

# **Transnational Private Governance and its Limits**

**Edited by Jean-Christophe Graz and  
Andreas Nölke**

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## 6 Where to find a 'demos' for controlling global risk regulators?

From private to public regulation and back

*Franz van Waarden*

### From private to public regulation of risks and uncertainties

The state has always been in the 'business' of reducing risks and uncertainties for its citizens. Much of its public goods do just that. This holds first for the primary – Hobbesian – task of the state: the protection of its citizens against threats to their life, liberty, and property, be they from domestic or 'foreign' origin. In the old days, Hadrian's, the Chinese, and medieval city walls created visible borders around – and thereby defined – the 'group' to be protected; and watch towers, castles, and soldiers kept threats, varying from wandering dogs to foreign enemies, out. Nowadays, institutions such as the coast guard, the customs, airport security checks, and satellites do in principle the same. Other public goods regulate the 'grid', the relations within the demarcated 'group' (Douglas and Wildavsky 1982). They protect against internal threats: the police against thieves and murderers; hospitals against infectious diseases; and environmental inspectors against unsafe water or unpleasant odours.

Other institutions protect citizens from unexpected and 'uncivilised' action by the protectors themselves. The rule of law, constitutionalism, the judiciary, Committees of Public Accounts, and other institutions 'check and balance' state power and reduce the risks and uncertainties of possible arbitrary action of rule makers and rule enforcers.

Civil society also produced its own means for reducing the risks and uncertainties of life. First, through the division of labour, trade, and other forms of economic action. These provide essential securities as shelter, food, and reproduction. However, division of labour and markets are no spontaneous social orders. Unregulated markets pose such great uncertainties – information asymmetries allow for fraud and deception – that transactions are not likely in the absence of risk- and uncertainty-reducing institutions.

Again, civil society has produced its own transaction facilitating institutions: detectives check the reputation partners in the transaction; commercial rating agencies rate their financial reliability; accountants audit their books in the interest of clients and investors; advertisers pretend to help ameliorate information asymmetries; lawyers draw up and monitor contracts; gangs, strong-armed

bandits, and the mafia aid in enforcing contracts; insurance companies insure calculable risks; technical standards increase market transparency and allow for interconnectivity; educational institutions certify labour and in particular specialised skills such as those for doctors, lawyers, or accountants; trade unions reduce the insecurities of workers in the labour market; guilds or trade associations regulate the quality and reputation of products and their producers, keep moonlighters from the market, or provide bodies for commercial arbitration, etc. (van Waarden 2002).

However, here too, the state has a task, as many private solutions to the risks and uncertainties of the market turned out to have problems of their own, and/or to become new sources of risk and uncertainty themselves. Detectives and other reputation rating agencies threaten the privacy of economic actors; the mafia and other gangs became themselves threats to life, liberty, and property, not infrequently of the very transactional partners that had engaged them in the first place; lawyers cannot do much without a legal framework; advertising agencies do not exactly have an image of neutrality and objectivity; insurers can go broke, and this threat limits the trust of consumers to insure risks with them; associations suffer from the threat of free riders and find it difficult to enforce self-regulation; competition between educational institutions for students can produce diploma-inflation; and a proliferation of competing private technical and administrative standards can become self-defeating as they may obfuscate markets rather than make them more transparent.

Such problems have led the state to support private risk- and uncertainty-reducing institutions: 'law and order'; a legal infrastructure; uniform statutory standards for weights and measures; product and labour quality (diplomas) norms; regulation and supervision of accountants and insurance companies; and recognition, privileged access, and statutory powers for associations. In the end the state added its own regulations.

All these state-produced 'public goods' aim to reduce risk and uncertainty and to increase public 'trust' in public space (streets and cities), private space (planes, trains, taxis, factories, offices, and houses), goods and services, and labour (especially in risky occupations such as doctors, butchers, and lawyers).

These activities provide legitimacy to the state, and justification for taxation. Any perceived failure and any perceived increase in risk and uncertainty threaten the legitimacy of the state, *in casu* of the ruling parties. Unemployment, inflation, rising crime, contagious diseases in humans (aids and SARS) or animals (bovine spongiform encephalopathy (BSE) and chicken pest), waiting lists for health care, and corruption have been often causes for small revolutions in politics.

