **Beyond the Borders:** **Globalisation, Sovereignty and Extra-territoriality**

‘with global flows of capital and the internationalisation of production, we live in a world in which the complexity of spatial relations is more obvious than the simple legalistic maps of state sovereignty’.<sup>1</sup>

### **Introduction: Sovereignty and beyond**

Sovereignty, the bundling of rule-making authority within bounded territories, is the hallmark of the modern international political economy. Globalisation, signifying an increase in the importance, volume, speed and scope of cross-border flows of ideas, money, commodities and people, challenges the exclusive territorial authority of sovereign states. Rules and regulations have historically referred to activities and/or the spaces where the activities are conducted. In an era when activities increasingly cross borders - lines which separate different regulatory environments - and regulators seek to maintain some control over these activities, the spatial organisation of rule-making authority is brought into question. Issues of extra-territoriality or disputes of jurisdictional authority inevitably come to the fore as spaces and the rules which govern them are contested. Spaces and rule-making authority may come to be shared, but the ways in which they are shared and the outcomes of such sharing depend upon the institutional mechanisms which are established to deal with jurisdictional disputes.

In the context of contemporary challenges to sovereignty, increased attention has been given to the historical geography of state power.<sup>2</sup> Until recently however, scholars, particularly but not exclusively in International Relations, have tended to take ‘sovereignty’ - the bounded territorialisation of power and social relations - as an adequate description of the spatial organisation (spatiality) of regulatory authority, falling into the ‘territorial trap’.<sup>3</sup> The discourse/practice of sovereignty has provided the link between regulation and geography, or power and space, linking power with space in bounded sovereign state-territorial parcels. Sovereignty sets up a dichotomy of inside/outside: inside is the domestic arena of politics and

community; outside is characterised by anarchy and international relations.<sup>4</sup> Externally, territories are defined through mutual recognition in the inter-state system; internally, sovereignty allows the state to shape what goes on within its territory. Discourses and practices of sovereignty mark out territories in space and confer the power to regulate what takes place within them. But, as history shows, other spatialities of power and social relations are possible.<sup>5</sup> As social processes change, the spatial organisation of power and social relations may be expected to change too. It is important not to accept sovereign state territoriality as an unchanging principle of the international political economy. As Ruggie complains: 'it is truly astonishing that the concept of territoriality has been so little studied by students of international politics; its neglect is akin to never looking at the ground that one is walking on'.<sup>6</sup>

This paper seeks to put territoriality and borders at the heart of a spatialised International Political Economy. The paper begins by offering a conceptual framework - the idea of 'regulatory landscapes' - for thinking about the spatiality of rules and the activities which the rules seek to regulate,<sup>7</sup> before using this framework to describe two moments of geo-regulatory change and to explain how extra-territorial jurisdictional disputes arise. Processes of globalisation lead to geo-political conflicts as regulatory authorities seek to extend their rules beyond their borders. The paper then turns to consider how such jurisdictional disputes are dealt with, and argues that rather than simply celebrating the dismantling of boundaries and the sharing of spaces in a postmodern world - which is not a universal process anyway - we ought to pay more attention to the institutional mechanisms through which border disputes and competing jurisdictional claims are managed. It is through the development of such mechanisms that spaces and rule-making authority can be shared.

### **Regulatory Landscapes**

Geographers might be expected to focus on the spatialities of power and social relations in trying to understand processes of social change,<sup>8</sup> but scholars of International Relations, Political Science and Sociology too have begun to appreciate that in order to understand

processes of globalisation we must explore their geographies.<sup>9</sup> Globalisation, for a variety of commentators, is best understood in terms of changes in the importance and meaning of space, place, distance and borders; the spatialities of power and social relations. Globalisation, fundamentally, refers to the stretching of social relations across space and time,<sup>10</sup> to 'processes which are not hindered or prevented by territorial or jurisdictional boundaries'.<sup>11</sup>

Cerny develops a spatialised political economy approach with his discussion of globalisation and the changing logic of collective action.<sup>12</sup> In this framework, globalisation is about a shift in the appropriate scale for the provision of public goods. Political economies of scale are 'particular historical matrices or patterns of imbrication between economic-organizational and political-institutional structures'.<sup>13</sup> These political economies of scale change over time as the nature and spatial mobility of the goods, assets and resources which are central to the international political economy change in a dynamic technological environment. As the scale of goods and assets produced, exchanged and used in an economic sector diverges from the scale of the state, the authority, legitimacy and effectiveness of the state as a regulatory authority is brought into question. Such processes of structural differentiation require new political economies of scale.<sup>14</sup>

Agnew and Corbridge develop a similar approach to understanding changes in the international political economy with their concept of 'geopolitical order'.<sup>15</sup> By order they mean 'the routinized rules, institutions, activities and strategies through which the international political economy operates in different historical periods'.<sup>16</sup> They argue that orders are necessarily geographical, involving particular spatialities of power and social relations; that orders can be distinguished by their geographies<sup>17</sup>; and that changes in the geopolitical order involve changes in the differentiation of the spatial fields of practice, that is, changes in the location, function and understanding of borders. Geopolitical orders are organised in terms of two dimensions: the scale of accumulation or economic activity; and the scale of political regulation. It is this sort of approach which I develop with my concept of 'regulatory landscapes'.

