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Governing ‘as if’:

Global subsidies regulation and the benchmark problem

*Andrew Lang**

As a result of the extraordinary work of Foucault, Shapin and Schaffer, Porter, and many others, we are familiar with many of the practices of governance which emerged during the 19th century at the intersection of the modern social sciences and the modern state, as ‘naturalised’ knowledge of an objectified social body formed the foundation of specific kinds of social and political order. But over the course of the 20th century, critiques of objectivity have become commonplace, and a post-positivist epistemological revolution has taken root in many quarters. How, then, have practices of governance-through-knowledge modified themselves in response to a century of such critiques? This paper takes inspiration from the work of Jasanoff, Riles, Latour and others, to identify a mode of ‘governing as if’: a pragmatic mode of governance which works not through the production of objective knowledge as the shared epistemic foundation for political settlements, but rather by generating knowledge claims that stabilise social orderings precisely through their self-conscious partiality, contingency and context-dependence. This argument is developed using the illustration of global subsidies regulation in World Trade Organization law, focussing in particular on the knowledge practices by which particular conceptions of ‘the market’ are produced and deployed in the course of its operation. The paper argues that the standard criticisms of naturalised economic conceptions of the ‘free market’, developed in various scholarly traditions throughout the 20th century, do not provide an adequate account of economic governance working in ‘as if’ mode, either positively or normatively. It further argues, following Riles, that such regimes of governance derive their effectiveness fundamentally from their ‘hollow core’, and that it is in the constant and active work of ‘hollowing out’ that we are likely to find their characteristic modalities of power and underlying structural dynamics.

I. The ‘market’ and its objectification

In their classic study of the birth of modern scientific methods in the middle of the 17th century, Steven Shapin and Simon Schaffer show very clearly the intimate connections that exist between the way we produce knowledge about the world and the way we choose to govern ourselves in it. The ‘practices involved in the generation and justification of proper knowledge’, they suggest, are ‘part of the settlement and protection of a certain kind of social order’.¹ Following the lead of these and other

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¹ Steven Shapin and Simon Schaffer, *Leviathan and the Air-pump: Hobbes, Boyle, and the Experimental Life* (Princeton University Press 2011), 342.

authors, this paper takes as its broad theme the ‘co-production’² of knowledge and governance – with a more focussed interest in the co-production of economic knowledge and economic governance. Its point of departure is a relatively familiar story about the emergence of an objectified understanding of market relations through the development of political economy and modern economic science from the mid 1700s onwards, and its articulation within various practices of economic statecraft over the 19th and 20th centuries.

The classical political economists and their peers were among the first to think of economic life as belonging to its own distinct domain, and to imagine the market as a having its own internal laws of motion. These laws of motion were on the whole understood to be natural, in the sense of being a spontaneous product of relations between individuals, and deducible from certain self-evident propositions about human nature. A central task of political economy, accordingly, was to discover and describe the systemic forces and laws of motion which governed economic life, and in doing so to produce the ‘market’ as an object of scrutiny. As Colin Gordon reminds us, the ‘new objectivity of political economy [did] not consist solely in its occupation of a politically detached scientific standpoint: more profoundly, it inaugurate[d] a new mode of objectification of governed reality’.³ This way of understanding and representing economic life was both a product of, and helped to produce, a particular rationality of government. On one hand, the objectification of the market limited the practices of economic statecraft, on the basis that the practical ability of governments to work against the inherent dynamics of markets were understood to be fundamentally limited. On the other, it also shaped the purposes of economic governance, which were re-oriented towards ensuring the integrity and proper functioning of these inherent dynamics. In Foucault’s words, this was a rationality of government which sought above all to ‘ensure that the necessary and natural regulations work, or even to create regulations that enable natural regulations to work.’⁴

For reasons that are too well known to repeat, new demands for state action to remedy and ameliorate the operation of actually existing markets emerged from the mid- to late-19th century through the first half of the 20th. The new techniques of economic management characteristic of this period were critically enabled by new practices of knowledge production within the economic sciences. As has been chronicled by a number of authors, the development of comprehensive national economic statistics, alongside the creation of macroeconomics as a subfield of economics, were central to this history.⁵ This was the period in which the national economy as a whole was

² Sheila Jasanoff, *States of Knowledge: the Co-Production of Science and the Social Order* (Routledge 2006).

³ Colin Gordon, ‘Governmental Rationality: An Introduction’ in Graham Burchell and others (eds), *The Foucault Effect: Studies in Governmentality: with two lectures by and an interview with Michael Foucault* (Harvester Wheatsheaf 1991), 17.

⁴ Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-78* (Palgrave Macmillan 2009), 353.