### Crises and scandals fuelling more and stricter regulation

The long-term historical trend has been one of ever more state regulation, notwithstanding repeated attempts at deregulation. This process has been fuelled by incidents. State aid to, oversight over, or replacement of private regulation increased often after scandals, crises, fraud, and other sudden threats to security.

The recent accountancy scandals are a case in point. Not long ago, several governments, among them the Dutch, took steps to 'deregulate' the accountancy profession. One of the measures contemplated was the abolition of the 'fences' between the professions of law, consultancy, and accountancy. These divisions had been built up because these professions were considered to be guided by conflicting motives: consultants advise business firms, lawyers defend their interests; but accountants control their activities in the interests of investors and the general public. However, under pressure from large 'commercial service'-providing firms, like Ernst and Young, Arthur Andersen, and others, who integrated these different activities, governments were about to tear down these fences . . . until, the bookkeeping scandals of Enron and Worldcom hit the headlines of the world-press. It turned out that the scandals were in large part traceable to accountants being at the same time consultants. Those who should have exposed illegal bookkeeping practices were the same ones who invented and advised these practices. In no time came proposals to remove the abolition of these fences from the political agenda. Instead many countries scrambled to solve the credibility and trust problem by raising rather than lowering standards for auditing, accountancy, and corporate governance.

History abounds with scandals and crises driving social and economic regulation. Modern labour law was boosted by the revolutionary threats at the end of the First World War; the economic crisis of the 1930s led to an extensive elaboration of agricultural, economic and social regulation in Europe, and to the New Deal in the US. More recently, the 1963 softenon (thalodamide) scandal set the stage for the worldwide regulation of the admission of pharmaceuticals to the market; a dozen senior citizens dying from eating peeled shrimp in the Netherlands led to an overhaul of consumer protection regulation; while the various animal epidemics (BSE, foot and mouth disease, and pig and chicken pests) since the 1990s have led to a tightening of veterinary inspections, animal fodder standards, and food regulation general.

Two further developments have enhanced this historical trend. First, a revolution of rising expectations by ever more assertive citizens in democratic societies – both as voters and litigants in court. They hold states responsible for providing solutions to ever more risks and uncertainties: Workers want compensation for headaches because of the weather; horticulturalists for broken greenhouse glass because of the same weather. Second, advances in science and diffusion of information have made citizens aware of risks they were formerly unaware of (e.g. the consequences of asbestos or suspected carcinogens).

### **Globalisation: external sources of risk and uncertainty**

Curiously enough, modern states threaten to get squeezed between rising expectations of citizens for risk and uncertainty reduction against decreasing capacity to do so. With globalisation, more and more sources of risk and uncertainty are beyond the direct control of the nation-state. Many emanate from outside its territory.

Globalisation means first of all an increase in international division of labour

and international trade, thus an increase in global interdependencies. This is most visible in the products we consume. They come from everywhere: apples from Australia, beef from Argentina, cortisone from China, cars from Ireland, and cod from Iceland. It has been estimated that an average product has travelled 5000 miles before it reaches its final consumer. More and more goods are composite ones. A simple cellphone incorporates hundreds of patents held by companies across the globe. Globalisation is not only visible in assembly, but also in process industries. Manure from Chile may have been transformed into US corn; that into Belgian cows and milk and that into Dutch cheese. A leftover, why powder, is turned into French calves and bonemeal, that into British beef, ad infinitum. It is difficult to follow ingredients in these ever longer food chains.

Not only goods are increasingly mobile due to the modern technologies of transportation, telecommunication, and conservation, so are waste products, services, people, capital, ideas, and information. This mobility can entail a great diversity of risks and uncertainties for nation-states.

Contaminated food or unsafe chemicals or pharmaceuticals may spread quickly, and may be difficult to trace. Live produce may spread pests and infectious diseases fast, in particular to the dense population concentrations typical of the bioindustry. This entails even risks of moving to – also frequently dense – areas of human population. The recent international animal and human epidemics of BSE, pig and chicken pests, AIDS, and SARS are cases in point.