In using the term 'regulatory landscape' I mean to suggest that the international political economy in some ways resembles the physical landscape. It is a landscape of places and actors; a landscape which is re-shaped by actors within it, at the same time as the actors' behaviour is shaped by the existing landscape; a landscape made up of individual places and actors and the connections between them; a landscape which is uneven; a landscape in which there are flows of people, goods, money, and other types of assets and information which flow in different ways depending upon their characteristics, particularly, their spatial mobility or immobility; and, a landscape which is reproduced and transformed by the flows of these goods and assets. Most importantly, regulatory landscapes are socially constructed or constituted,<sup>18</sup> and scaled in particular ways.<sup>19</sup>

The concept of scale is crucial here: 'geographical scale is the focal setting at which spatial boundaries are defined for a specific social claim, activity or behaviour'.<sup>20</sup> The politics of scale provides an important tool to help us to understand processes of globalisation<sup>21</sup>; scale is about boundaries, and boundaries are about power. The location, function and understanding of boundaries which separate different regulatory environments is part of a social process involving contests for power or authority. But, scales and the borders which constitute them change only intermittently because they are institutionalised, for a time, through the discourse and practice of law.<sup>22</sup> The politics of globalisation, then, is all about who has the power to draw boundaries around places and peoples, at what scale such boundaries are drawn, and, what the boundaries signify. If we neglect the politics of scale and boundaries we miss the central feature of processes of globalisation, the reshaping of regulatory landscapes, shifts in the stage on which the play of power politics is performed.<sup>23</sup>

To put the 'regulatory landscapes' approach to work, we need to disaggregate and recombine the component parts of regulatory landscapes, develop a typology of landscapes, and generate testable hypotheses about their dynamics. Regulatory landscapes are organised in terms of two dimensions or axes: the degree of boundedness of economic activity; and, the degree of boundedness of political regulation. Each of these axes stretch from 'bounded' to 'trans-boundary' poles. 'Bounded' economic activity refers to the production, distribution and

consumption of commodities within a defined territory, for instance the state; ‘trans-boundary’ economic activity refers to situations where commodity flows cross (state) borders. The scale and hence boundedness of economic activity depends upon the technological environment and the characteristics - particularly the potential spatial mobility - of the commodities in question. ‘Bounded’ regulation means that rules refer to specific defined territories or jurisdictions; ‘trans-boundary’ regulation signifies that rules extend beyond national borders. The scale and boundedness of political regulation depends upon the technological environment and decisions made by national regulators about the optimal scale of political regulation for the commodities in question. Combining these two dimensions generates a typology of regulatory landscapes, or geo-political economies, as illustrated by Figure 1.

Figure 1: A typology of regulatory landscapes

		<u>Political regulation</u>	
		<b>Bounded</b>	<b>Trans-Boundary</b>
<u>Economic accumulation</u>	<b>Bounded</b>	Domestic political economies (sovereignty and autonomy)	Political globalisation (extra-territoriality)
	<b>Trans-Boundary</b>	Economic globalisation (competitive deregulation)	Global political economy (borderless world)

Regulatory landscapes can be differentiated in terms of the ways in which scales of economic accumulation and political regulation are combined. That is, in terms of the degree of boundedness or territoriality of activities and rules. In a regulatory landscape of ‘domestic

political economies', borders are all important. This ideal type landscape - pre-dating the development of transport and communications technologies - is one of economic autonomy and political sovereignty in which communities are self-contained and de-linked from the international political economy. In a 'global political economy', borders are unimportant; this is a borderless world in which neither activities nor rules pay much attention to territorial limits; some aspects of internet commerce perhaps come closest to this ideal. In the case of 'political globalisation', rules transcend borders whilst commodity flows do not; this is a landscape characterised by extra-territoriality or efforts to apply rules to activities which do not take place within the territory of the regulatory authority which seeks to extend its rules. Efforts by Northern countries to impose minimum environmental or labour standards on domestic industries in the South would come close to this landscape. In the case of 'economic globalisation', commodity flows cross borders whilst rules do not; this is a landscape characterised by tendencies towards competitive deregulation and regulatory underprovision. The development of Caribbean offshore financial centres and tax havens in the 1960s and 1970s when the centres were largely able to preserve their autonomy to regulate their own territories and the transnational banking which made use of them, provides a good example of this type of regulatory landscape.<sup>24</sup> In short, regulatory landscapes are socially constructed spatial configurations or scalings of economic activity and political regulation, in which borders are more or less important; particular spatialities of power and social relations, particular geographies.

### **Geo-Regulatory Change**

The theory of regulatory landscapes generates a series of research questions about the production of regulatory landscapes, their dynamism, and the implications which follow from the development of different types of landscape. Processes of geo-regulatory change involve two analytically separable moments - the trans-boundary extension of economic accumulation, and, the trans-boundary extension of political regulation - both of which lead to potential problems.