⁵ See, eg, Theodore M. Porter, *Trust in Numbers: The Pursuit of Objectivity in Science and Public Life* (Princeton University Press 1996); Theodore M Porter, *The Rise of Statistical Thinking, 1820-1900* (Princeton University Press 1986); Alain Desrosières, *The Politics of Large Numbers: A History of Statistical Reasoning* (Harvard University Press 1998); Timothy Mitchell, *Rule of Experts: Egypt, Techno-politics, Modernity* (University of California Press 2002); Mary Poovey, *A History of the*

mapped and systematically measured for the first time,⁶ with the emergence of new and more detailed national statistics in this period, from cost of living indices, population level consumption data, a variety of labour indices, and so on, all directly related to the political priorities of the emergent welfare states of the period. These new domains of knowledge production oriented the new interventionism by reconstructing economic life in terms amenable for state action. ‘Unemployment’ was invented as a particular kind of social problem, in part through practices of data collection on joblessness. GDP was invented and offered itself as a target of state programs of industrial development. For Timothy Mitchell, indeed,

[t]he idea of the economy in its contemporary sense did not emerge until the middle decades of the twentieth century. Between the 1930s and 1950s, economists, sociologists, national statistical agencies, international and corporate organizations and government programs formulated the concept of the economy, meaning the totality of monetarized exchanges within a defined space. The economy came into being as a self-contained, internally dynamic, and statistically measurable sphere of social action, scientific analysis and political regulation.⁷

The formal disciplinary separation of economics from politics and sociology around the turn of the century also reinforced this mechanical image of the economy as a self-contained sphere with its own internal dynamics. In the first half of the 20th century economics became in part an ‘engineering’ science, geared towards the production of usable knowledge for the emerging administrative and welfare state.⁸ At about the same time, the academic discipline of economics also began self-consciously to aspire to the formal rigour of the natural sciences. The formalisation of the discipline, which had begun already with Walras in the late 19th century, entrenched itself firmly in subsequent decades, particularly after World War 2.⁹ The emphasis placed on the formulation of general and abstract laws, the use of mathematical techniques, and the production of parsimonious models were all aspects of a culture of objectivity keenly attuned to the epistemic virtues of positivist social science.

In this mode, economic knowledge did the ‘costly work of objectification’ of the market, stabilizing a common description of economic situations, and thus providing a shared basis for public and private action.¹⁰ Economic statecraft based its legitimacy on objective technical knowledge, obtaining consent to its large scale projects of

Modern Fact: Problems of Knowledge in the Sciences of Wealth and Society (University of Chicago Press 1998).

⁶ Though see also Catherine Larrère, *L'invention de l'économie au 18. siècle: du droit naturel à la physiocratie* (Presses universitaires de France 1992).

⁷ Mitchell (n5) 4.

⁸ Mary Morgan, ‘Economics’ in Roy Porter and others (eds), *The Cambridge History of Science: Volume 7, The Modern Social Sciences* (Cambridge University Press 2003).

⁹ See, for two accounts, Geoffrey Hodgson, *How Economics Forgot History: The Problem of Historical Specificity in Social Science* (Routledge 2001); Philip Mirowski, *More Heat than Light: Economics as Social Physics, Physics as Nature's Economics* (Cambridge University Press 1989).

¹⁰ Laura Centemeri, ‘The Contribution of the Sociology of Quantification to a Discussion of Objectivity in Economics’ in José Castro Caldas and Vítor Neves (eds), *Facts, values, and objectivity in economics* (Routledge 2012), 112. See also generally Mary S Morgan, *The World in the Model: How Economists Work and Think* (Cambridge University Press 2012).

social and economic transformation in significant part through the scientific construction of a shared economic reality.¹¹

It is commonplace to note that, from at least the 1970s onwards, public scepticism about both the possibility and desirability of ‘objective’ social scientific knowledge in an uncomplicated sense has become especially visible and widespread. Around this time, in Dorothy Ross’s summation:

[t]he social scientists’ project was buffeted not only by political shifts but also by long-accumulated discontents with modern society. The most vocal critics repudiated the liberal Enlightenment vision of modernity guided by science and technocracy, declaring it to be monolithic and coercive, and sought alternative, postmodern bases for individual freedom. Theoretical attacks on positivism and new linguistic critiques of knowledge fuelled the postmodern vision and worked more broadly to reopen fundamental questions about the viability of the social science disciplines and their relationship to [natural] science and the humanities.¹²

Economic knowledge, needless to say, has not been immune to such currents. Particularly in the present moment, it is fair to say that economics, at least as much as all natural and social scientific disciplines, ‘live[s] under constant suspicion’, and is at times of stress routinely suspected of ‘providing knowledge that aggravates our condition rather than improves it’.¹³

What has happened, then, to techniques of economic governance which are enabled by the epistemic objectification of the market? How have practices of knowledge production been transformed in response to post-positivist critiques of the objectifications of modern economic science? And has their articulation within regimes of governance given rise to new or modified forms of economic statecraft? What new ‘practices of objectivity’ have emerged to shore up claims to objectivity in a post-positivist world? And how, indeed, has the aspiration to objectivity been displaced or redefined as the guiding orientation of governmental knowledge practices?