Similarly, people on the move can also spread diseases. (Illegal) migrants also bring risks of unemployment, crime, and social unrest, or at least as many citizens believe. Others spread risks of terrorism. The mobility of capital can undermine economies, lead to speculations against currencies, create great volatility in financial markets, and bring major companies to bankruptcy and mass lay-offs, with the attendant risks of loss of trust among investors, consumers, and employees alike.

Technological developments are another external source of risk and uncertainty, difficult for nation-states to control. Every day new chemical substances, with yet unknown properties and risks, are being developed. 'Weapons of mass destruction' become easier to produce and to deliver. The list is endless. Science has also provided greater knowledge about various threats and risks, which we were formerly unaware of.

All this enhances citizens' expectations towards the state: they expect politicians to act, and to use all available knowledge, resources, and powers to ward off imminent threats. This is reinforced by instant diffusion of information through the mass media about threats from far away (SARS in China, nuclear arms in Korea) and about the demands of citizens elsewhere. A veritable 'race of rising expectations' results.

### **Old and new responses to 'foreign' risks and uncertainties**

The traditional response of states to threats from abroad has been to try to keep them out: by erecting, maintaining, and enforcing borders – the very essence of

a territorial state; and by controlling the 'import' or intrusion of 'foreign' goods, people, soldiers, criminals, diseases, ideas, and information considered 'harmful' to their citizens (and the political power holders). This strategy of building 'fortresses' becomes increasingly difficult in a globalising world. Citizens demand goods available elsewhere, illegal immigration is rampant, states punish each other for protectionism, terrorists are invisible, and polities that tried to keep seditious ideas out (the DDR, China) have failed dramatically.

This creates incentives for states to try to extend control beyond their own territory, by exporting their standards, imposing them on others, entering in international negotiations on harmonisation of regulatory standards to increasingly higher levels, or other forms of regulatory cooperation. As in the past, this 'race-to-the-top' is found at any point in time foremost on issues where citizens feel their security acutely threatened by crises or scandals, such as, currently, the insecurities of investment (accountancy scandals), of food and health (animal and human epidemics), and of life (terrorism). But as crises and scandals follow each other in quick succession and emerge in quite different policy areas, regulatory 'races-to-the-top' are spreading.

### Shifts in Governance I: centralisation of regulations

These demands on the state to reduce new risks and uncertainties produce 'shifts in governance' (van Kersbergen and van Waarden 2001, 2004) and shifts in power to those levels and actors of whom it is believed that they can most effectively deal with the problems. Often, this implies *centralisation*. It did so earlier in the process of state formation. Now it is behind the pressures for formation of and regulation by supranational institutions.

What to centralise? Obviously, the regulation of the production, handling and quality of mobile goods, services, and people, that cross borders, and particularly those that may affect the security and health of citizens: foodstuffs, drugs, their ingredients such as plants and animals, animal fodder, veterinary medicine, fertiliser, etc. Here great controversies between nations have arisen: over genetically modified organisms, or hormones in beef (Princen 2002). The list is however longer: qualifications of doctors, veterinarians, or butchers; hygiene and safety of hospital equipment; immigration and travel of potential terrorists (i.e. in principle everybody); airplane security; privacy issues and exchange of information; and the safety of investments elsewhere and information about those (accountancy standards).

It may seem less likely that also standards for less mobile products, services, activities, or people will experience pressures for central harmonisation. Building codes, housing standards, and traffic safety rules differ between countries. Yet, past explosions of factories processing dangerous materials (Flixborough in Britain and Seveso in Italy) have led to supranational regulation of factory security, e.g. the European Seveso directives (Versluis 2003).

How do countries try to influence regulatory standards elsewhere? Economically or politically powerful nations can and do impose their standards on other

nations, through trade relations (the 'California effect', Vogel 1995), or by political, diplomatic, or military pressures (the 'war on terrorism'). Recent new cases of the California effect have appeared: the US SEC exporting its accountancy standards as condition for listing on American stock exchanges and airplane security standards as condition for landing rights in the US.

More frequently used are less asymmetric forms: international regulatory cooperation and negotiation, and harmonisation in arenas of longer established supranational organisations, such as the European Union (EU), the WTO, the ITU, or the WHO.