Regarding the first moment of geo-regulatory change the theory suggests that: increased potential spatial mobility of the assets or commodities in question, in conjunction with the potential for greater profitability, leads to an extension of economic activity beyond the existing borders. This first moment of geo-regulatory change is well illustrated by the development of new forms of money such as Eurodollars from the 1960s, although we could also examine the transnationalisation of manufacturing and other forms of economic activity. Particularly from the 1960s, US Dollars moved out of the USA to European, Caribbean and other offshore financial centres, due to a combination of technological change and the existence of regulatory differentials which made potential profits greater offshore. This extension of financial activity offshore generated a process of competitive deregulation. Offshore states were able to regulate their own territories, and created attractive regulatory environments for transnational banking, a process which, in the absence of central coordination, led to a game of competitive deregulation and regulatory underprovision. The globalisation of economic activity and the resultant scale mismatch with the states' basis of political authority made the provision of territorial regulation by individual states problematic and insufficient for activities which spanned state boundaries.<sup>25</sup>

The second moment of geo-regulatory change is illustrated in the 1990s by the USA's Helms-Burton Act concerning trade with Cuba which seeks to include non-US businesses in the continuing economic embargo, and perhaps most clearly in US efforts to restrict the activities of Caribbean offshore financial centres through the 1980s. The US feared that the laxity of regulation in the offshore centres was leading to processes of competitive deregulation which increased the likelihood of the centres facilitating tax evasion, tax avoidance, financial fraud and money laundering by US corporations, organisations and citizens. Perceiving this threat, the USA sought to extend its regulations into the formally sovereign Caribbean territories, interestingly by holding transnational banks accountable across borders. However, as US regulators sought to catch up with the scale of economic accumulation and extend their rules offshore, the Caribbean centres defended their sovereignty, leading to border skirmishes. Border skirmishes are legal battles, often



characterised as 'extra-territoriality', over the location, role, meaning and porosity of boundaries.<sup>26</sup> As states attempt to extend their laws extra-territorially, to catch up with their economic activity or to prevent competitive deregulation, conflicts of jurisdictional authority or sovereignty result.

### **Extra-territoriality and Jurisdictional Conflicts**

Jurisdiction involves powers exercised by a state or other regulatory authority over persons, property or events. So, the question is: which state or regulatory authority has the legitimate power to set the rules of the game for the particular activity within the territory in question? Border skirmishes are the result of competing claims to jurisdiction. International Law distinguishes between different varieties of jurisdiction: legislative or prescriptive jurisdiction - the power to set the rules of the game; adjudicative or judicial jurisdiction - the power given to the state's courts to judge between competing interests; and, enforcement jurisdiction - the power to police and enforce the rules of the game through arrest, seizure of property and so on.<sup>27</sup> However, for the purposes of understanding extra-territoriality, it is not the varieties of jurisdictional claim which matter; rather, it is the fact that claims to jurisdiction - of whatever variety - can be based on more than one principle, and that these principles can and do produce conflicts. To put it simply, do the rules refer to fixed bounded territories, or potentially mobile trans-boundary activities and commodities? International Law, in principle and practice, allows that claims to jurisdiction may be based on a variety of principles: the territorial principle; the nationality principle; the protective principle; and, the principle of universality. This is clearly seen in the United States' 1987 Restatement (Third) of Foreign Relations Law.<sup>28</sup>

The territorial principle allows that states have the right to exercise their power legitimately when the events, persons or property in question are physically placed within their territory. This is the principle of jurisdiction upon which sovereign statehood is fundamentally based. Closely linked to ideas of private property,<sup>29</sup> the territorial principle of jurisdiction organises power and regulatory frameworks through the use of clearly defined spatial borders

- that is, exclusive territoriality.<sup>30</sup> However, even this first principle of jurisdiction is not clear cut. If a man standing in France shoots a man standing across the border in Germany, both states have jurisdiction. France has jurisdiction under the subjective territorial principle because the shot was fired from France; Germany has jurisdiction under the objective territorial principle - the effects doctrine - because the injury was felt in Germany.<sup>31</sup> In an increasingly globalised world in which money, goods, pollution and so on - as well as bullets - flow across borders, the importance of this tension within the territorial principle is clear.

Nationality provides the second principle upon which jurisdictional claims may be based within international law. Put simply, this means firstly that the USA retains some right to legitimately exercise its power over a person or corporation of US nationality even if that 'person' is located beyond US territorial borders. The USA may prosecute its nationals for crimes committed anywhere in the world. Secondly - at least in regard to terrorist activities and other serious crimes - the USA may legitimately claim jurisdiction over activities and persons beyond its borders which affect US nationals.<sup>32</sup>

Thirdly, the protective principle allows that a state - the USA say - may legitimately seek to regulate activities which take place beyond its territorial borders and which are not conducted by US nationals if those activities pose a threat to the security of the state. For instance, plots to overthrow the government, espionage, currency counterfeiting and plots to break immigration regulations would be covered by this principle.<sup>33</sup> Clearly this leaves much room for interpretation; it might be clear that US security is threatened by the production of nuclear weapons targeted on New York, but it is less clear that the production of training shoes by child labour in Pakistan poses a threat to US security. The line has to be drawn somewhere.