These are the broader questions which animate this paper. In order to sharpen them a little, it is useful to set out three different critical responses to the objectification of the market, all of which have been with us in various forms since at least the early 20th century. All seek to undo the work of objectification performed by mainstream economic thought, but in significantly different ways. First, it is argued that the objectified image of the market which emerges from mainstream economic analysis is *false*, because the assumptions on which it is based are wrong. In this category, for example, we find the common claim that the rational actor hypothesis is wrong, either because humans are prone to systematic and predictable cognitive biases in their decision-making (behavioural economics), or because ‘social norms’ influence social

¹¹ Yaron Ezrahi, *The Descent of Icarus: Science and the Transformation of Contemporary Democracy* (Harvard University Press 1990).

¹² Dorothy Ross, ‘Changing Contours of the Social Science Disciplines’ in Roy Porter and others (eds), *The Cambridge History of Science: Volume 7, The Modern Social Sciences* (Cambridge University Press 2003), 234-35.

¹³ Peter Sloterdijk, *Critique of Cynical Reason* (University of Minnesota Press 1987), 334, 536.

behaviour within the market just as much as they do outside it (certain strands of economic sociology¹⁴). Second, even where one accepts (as a positive claim) the separation of the economic and the social, others have noted that this separation is *socially constructed* – and that this fact is obscured by the objectification of the market in most economic thinking. Polanyi’s account of the social construction of markets provides the classic example of this line of criticism,¹⁵ though the new institutionalists in the Northian line also fall into this category. A third response, by contrast, emphasises the fact that the imagined ‘ideal market’ is a partially *indeterminate* concept – very different from claiming that it is inaccurate as a description of actually existing markets. This line of argument derives fundamentally from the legal realists and early institutionalists, who observed that factors of production are nothing other than legal entitlements, and that there is in principle no set of criteria internal to economics (including, lest we fall into circularity, ‘the market’ itself) by which we can determine what form these legal entitlements would ideally take in a ‘perfect’ market.¹⁶

Although all three of these lines of criticism have been influential at different periods over the last century, in this paper I am primarily interested only in the last of them: the indeterminacy of the concept of the market. More specifically, my aim is to explore and understand what happens when regimes of governance which operate by means of *market benchmarking* – that is to say, measuring and disciplining deviations from market outcomes – confront the problem of the indeterminacy of the market benchmark itself.

In what follows, I examine an illustrative regime of governance-by-market-benchmarking – namely, global subsidies regulation under the law of the World Trade Organization. I show how this regime is confronted at every turn by the problem of the indeterminacy of the concept of the market. And I describe the knowledge practices by which particular notions of the market come nevertheless to be treated as valid, or at least to be accepted as the basis for action for the purposes of WTO subsidies law. My argument will be that knowledge practices in the field of global subsidies regulation do not aspire to produce facts of the sort valorised by economic science – that is to say, facts which are true to nature, value-free, observer-independent, applicable across contexts, and durable. Such knowledge practices do not objectify the market in the manner of much economic thinking, but instead merely invite us to *act as if* ‘the market’ were coextensive with one of its particular instituted forms. In other words, they merely create an ‘as if’ market benchmark for us to accept only for certain limited purposes, and only in a strictly bounded context.

II. Global subsidies regulation and benchmark problem

¹⁴ I am thinking here of the ‘embeddedness’ thesis of the sort associated with Granovetter, eg. Mark Granovetter, ‘Economic action and social structure: the problem of embeddedness’ (1985) 91 *American Journal of Sociology* 481–510.

¹⁵ Karl Polanyi, *Origins of Our Time: The Great Transformation* (V Gollancz, 1945).

¹⁶ See, eg. Robert L. Hale, ‘Coercion and Distribution in a Supposedly Non-Coercive State’ (1923) 38 *Political Science Quarterly* 470–494; Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1917) 26 *Yale Law Journal* 710; Kennedy, ‘The Role of Law in Economic Thought: Essays on the Fetishism of Commodities’ (1985) 34 *American University Law Review* 939; Coase, ‘The Problem of Social Cost’ (1960) 3 *Journal of Law and Economics* 1.