### The importance of enforcement and compliance

Mere export, harmonisation, or convergence of regulations on paper does not suffice. What counts is whether and how these 'rules-in-the-books' are translated to 'rules-in-action'. Enforcement and compliance are the Achilles heel of any regulation.

Standards one country wants to 'impose' on others, or internationally agreed regulations, have to be applied and enforced on street level, shop floors, harbours, airfields in other countries, if not 'the world', by local food and labour inspectors, airport security marshals, or auditors and accountants elsewhere. Product and people standards can still be checked for when they enter a country, but this is not possible for process standards or product standards that can no longer be identified in the product, e.g. whether a tomato is genetically modified. In such cases, countries have to *trust* the certificates and licenses that street-level bureaucrats in other countries have issued: the Thai inspector who controls the hygiene of shrimp peeling and the Guatemaltecan one who certifies that the bananas are not genetically modified.

Mutual trust between countries in their enforcement practices and value of certificates is complicated because the discretionary authority of street-level bureaucrats and their enforcement styles differ significantly between countries (Vogel 1986). American enforcement officers have limited discretion and apply regulations in an indiscriminating way, making the full force of the law fall equally on all subjects of the regulations, without much concern for individual circumstances. This practice is often experienced by citizens and firms as 'regulatory unreasonableness', but serves the maintenance of universalistic values: all citizens/firms are equal before the law (Bardach and Kagan 1982; Kagan 2001). British, Dutch, or Italian rule enforcers have more discretionary authority and can take account of individual circumstances. They can give (temporary) exemptions, bargain with the subjects of regulation, and be flexible in sanctioning. The price of flexibility is uncertainty and possible inequality (Bakker and van Waarden 1999; van Waarden 1999a, 1999b).

Given these differences in regulatory styles, countries and agencies that maintain stricter enforcement procedures will hesitate to trust others that are known for having less strict ones. Instead, they will try to control foreign controllers. By sending their own controllers and inspectors for double-checks; or

by having international organisations with a strong reputation send out inspectors. Yet external controllers of local controllers have the disadvantage that they are less familiar with local circumstances, customs, people, reputations, and networks. Sooner or later, they will have to collaborate with local informants.

### Shifts in Governance II: back from public to private – from national public to international private regulation and enforcement

Many national governments have long and good experience with private interest associations, NGOs, standardisation bodies, patent offices, foundations, and even business in regulation and its implementation. Now that they hit upon the limits of their legal jurisdictions with more threats to domestic risk and uncertainties coming from abroad, there is an inclination to again engage private organisations in regulation and enforcement, or, where international private self-regulation spontaneously emerges, to tolerate, recognise, or even support and sanction it. Private organisations rely less on a legal system to regulate their environment, and are hence less bound by territorial jurisdictions than nation-states. They can easily and more legitimately extend their activities abroad. And they have already been involved in informal or formal networks with organisations in other countries, sometimes under the umbrella of international corporations. Thus, they have become interesting partners for nation-states that want to extend their regulatory influence beyond their borders.

This often starts from already existing public-private partnerships at the national level. The international contacts and activities of private partners can gradually get integrated and instrumentalised in domestic regulations. They can assist in developing, setting, and extending standards and may aid in enforcing them through their international relations or foreign supply chains. Some examples may elucidate this.

One case is the developing international chain of standards and controls for animal feed. Animal feed is a major input at the beginning of the food supply chain, and problems with its quality (dioxin and ground up bones) have caused recent scandals and crises (BSE and chicken pest). 'Safe feed = safe food' is the industry's slogan. Thus, national governments have quite a stake in this product, but much animal feed comes from far away, is being shipped back and forth, and gets mixed in all kinds of combinations of fodder.