Universality provides the fourth principle upon which claims to jurisdiction may be based. A state may legitimately claim jurisdiction over activities which take place beyond its borders if those activities - war crimes, genocide, piracy, hijacking, international terrorism - are universally viewed as harmful or illegitimate.

To summarise, claims to jurisdiction may be based on a variety of principles and so states and regulatory authorities may disagree over who has the right to regulate the events, persons, or property in question. As Trachtman clearly puts it, '[t]he problem results from the fact that each state, or jurisdiction, may have multiple relations with a particular activity, asset, or person'.<sup>34</sup> The increasing prominence of issues of so-called extra-territoriality (more precisely, conflicting jurisdictional claims), can be seen in, for instance: the USA's Helms-Burton Act concerning trade with Cuba which seeks to force other states and their nationals to join the US economic embargo of Cuba<sup>35</sup>; the Massachusetts Burma law which seeks to persuade corporations of whatever nationality not to deal with the current Burmese government; and, attempts - such as in the Tuna-Dolphin and Turtle-Shrimp cases - to unilaterally apply environmental or labour standards extra-territorially, in apparent contravention of the General Agreement on Tariffs and Trade (GATT) and World Trade Organization's multilateral framework.

As economic activity spreads increasingly across the borders which have marked the limits of national laws, and states attempt to retain some control over these transnational activities, these laws are likely to come into conflict. The USA particularly, in defining its interests as regional or global - scaling the regulatory landscape in a particular way - comes into conflict with other jurisdictions which are keen to defend their sovereignty and regard US efforts to regulate their territories as illegitimate interference. Palan suggests that, 'the transnationalization of economic activities has created in effect a situation whereby the right to devise the laws as expressed in the concept of sovereignty is increasingly "shared" among many polities'.<sup>36</sup> In the absence of a clear hierarchy of principles of jurisdiction the issue is how the international community should decide which rules apply to which events, persons, property and territories? How should power over space be shared? Where and how should the border be drawn?

### **Allocating Authority**

Border skirmishes are the primary process through which the regulatory landscape is transformed and power and authority are reallocated. In all jurisdictional conflicts the question is how to accommodate overlapping claims to jurisdiction. Border skirmishes are the primary mechanism of change because in modernity, power, communities and their values have tended to be horizontally organised into territorial parcels.<sup>37</sup> It is worth reiterating however that border skirmishes include conflicts over the role, meaning and porosity of borders as well as their geographical location. In fact, as we shall see, one of the ways in which horizontal/spatial jurisdictional conflicts are resolved is through the unbundling of authority or sovereignty into various vertical issue areas.<sup>38</sup> Challenges to sovereignty as an historically specific spatial organisation of power are most apparent at the margin; power may be everywhere, but it is most clearly contested at the margin. In the transition from a modern to a postmodern regulatory landscape the margin is frequently a spatial border. As Rosenau puts it: 'the political space opened up by the erosion of the boundaries between domestic and foreign affairs emerged as the frontier where most of the action on the global stage unfolds'.<sup>39</sup> Border skirmishes are central to processes of geo-regulatory change.

Borders are the dividing lines between cultures, communities and value-systems. As competing communities seek to extend their value-systems or rules they will eventually clash. Border skirmishes are negotiations about which/whose rules should rule over which activities in which spaces; they are battles over the appropriate scope and scale of political regulation. Conflicts over the allocation of authority may involve horizontal and vertical elements. Horizontally, is the USA or Mexico the appropriate regulatory authority for the Eastern Tropical Pacific? Vertically, does the USA have the authority to regulate all activities in the Eastern Tropical Pacific, or just dolphin-unfriendly tuna-fishing, or no activities whatsoever?

The horizontal and vertical reallocation of power and authority, is fundamentally political, with the outcomes of border skirmishes often determined by the relative powers of the protagonists. In practice, the USA is frequently able to get away with the extra-territorial application of its laws. However, with the international community looking on, brute force may not suffice. States are increasingly forced to justify their jurisdictional claims, to give

persuasive reasonable accounts as to why their rules and values should win out over those of competing regulatory authorities. In order to redraw the borders, to reallocate regulatory authority, decisions have to be made, jurisdictional claims and the values upon which they are based must be compared.