International rules on subsidies have developed in a halting and rather piecemeal way in the 70 years since the end of World War 2. Although the stillborn ITO Charter contained a prohibition on export subsidies,¹⁷ this was not included in the GATT 1947. Instead, the drafters of the latter document opted in Article XVI for a relatively loose combination of a notification requirement coupled with an obligation to ‘discuss ... the possibility of limiting the subsidization’ with those trading partners suffering ‘serious prejudice’ as a result of the subsidies in question.¹⁸ In addition, flexibility to provide subsidies to domestic producers was maintained through an exemption from the national treatment obligation in Article III:8(b). Partially offsetting these permissive provisions was Article VI:3, which permitted GATT contracting parties to impose countervailing duties on subsidized imports, subject to certain procedural safeguards. The notion of a ‘subsidy’, however, was nowhere defined.

In 1955, further obligations on export subsidies were added to Article XVI. The new paragraph 4 envisaged that agreement would be reached to abolish all export subsidies on non-primary products by 1958, and provided for a ‘standstill’ for existing subsidy programs until then.¹⁹ In relation to primary (mainly agricultural) products, contracting parties agreed that they should ‘seek to avoid the use’ of export subsidies, and not to use them in a manner which would result in their having a ‘more than equitable share of world trade’ of the product in question.²⁰ While these amendments still did not address the definitional issue, in 1960, during the negotiations designed to put GATT Article XVI:4 into effect, a Working Party produced an illustrative list of measures which could reasonably be treated as export subsidies, in the absence of a general definition of the concept.²¹ This report was adopted by the Contracting Parties, and has continued to act as an important reference point since then.

The Tokyo Round saw the adoption of the Subsidies Code, a new and at the time important agreement signed to by 23 GATT contracting parties. It contained a more categorical prohibition of export subsidies, as well as some elaborated disciplines on domestic subsidies, and new constraints on the unilateral imposition of countervailing duties. But this was superseded some 16 years later by the new Agreement on Subsidies and Countervailing Measures (‘SCM Agreement’) negotiated during the Uruguay Round, which came into force in 1995.²² The SCM Agreement contained, for the first time, a general definition of the concept of a ‘subsidy’: under Article 1.1 of the agreement, a subsidy is deemed to exist, where: (a) there is either a ‘financial contribution’ by a government or public body or ‘income or price support’; and (b) a ‘benefit is thereby conferred’ on the recipient. Such subsidies are only subject to the disciplines contained in the agreement if they are ‘specific’.²³ As regards substantive disciplines, the SCM Agreement continues the separate treatment of export and

¹⁷ United Nations Conference on Trade and Employment, Final Act and Related Documents (24 March 1948) E/CONF.2/78, arts 25-28.

¹⁸ General Agreement on Tariffs and Trade 1947 (30 October 1947) 55 UNTS 194, art XVI.

¹⁹ GATT 1947, art XVI:4. As it happened, agreement proved impossible, however, and in the end only a subgroup of 17 industrialised countries reached an agreement in 1960.

²⁰ GATT 1947, art XVI:3.

²¹ Working Party Report on ‘Provisions of Article XVI:4’ (19 November 1960) BISD 9S 185.

²² Agreement on Subsidies and Countervailing Measures (15 April 1994) LT/UR/A-1A/9 (‘SCM Agreement’).

²³ SCM Agreement, art 1.2.

domestic subsidies found in earlier texts. On one hand, export subsidies and so-called import substitution subsidies are prohibited outright, though there is an exemption for agricultural subsidies, which are addressed in a separate agreement.²⁴ On the other, domestic subsidies are ‘actionable’ under the agreement only if they cause, or threaten to cause, ‘adverse effects to the interests of other Members’, a concept which is elaborated in considerable detail in Articles 5 and 6. In respect of both actionable and prohibited subsidies, the injured Member has a choice of remedies: to bring a complaint to the dispute settlement body seeking removal of the subsidy; and/or to unilaterally impose countervailing duties on the subsidized import to offset the effect of the subsidy.²⁵ Part V of the agreement then imposes a series of important procedural and substantive limits on the use of such countervailing duties.