In the Netherlands, animal feed is regulated and inspected by the Ministry of Agriculture and a statutory trade association PDV (a trade association with a public law status and statutory powers: compulsory membership for the relevant industry, powers to tax and regulate the industry) – all under the umbrella of European agricultural and food regulation. The PDV recognises certification, inspection, and monitoring bodies that in turn certify production and trade and transport firms throughout the production chain from raw materials to transport and livestock breeding. Their monitoring bodies employ private control and auditing organisations to carry out quality inspections throughout the chain. To

this end, it employs GMP (good manufacturing practices) and HACCP (hazard analysis and critical control points) standards and an early warning and response system, which is linked to the EU rapid alert system for food and feed. These standards have been developed in international public-private cooperation, in which the Codex Alimentarius, the European Commission, and the European Feed Manufacturers Federation and its daughter associations in the other European member states cooperate. The European Feed Manufacturers Federation has also affiliated members from non-EU states and has an observer status at the Codex Alimentarius. That is, the sector is enmeshed in an international network of safety standards and both public and private certification and control organisations (Brkulic 2001; den Hartog 2003; Freeriks 2004; van Waarden 2006).

Animal feed safety standards concern product quality, which can be inspected at the border, though the products often enter countries as mixtures whose origin is difficult to trace. Hence, international cooperation in controlling the whole production chain is advisable to avert surprises. More difficult is *process* quality control. How can animal-friendly consumers be sure that imported eggs really come from free range chickens? How can enlightened coffee drinkers be sure that the growers of their coffee really get a fair share of the price? To ensure this requires controls all along the production and trade chain, including faraway countries. Therefore, national associations (like the Dutch Max Havelaar) have formed the Fair Trade Labeling Organisations International (FLO), which sets standards for fair social and economic development, concerning both production and process methods, management systems, and supply chain relationships. It engages in certification and employs a network of national organisations and independent auditors and inspectors that monitor compliance by producers, traders, and retailers. The FLO is in turn a member of the International Social and Environmental Accreditation and Labelling (ISEAL) alliance, to which also organisations such as the Forest Stewardship Council, the Rainforest Alliance, and Social Accountability International belong. The ISEAL has a Code of Good Practice for Setting Social and Environmental Standards, which is both a benchmark for, and a control on, the control by organisations such as the FLO. It in turn draws on semi-public standards such as the ISO/IEC Guide 59 Code of Good Practice for Standardisation, the WTO Sanitary and Phytosanitary Measures (SPS), and the WTO Technical Barriers to Trade (TBT) Agreements Annex 3 Code of Good Practice for the preparation, adoption, and application of standards. ISEAL does not only set standards for standards, but it also aids members in capacity building to meet standards. Though these are mostly private initiatives, they get support from national governments and international organisations such as the FAO.

A third channel of private international organisations that aid in public control are multinational corporations, such as large supermarket chains. They have to abide by food quality standards in the consuming countries and nurture their reputations among consumers, leading them to adopt even standards that are not statutory. The supermarket chain Sainsbury, for instance, decided voluntarily to ban GMO products from its shelves. In this way, they impose national standards onto foreign suppliers, and they often do have the organisational

capacity for careful monitoring and control along the supply chain (Havinga 2003).

In regulating sustainable fishing practices, again many international private organisations work together: functionally specialised organisations like the Marine Stewardship Council, public interest associations (the World Wildlife Fund), multinationals such as Unilever and supermarket chains; all recognised, encouraged, and supported by nation-states and the EU, advised by the International Council for the Exploration of the Sea.

Thus, whereas first the long-term historical trend was one of public authorities coming to aid private regulation in civil society; in the era of globalisation, private actors come to the aid of public authorities. Such private and semi-private international organisations help solve governability problems for national governments; but their involvement and responsibilities add to or create new problems of legitimacy and democratic accountability.

In these complex networks of national and international organisations, the identities and boundaries of public and private organisations are no longer so clear. The distinctions get blurred. Public dissolves and blends into private and vice versa. Is a foundation created and governed by a state agency public or private? And what about an (international) association of national public agencies? Is an international public interest association like the FLO really only private even though it performs public tasks? What about the Codex Alimentarius or the ISEAL? The traditional legal distinctions are less useful if organisations cannot link their identity to jurisdiction over a certain territory. Characteristic of a public organisation is that it can be held politically accountable by a 'demos'.

### Shifts in Governance III: increasing influence of expert epistemic policy communities

The pressures for international regulatory cooperation produce shifts in governance and hence in the distribution of political power. We know from organisation studies that those parts of an organisation that are best able to ward off threats from the environment gain in importance and power within the organisation.