### Reallocating Jurisdictional Authority in Theory

Reallocating jurisdictional authority involves comparing the values upon which competing jurisdictional claims are based. As Trachtman puts it, there is a need ‘to compare different reasons and integrate them in order to indicate where jurisdiction should be allocated in particular circumstances’.<sup>40</sup> In an interesting and provocative article, Trachtman draws on the transactions costs approach to Law and Economics, after Coase, Demsetz and Williamson, suggesting that the allocation of prescriptive jurisdiction is usefully thought of in terms of a market for property rights. The first move in this argument is the suggestion that ‘claims of prescriptive jurisdiction may be regarded as analogous to claims to property rights, insofar as the bundle of prescriptive jurisdiction rights that a particular state has in a particular activity, asset or person is comparable with the property rights that an individual has with respect to a particular activity, asset, or person within a domestic legal system’.<sup>41</sup> Just as markets work to allocate property rights and resources, the allocation of regulatory authority as a set of property rights can also be conceptualised in terms of transactions between actors with different preferences or values.

For instance, the Helms-Burton law dispute involves two ‘transactors’ - the USA and the EU - with different preferences or values concerning trade with Cuba. The USA values the transition to a post-Castro democratic regime most highly and believes that isolating Cuba through an economic embargo is the best way to achieve this; the EU values its authority to regulate the activities of its corporations’ Cuba-related trade and investment, believing that the transition to democracy can best be achieved through integrating Cuba into the world economy. In a transactions costs approach, the socially optimal allocation of regulatory authority is achieved through comparing these values on a common metric and drawing the

line accordingly. In the language of transactions costs economics, externalities should be internalised to the marginal point; the border should be shifted - authority should be reallocated horizontally and vertically - to the point where net gains are maximised.<sup>42</sup>

The transactions costs approach is - as Trachtman recognises and the USA-Cuba example makes clear - extremely problematic. Firstly, in claiming that allocations of authority exist because they are the most efficient solution, and that they are arrived at through maximising the efficiency of allocation, the transactions costs approach is tautological. Secondly, it takes a leap of faith to view states as unified actors with clear bundles of preference and values. Thirdly, there are clear practical and moral problems with placing values on preferences. Can and should values - monetary or otherwise - be placed on the wish to see a post-Castro Cuba; can and should environmental preferences be measured? Finally, even if we can value different preferences using a common metric, we are still faced with the problem of inter-personal, or inter-national comparisons of utility or values. Although it may be that the US values the economic embargo of Cuba, and the EU values its approach to Cuba, each to the tune of \$1bn, this does not necessarily mean that their preferences are equal.

Despite these problems the transactions costs approach usefully emphasises the necessity of choice. It may be difficult to compare values but such comparisons and choices cannot be avoided. The question is: which institutional mechanisms should be used to make decisions about the allocation of jurisdictional authority.<sup>43</sup> Trachtman suggests that the transactions costs approach can be rescued and operationalised through an institutional analysis which compares the cost and benefit profiles of various institutional mechanisms.<sup>44</sup>

### Reallocating Jurisdictional Authority in Practice

In recent years, as levels of interdependence between states have increased and become institutionalised - for example in the EU, NAFTA and the WTO - the necessity of establishing institutional mechanisms for deciding upon the allocation of regulatory authority and the legitimacy of jurisdictional claims has become apparent. Where and at what level, should power lie in relation to which activities? Within these inter-state clubs the constitutional rules

which govern the allocation of authority are particularly important. As with any club, if a member-state isn't satisfied with the way the club works the state may choose to exercise its exit option, to the detriment of the club as a whole. Such issues have assumed particular prominence in recent years as the WTO - and now the proposed and recently (April 1998) postponed Multilateral Agreement on Investment (MAI) - has come under scrutiny due to its apparent prioritisation of the values of free trade and investment.<sup>45</sup> Environmentalists and labour groups have often claimed that the WTO allows little room for the consideration of environmental values and labour rights.<sup>46</sup> This may be so, but the WTO, the EU, the USA as a federal system, and other inter-state organisations, necessarily include mechanisms for comparing different sets of values and allocating jurisdiction. From an environmental perspective the objection to the WTO is perhaps more that environmental protection is not viewed as a value worthy of comparison, rather than a fundamental objection to the mechanisms through which values are compared and decisions made.<sup>47</sup> In the spirit of comparative institutional analysis it is worth examining the different ways in which jurisdictional claims - and hence values - are evaluated and compared in these inter-state organisations.

In a recent paper Trachtman (1998) examines the ways in which jurisdictional disputes about the values attached to trade and other issues are settled: within the WTO, by Dispute Resolution Panels; within the EU, by the European Court of Justice; and within the USA, by the Supreme Court.<sup>48</sup> The constitutions of each of these organisations provide decision-making guidelines for cases when there is an apparent conflict between trade and other values such as environmental protection or labour rights. Although these guidelines are primarily about the vertical allocation of power in trade disputes, they also provide the framework for resolving extra-territorial disputes or border skirmishes, which are conceptually similar in that they are about the horizontal allocation of power or authority. In fact, in practice, jurisdictional disputes often involve both horizontal and vertical elements, with the vertical re-allocation of power providing one mechanism through which horizontal disputes are settled. In the WTO, Article XX of GATT is the meta-rule for deciding on the rules of the game; in

the EU it is Articles 30 and 36 of the Treaty of Rome; in the US it is the Commerce Clause. Despite their differences it is possible to see a similar range of mechanisms for deciding on the legitimacy of jurisdictional claims operating in each organisation.

Ideally and by definition, decisions would be made on the basis of a comprehensive cost-benefit analysis which would maximise social welfare, at least among the members of the club. In practice, because of measurement and administrative difficulties, distributive, moral (should you value dolphins?) and theoretical (can you make inter-personal comparisons of utility?) concerns, these international organisations have tended to shy away from strict cost-benefit analysis. Rather, as Trachtman outlines, they make use of a variety of trade-off devices which retain some of the strengths of cost-benefit analysis and avoid some of the weaknesses. The first guideline or trade-off device is the test of 'National treatment'. Such a rule is an anti-discrimination device which looks at whether different regulatory standards are applied to comparable cases, which vary only in terms of the nationality of the regulatees. A jurisdictional claim which treats Mexican fishermen less favourably than their US counterparts by virtue of their nationality is disallowed under this rule. Simply put, this rule says: treat foreigners and their goods at least as well as you treat locals and their goods. A second guideline for the allocation of jurisdiction is the 'simple means-ends rationality test'. Is an import restriction on dolphin-unfriendly tuna a reasonable way of protecting dolphins?; if not, the jurisdictional claim is illegitimate. A third test, the 'necessity or least trade-restrictive alternative', asks whether the extra-territorial jurisdictional claim - the US attempt to protect dolphins through import restrictions - was the only way of achieving the goal, or whether there was a different less trade-restrictive way of achieving the same goal, a multilateral agreement for instance. Fourthly, the 'proportionality' test asks whether the jurisdictional claim is reasonable given the importance of adequately regulating the issue area in question. Finally, coming closest to a full cost-benefit analysis is the 'balance of interests' trade-off device in which the legitimacy of the jurisdictional claim is evaluated by taking all factors and interests into account even if they are not strictly amenable to monetisation or comparison.



Despite their differences, all of these trade-off devices or guidelines for deciding about the legitimacy of jurisdictional claims have one thing in common, a willingness to juxtapose, and in many cases compare, trade and non-trade values. They are all institutional mechanisms used in the process of evaluating competing claims and values. None of them are perfect - in the real world of transactions costs and trade-offs how could they be? - but they do face up to the inevitable problem of choice. The EU, the GATT/WTO and the US Federal System use different mixtures of trade-off devices in different ways. The EU and the US make limited use of balancing and cost-benefit analysis, whilst the GATT/WTO does not as yet require such a test. Proportionality tests are employed by the EU, occasionally considered by the US, but not required by the GATT/WTO. Necessity testing is required by the EU and used in certain limited circumstances by the GATT/WTO and the US. Simple means-ends rationality tests are required by both the EU and the US and are frequently employed by the GATT/WTO. National treatment however, is central to the decision-making of all three inter-state organisations. This principle of non-discrimination is the fundamental principle upon which these inter-state clubs are based; it is the institutional mechanism which makes them more than just a collection of states. The national treatment trade-off device institutionalises principles of impartiality and fairness amongst the members of the inter-state clubs. In the absence of such principles, club members would likely exercise their exit option and leave the club; in fact the club would more closely resemble an imperial project in which the values and jurisdictional claims of the most-powerful state would always take precedence. The institutional mechanisms employed by these inter-state organisations for the allocation of jurisdictional authority commit the organisations and their participants to some conception of impartiality, fairness and justice.<sup>49</sup>

Institutional mechanisms are central to the evaluation of competing jurisdictional claims and the reallocation of regulatory authority. It is through these mechanisms that the borders are re-drawn and jurisdictional authority is reallocated. Once the borders have been re-drawn and authority has been reallocated, the regulatory landscape enters another period of temporary stability, stability which is codified in legal institutions and norms.<sup>50</sup> The nature of

the geo-regulatory landscape and the meanings attached to borders have been transformed. A new regulatory landscape of values institutionalised through temporarily scaled spaces and borders has been constructed.

## **Conclusions**

This paper has offered the idea of ‘regulatory landscapes’ as an approach to thinking about processes of globalisation and the ways in which such cross-border processes challenge sovereignty as the basic principle of the international political economy. As activities spread across borders and regulators seek to maintain some control of these activities, overlapping and competing claims to jurisdictional authority are almost inevitable. Currently, extra-territorial disputes and competing claims to jurisdiction proliferate and assume ever greater prominence in relations within and between the WTO, NAFTA and the EU. Sovereignty as a particular spatiality of power and authority seems unsuitable for an increasingly globalised world. As Spruyt puts it: ‘[g]lobal ecological problems, international financial transactions, unprecedented human migration, the potentially disastrous effects of nuclear force, and growing economic interdependence cast doubts upon the sovereign, territorial state as the system of rule most appropriate to deal with such issues’.<sup>51</sup>

Extra-territorial disputes arise due to competing jurisdictional claims, in which multiple regulatory authorities seek to set the rules of the game for a particular space and/or issue area. These disputes are settled, and the competing jurisdictional claims evaluated, through specific institutional mechanisms. Although extra-territorial disputes may seem marginal to the workings of the international political economy, changes by definition occur at the margin. Competing jurisdictional claims and the resultant reallocations of jurisdictional authority are both marginal and central. The allocation of jurisdiction, spatially and otherwise, is never socially neutral. When borders are re-drawn and authority reallocated the geo-regulatory landscape is transformed. Different regulatory landscapes institutionalise different value systems. Processes of re-scaling are simultaneously processes of re-valuing. If spaces are to be shared and jurisdictional authority is to be allocated in fair and sustainable ways, rather than

simply celebrate the development of a so-called borderless world, careful attention must be paid to the nature of the institutional mechanisms through which the regulatory landscape is transformed.