This also holds for the risks and uncertainties that give rise to pressures for international regulatory cooperation. At issue are often highly technical matters. Scientific and technical knowledge is required to estimate the risks involved in feeding animals bonemeal, or the effectiveness of an emergency management plan. This gives experts and specialists power in political decision making. Think of the potential influence of the expert weapon inspectors in Iraq. However, one should not only think of natural scientists, engineers, veterinarians, medical personnel, or ICT experts, but also of economists, financial experts, immigration, competition and food law lawyers, accountants, military specialists, secret servicemen, airplane security specialists, etc.

Such experts meet with experts of other nations. They do so first in the processes of negotiation, attempted imposition, cooperation, and development of

common standards. However, given the importance of implementation and enforcement, experts of one country will contact street-level controllers in other countries, often also experts in their field. US secret servicemen seek the collaboration of local agents in Kurdistan and Baghdad; WHO-authorities in Europe contact doctors in Hong Kong who deal with SARS. Thus, the expert networks that develop are not only 'horizontal' but also 'diagonal' between standard setters in one country and implementers in others.

These experts tend to form technically specialised policy or epistemic communities. They include not only experts employed by the state or by international organisations such as the WHO, the World Bank, the WTO, ITU, European regulatory agencies, or the ISO; but also privately employed experts: consultants, rating agencies, and multinationals involved in the production and distribution of risk-sensitive products (food and drug or aircraft manufacturers) which have often larger scientific and information resources than public agencies.

Thus, extensive networks of regulators and enforcers develop, which can be highly specific for certain risks, products, or policy areas. The Seveso II directive, which we studied in detail in Utrecht (Versluis 2003) produced such a specialised network: those charged with enforcement meet regularly, either individually or at joint meetings and conferences, where they exchange experiences and information.

### A third phase in the development of democracy

These international epistemic and regulatory communities represent a challenge to a possible third wave of democratisation, but a different one than Majone (2002) distinguishes, following Dahl (1989). According to him, the first wave was the introduction of *direct democracy* in the Athenian city state, in which the demos, the people (at least a part of it), directly participated in the formulation, but also implementation of public decisions, the 'policy'. The second wave was the introduction of *indirect or representative democracy*, the indirect participation of the demos in policy making, through democratically elected representatives. This made it possible to extend the democratic idea to larger social groups, usually territorially defined. Majone sees the formation of supranational organisations like the EU as a third stage of democratisation. I wonder if it is not much more the introduction of these international expert policy making, standard-setting and monitoring communities. While the second stage entailed citizens electing representatives who formulate and administer policies, the third one is a form of *second-level indirect representative democracy*: citizens elect representatives who control and supervise 'technicians' who formulate and administer policies, even beyond their borders.

### The constitutionalisation of international expert communities

This third phase of democracy has also surfaced at the level of the nation-state with the growth in size of the public administration and the increasingly

technical nature of policy formulation and implementation. At this level, political oversight of technical agencies operationalising, administering, and enforcing regulations is already difficult. How much greater will the problems then not be in even longer principal-agent chains of implementation of international or supranational regulations?

If international expert communities exercise de facto more and more power, then the question becomes urgent to whom these communities are accountable, what the checks and balances on their power are. History teaches that whenever and wherever such checks are absent, sooner or later those in positions of power will abuse their prerogatives and privileges. Without such checks and balances, public trust in such officials will wane. What is needed is *constitutionalisation of international networks of technocrats*. We need checks on the powers of secret servicemen, food inspectors, immigration officers, diploma certifiers, risk assessors, accountants; in short, expert bureaucrats, acting in international networks, including NGOs, where the control of national politicians is severely limited. I can do no more than offer some suggestions for such checks and balances.

- Can the old and well-tried idea of the Trias Politica be a source of inspiration?
  - Judicial review of decisions of international and supranational institutions, placed at the nuclei of expert networks, e.g. by an international court for administrative law, following the example of the recently created international criminal court? That is, possibilities of appeal against decisions of the WTO or the World Bank, or of foreign/international controllers of local controllers?
  - A balance of power between networks and their institutions representing different disciplines, or policy areas, i.e. a functional division of powers, following the already existing functional balance (or more frequently de facto imbalance) of powers between different ministries at the level of the nation-state
- To what extent can the market model be a source of inspiration?
  - *Peer review and competitive markets of enforcement ideas*. Of course experts provide first and foremost 'checks and balances' on each other. There is peer review, more or less public exchange of arguments, and within many disciplines there are rival theoretical and paradigmatic schools. They may vie for domination, but as long as no one succeeds in acquiring a dominating position there is some form of mutual control. This seems to work well in science, but should not the formulation and implementation of risk and uncertainty regulation be more publicly accountable?
  - *A competition authority* for expert networks. Does not the danger of monopolisation of certain schools of law, economics, food safety, etc. require some regulation itself? Do we perhaps need 'competition authorities' for these epistemic communities? Should there be some form of 'affirmative action' for disadvantaged schools and approaches? Or guarantees for 'market entry' for new approaches?

- Associational self-regulation
  - At the national level, professions regulate themselves in associations with statutory powers. Can we envision something like that at the international level? For example, an *international disciplinary tribunal* for accountants, or food inspectors, or NGOs?
- Publicity, the reputation mechanism, the press
  - At the national level, major checks on abuse of political power come from a critical press, from publicity affecting reputations, and from actors caring for their reputations. Could this also be used for networks of powerful experts? This would of course require press interest, and that in turn requires interest of its readership. Such interest is likely to come from crises and scandals. A BSE or SARS crisis should be good enough to point the attention of the press to the wheeling and dealings of the relevant expert community. It does already occasionally. But what is missing is knowledge and insights of the press in the existence of, power of, and functioning of such international expert networks. Would a *specialised journalist school* and a specialised international association of journalists be a solution?

### Constitutional democracy for which 'demos'?

Majone (2002) bases the legitimation for regulatory intervention – that is, the ideal regulatory jurisdiction – on a *territorially* circumscribed *demos*, which derives its identity from a certain homogeneity. He writes: '...the primacy of the territorial state has the same origin as the idea of democracy. Cleisthenes, ... the founder of Athenian democracy ... brought the territorial principle to triumph over the kinship principle of social organisation ... Democratic theory presupposes a territorially based 'demos', and 'the democratic process presupposes the existence of a fairly homogeneous polity'.

But what if regulation by supposedly homogeneous nation-states is no longer effective and regulation at higher levels of aggregation is required? And what if the logical connection between legitimacy–democracy–demos–territory–homogeneity is not so convincing any more in an age of globalisation? Why and whence did territory become a defining unit for a 'demos'? Homogeneity is the answer of Majone. But homogeneity of what? Interests? Cultural norms and values? Are nation-states really so homogeneous as is often (including by Majone) argued? Are they really such 'tight' communities? The *criteria* by which homogeneity should be measured are not so clear.

If we take language, religion, or culture as a criterion, many nation-states are or were not so homogeneous as Majone implies. Many supposedly 'homogeneous' European nation-states were split along religious, language, or class lines, which found expression in political ideologies, movements, civil society organisations, and political philosophies (socialism, communism, Christian democracy, and liberalism). Furthermore, many West-European countries are becoming even more 'multi-cultural'. They harbour immigrant minorities which

are quickly growing in size, coming in part from former colonies, in part from neighbouring – Mediterranean or East European – countries.

### A functional as opposed to a territorially defined demos?

If a territorially defined 'demos' is not so homogeneous, what kind of legitimacy does it provide for regulatory jurisdictions? Merely because that is the turn history took? Are there no alternatives? What about a *functional* as opposed to a *territorial* definition of a 'demos'?

I have argued in this article that most regulations by *public actors*, like states, have a functional foundation: they are public goods that reduce risk and uncertainty for the citizens that have created these public actors. From this functional criterion, one could also derive a functional criterion for delineating the demos: those affected by certain threats; or, in other words, sharing a *common fate*.