## NOTES

<sup>1</sup> R.B.J. Walker, Inside/outside: international relations as political theory (Cambridge: Cambridge University Press 1993) p.46.

<sup>2</sup> J. Anderson, 'The shifting stage of politics: new medieval and postmodern territorialities', Environment and Planning D: Society and Space 14/2 (1996) pp.133-153; J. Barkin and B. Cronin 'The state and the nation: Changing norms and the rules of sovereignty in international relations', International Organization 48/1 (1994) pp.107-130; T. Biersteker and C. Weber (eds.), State sovereignty as social construct (Cambridge: Cambridge University Press 1996); J. Camilleri and J. Falk, The end of sovereignty? The politics of a shrinking and fragmenting world. (Aldershot: Edward Elgar 1992); D. Elkins, Beyond sovereignty: Territory and political economy in the twenty-first century (London: University of Toronto Press 1995); F. Kratochwil, 'Of systems, boundaries and territoriality: an inquiry into the formation of the state system', World Politics 39/1 (1986) pp.27-52; R. Lapidot, 'Sovereignty in transition', Journal of International Affairs 45/2 (1992) pp.325-346; S. Rosow, N. Inayatullah, and M. Rupert (eds.), The global economy as political space (London: Lynne Rienner 1994); J.G. Ruggie, 'Territoriality and beyond: problematizing modernity in international relations', International Organization 47/1 (1993) pp.139-174; P. Taylor, 'The state as container: territoriality in the modern world system', Progress in Human Geography 18/2 (1994) pp.151-162; P. Taylor, 'Beyond containers: internationality, interstateness, interterritoriality', Progress in Human Geography 19/1 (1995) pp.1-15; R.B.J. Walker, 'State sovereignty and the articulation of political space/time', Millennium 20/3 (1991) pp.445-461.

<sup>3</sup> J. Agnew, 'The territorial trap: the geographical assumptions of international relations theory', Review of International Political Economy 1/1 (1994) pp.53-80.

<sup>4</sup> Walker (note 1).

<sup>5</sup> Y. Ferguson and R. Mansbach, Polities: Authority, identities and change (Columbia: University of South Carolina Press 1996); H. Spruyt, The sovereign state and its competitors: An analysis of systems of change (Princeton: Princeton University Press 1994).

<sup>6</sup> Ruggie (note 2) p.174.

<sup>7</sup> See also: A. Hudson, 'Reshaping the regulatory landscape: Border skirmishes around the Bahamas and Cayman offshore financial centres' Review of International Political Economy 5/3 (1998) pp.534-564.

<sup>8</sup> K. Cox (ed.), Spaces of globalization: reasserting the power of the local (New York: Guilford Press 1997); P. Dicken, Global shift: the internationalization of economic activity (London: Paul Chapman 1992); D. Harvey, The condition of postmodernity (Oxford: Blackwell 1989); E. Kofman and G. Youngs (eds.), Globalization: Theory and practice (London: Pinter Publishers 1996); E. Swyngedouw, 'Neither global nor local: "Glocalisation" and the politics of scale', in K. Cox (ed.), Spaces of globalization: reasserting the power of the local (New York: Guilford Press 1997) pp.137-166.

<sup>9</sup> P. Cerny, 'Globalization and the changing logic of collective action', International Organization 49/4 (1995) pp.595-625; A. Giddens, The consequences of modernity (Cambridge: Polity Press 1990); J. Rosenau, 'The dynamics of globalization: toward an operational framework', Paper presented at the Annual Meeting of the International Studies Association (1996); J. Rosenau, Along the domestic-foreign frontier: Exploring governance in a turbulent world (Cambridge: Cambridge University Press 1997); Ruggie (note 2); J. Scholte, 'Globalisation and modernity', Paper presented at the Annual Meeting of the International Studies Association (1996).

<sup>10</sup> Giddens (note 9).

<sup>11</sup> Rosenau (note 9 - 1996) p.5.

<sup>12</sup> Cerny (note 9).

<sup>13</sup> Cerny (note 9) p.598.

<sup>14</sup> See also Spruyt (note 5).

<sup>15</sup> J. Agnew and S. Corbridge, Mastering space: Hegemony, territory and international political economy (London: Routledge 1995).

<sup>16</sup> Ibid. p.15.

<sup>17</sup> Ruggie (note 2).

<sup>18</sup> K. Burch and R. Denmark (eds.), Constituting International Political Economy (London: Lynne Rienner Publishers 1997).

<sup>19</sup> D. Harvey, Justice, nature and the geography of difference (Oxford: Blackwell 1996).

<sup>20</sup> J. Agnew, 'The dramaturgy of horizons: Geographical scale in the "reconstruction of Italy" by the new Italian political parties, 1992-1995' Environment and Planning A 16/2 (1997) pp.99-121, p.100.

<sup>21</sup> N. Smith, 'Geography, difference, and the politics of scale', in J. Doherty, E. Graham and M. Malek (eds.), Postmodernism and the social sciences (London: Macmillan 1992) pp.57-79; E. Swyngedouw, 'The Mammon quest: "Glocalisation", interspatial competition and the monetary order: the construction of new scales', in M. Dunford and G. Kafkalas (eds.), Cities and regions in the new Europe (London: Belhaven Press 1992) pp.39-67.

<sup>22</sup> Rosenau (note 9 - 1997) p.217.

<sup>23</sup> Ruggie (note 2).

<sup>24</sup> A. Hudson, Globalization, regulation and geography: The development of the Bahamas and Cayman Islands offshore financial centres (Cambridge: Unpublished Ph.D. Dissertation 1996).

<sup>25</sup> Cerny (note 9) p.598.

<sup>26</sup> P. Gann, 'Issues in extraterritoriality - Foreword', Law and Contemporary Problems 50/3 (1987) pp.1-10; K. Meessen, Extraterritorial jurisdiction in theory and practice (London: Kluwer Law International 1996); S.

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<sup>27</sup> J. Griffin and M. Calabrese, 'Coping with extraterritoriality disputes', Journal of World Trade Law 22/3 (1988) pp.5-25; F. Mann, 'The doctrine of jurisdiction in international law', in F. Mann (ed.), Studies in International Law (Oxford: Clarendon Press 1973) pp.1-139; F. Mann 'The doctrine of international jurisdiction revisited after twenty years' in F. Mann (ed.) Further Studies in International Law (Oxford: Clarendon Press 1990) pp.1-83.

<sup>28</sup> J. Trachtman, 'Externalities and extraterritoriality: The law and economics of prescriptive jurisdiction', in J. Bhandari and A. Sykes, (eds.), Economic dimensions in international law: Comparative and empirical perspectives (Cambridge: Cambridge University Press 1997) pp.645-686.

<sup>29</sup> K. Burch, 'The "properties" of the state system and global capitalism', in S. Rosow, N. Inayatullah and M. Rupert (eds.), The global economy as political space (London: Lynne Rienner 1994) pp.37-59.

<sup>30</sup> R. Sack, Human territoriality: its theory and history (Cambridge: Cambridge University Press 1986).

<sup>31</sup> P. Malanczuk, Akehurst's modern introduction to international law (London: Routledge 1997).

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Trachtman (note 28) p.645.

<sup>35</sup> A. Lowenfeld, 'Congress and Cuba: The Helms-Burton Act', American Journal of International Law 90/3 (1996) pp.419-434; S. Lisio, 'Helms-Burton and the point of diminishing returns', International Affairs 72/4 (1996) pp.691-711.

<sup>36</sup> R. Palan, 'Having your cake and eating it: How and why the state system has created offshore', Paper Presented at the Annual Meeting of the International Studies Association (1996) p.6.

<sup>37</sup> Anderson (note 2); Ruggie (note 2).

<sup>38</sup> J. Trachtman, 'Trade and ... problems, cost-benefit analysis and subsidiarity', European Journal of International Law 9/1 (1998) pp.32-85, p.33.

<sup>39</sup> Rosenau (note 9 - 1997) p.xiv.

<sup>40</sup> Trachtman (note 28) p.653.

<sup>41</sup> Ibid. p.647.

<sup>42</sup> J. Trachtman, 'The theory of the firm and the theory of the international economic organization: Toward comparative institutional analysis', Northwestern Journal of International Law and Business 17/2 (1997) pp.470-555.

<sup>43</sup> Trachtman (note 38) p.85.

<sup>44</sup> Trachtman (note 42) p.502.

<sup>45</sup> It is interesting to note that one of the stumbling blocks to the completion of the MAI is the question of extra-territoriality and how jurisdiction should be allocated.

<sup>46</sup> D. Esty, Greening the GATT: Trade, environment and the future (Washington D.C.: Institute for International Economics 1994).

<sup>47</sup> This is not entirely correct as the mechanisms through which decisions are made are not environmentally neutral. For instance: trade restrictions on the basis of Process and Production Methods are WTO-illegal; WTO disputes can only be brought by states; and, NGOs do not have any legal standing within the WTO. These factors are unlikely to be environmentally neutral.



<sup>48</sup> Trachtman (note 38).

<sup>49</sup> B. Barry, Justice as impartiality (Oxford: Clarendon Press 1995).

<sup>50</sup> Rosenau (note 9 - 1997) p.217.

<sup>51</sup> Spruyt (note 5) p.183.