That is also what usually happened in history. The demos of existing nation-states were originally no demos at all. Any unity that may exist now is the result of a shared fate, usually a common enemy, which gave rise to state formation. The Swiss state began forming with the mythical oath of the Grütli in 1291 among the three 'forest' cantons around Lake Lucerne that saw their freedom threatened by the Habsburg Rudolf I, the then Holy Roman Emperor. Three centuries later, seven protestant Dutch provinces united in the Treaty of Utrecht (1579) and revolted against the Catholic authoritarian Spanish Habsburgs. Again, about two centuries later, thirteen, then quite heterogeneous, American colonies of Britain signed a Declaration of Independence (1776) against the Georgian monarchy. A short war with France eventually completed German unification in 1871, and Italian Risorgimento was completed amongst others in wars with the Papal States and France. Paraphrasing Tilly (1975), 'war made the states, and the states made war'. These states then forced the peoples within their borders – with different degrees of success – to become one people, a demos for the later democratic governments. There is nothing 'natural', mythological, or metaphysical about European peoples. What created territorially defined peoples was ambition by certain monarchs, war, bad, or good luck on the battlefields, and, because of all that, shared fates.

With the new transport and communication technologies and the resultant mobility of 'citizens', territory may become less of a criterion for 'shared fates', identity, and interests. Territory may be replaced by function. We may live more and more in different 'states' at the same time for different functions.

The Dutch have done so already for some time. They have a long history of functionally defined and differentiated 'state' institutions that reduced different risk and uncertainties for groups with a shared fate. As elsewhere, the oldest shared threats were territorial: from enemies outside the local (feudal autarchic) community (roaming bands, vagrants, highwaymen, and 'foreign' armies), and from criminals within the community. These threats gave rise to standard state organisations. However, the inhabitants of the marshes and peat bogs at the mouths of the Rhine, Meuse, and Scheldt had to withstand another threat – the

water. Sea and rivers were sources of frequent flooding. To counter this threat, the peat bidders formed, from the eleventh century on, functionally specific 'state' institutions, the *waterschappen* (hydraulic boards). They organised the construction and maintenance of an ideal typical public good: dykes, waterways, sluices, and later mills, which kept the feet of local inhabitants dry, and later on even draining parts of the delta.

Originally, it was a form of Dahl's direct democracy: all the inhabitants of the territory owning real estate decided on common policies and carried them out. Individuals were responsible for the maintenance of specific pieces of a dyke, dams, or sluice. They collectively organised a system of control and enforcement, and sloppy members – who risked the lives of others – were severely punished. Later, this system developed into one of indirect democracy that still exists.

Other forms of functional governance and democracy developed in the middle ages: the guilds that regulated economic life. Originally, this was still tied to territory: the guild had jurisdiction in a clearly demarcated territory, the walled city. In the twentieth century guilds got successors without such ties to territory: statutory trade associations that organised economic actors from across the country, whose shared fate was that they were involved in a similar economic activity, diffused in space. The statutory trade associations still in existence have – similar to the corporatist Chambers in Germany, Switzerland, and Austria – state-like powers: membership is compulsory, the government is democratically elected, and they have powers to tax and to regulate.

Globalisation will and does reinforce this trend. Our shared fates are less and less territorial, and more and more functional: worldwide risks and uncertainties of terrorism, food poisoning, contagious diseases, and global warming. Consequently, we live increasingly under regulatory regimes of functionally specialised international agencies, who perform state-like tasks: they help reduce such risks and uncertainties. At the European level, functionally specific institutions or forms of inter-state cooperation (involving different EU member states) have arisen: the European Commission, the European Monetary Union, and the Schengen Treaty. At the global level, institutions like the WTO, WHO, World Criminal Court, World Bank, IMF, UNDO, ISO, ITU, etc. have been formed, all for functionally specific tasks. And also private governance institutions such as in food safety or fair trade are functionally specialised. Any democratic control of such organisations goes so far via the nation-states. But what about direct democratic representation by functionally defined demos, i.e. those in whose interests such organisations try to reduce risks and uncertainties? It may not be easy to perceive exactly along which lines and with what institutions (electoral systems, eligibility for passive and active voting rights, etc). Such functionally defined demos should form to provide checks and balances on the power of functionally defined expert communities. But it is an idea worthy of further development.