I noted above that I am interested in this body of law because of the way that it operates by reference to a market benchmark. Most importantly, the market is used as a yardstick to define the concept of a ‘subsidy’: in order to qualify as a subsidy, a governmental measure must make the recipient better off as compared to the position they would have enjoyed in the marketplace. Thus, the Appellate Body has made it abundantly clear that ‘the marketplace provides an appropriate basis for comparison in determining whether a ‘benefit’ has been ‘conferred’.²⁶ Similarly, the notion of ‘income or price support’ has been similarly interpreted as involving a comparison with the existing price, and a market-oriented benchmark of an ‘equilibrium’ price.²⁷

Indeed, the technique of market benchmarking is central to almost every significant element of subsidies regulation. Under Article 3, whether a subsidy is *de facto* contingent upon export performance depends on the existence of an incentive ‘to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy’.²⁸ Under Articles 5 and 6, the question whether a subsidy has caused ‘adverse effects’ or ‘serious prejudice’ requires in most cases a detailed counterfactual analysis of the likely prices, trade flows, and market shares in an imagined market in which the subsidy was not granted. Under Article 14, the amount of a subsidy is to be calculated by comparing the financial contribution made by the government with one or other of a number of market benchmarks, including ‘the usual investment practice ... of private investors’, ‘the amount that the firm would pay on a comparable commercial loan which the firm could actually obtain on the market’, ‘adequate remuneration ... [as determined] in relation to prevailing market conditions’.²⁹ And the question of

²⁴ SCM Agreement, art 3.1.

²⁵ SCM Agreement, art 10, footnote 35.

²⁶ WTO, *Canada: Measures Affecting the Export of Civilian Aircraft – Report of the Appellate Body* (2 August 1999) WT/DS70/AB/R (‘*Canada – Aircraft (AB)*’) [157].

²⁷ WTO, *China: Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States – Report of the Panel* (15 June 2012) WT/DS414/R [7.85] ‘the concept of ‘price support’ ... includes direct government intervention in the market with the design to fix the price of a good at a particular level, for example through purchase of surplus production which price is set above equilibrium’.

²⁸ WTO, *European Communities and Certain Member States: Measures Affecting Trade in Large Civil Aircraft – Report of the Appellate Body* (18 May 2011) WT/DS316/AB/R (‘*EC – Aircraft (AB)*’) [1102].

²⁹ SCM Agreement, art 14, which provides context for interpretation of the notion of ‘benefit’ under article 1.1(b) (*Canada – Aircraft (AB)* [158]). Notes also that the Illustrative List of export subsidies in Annex I contains a similar set moves, eg, in paragraphs (d), (j), (k).

whether the sale of a subsidized entity extinguishes the effects of a subsidy requires a comparison between the price paid with a counterfactual benchmark of ‘fair market value’.³⁰ Other examples can easily be found.

The point, in brief, is that the technique of market benchmarking is central to WTO subsidy regulation: recourse to the market standard is used to resolve disagreements not only about what constitutes a subsidy, but also questions of characterisation, causation, quantification and extinction. In this respect, as Zheng has chronicled, the WTO adopted the approach which emerged in domestic US countervailing duty practice over the course of the 1980s.³¹ It turns out, however, that the ‘market’ does not quite deliver on its promise of providing a stable and determinate reference points for resolving subsidy disputes. For one thing, as those who specialise in this area of WTO law understand well, there are many different possible markets that one might choose as one’s benchmark, and this choice hugely affects the substantive scope, content and dynamics of the law. Which market, then, should be used for the purpose of benchmark analysis?

An obvious first choice for a suitable benchmark may be the ‘market-as-is’. Where a business receives a loan from the government, for example, does it not make sense to compare the terms of this loan to the terms that business could have received in the existing financial market? One problem with this commonsense benchmark has to do with the selection of an appropriate market transaction for comparison. Since all commercial transactions are at some level unique, any determination that two are relevantly comparable is subject to the classic finitist critique of all acts of classification, and therefore necessarily encounters problems of indeterminacy.³² To illustrate the point more concretely: in order to determine a comparable marketplace transaction, it may be necessary, for example, to determine the risk profile of the loan in question. How risky, precisely, was the commercial project being funded, and what premium would the market have charged in light of this risk? But the riskiness of a project is never a matter of uniform agreement amongst market participants – indeed, *necessarily not*, if the market is to function well – so that a determination of this sort necessarily involves choosing one among many possible views of market participants.³³ (The convention of citing a single ‘market price’ tends to obscure the

³⁰ See, eg, WTO, *United States: Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom – Report of the Appellate Body* (10 May 2000) WT/DS138/AB/R [68].

³¹ Wentong Zheng, ‘The pitfalls of the (perfect) market benchmark: the case of countervailing duty law’ (2010) 19 *Minnesota Journal of International Law* 1. See also Daniel K. Tarullo, ‘Beyond normalcy in the regulation of international trade’ (1987) 1 *Harvard Law Review* 546.

³² For a succinct statement of the finitist critique, see Barry Barnes, David Bloor, and John Henry, *Scientific knowledge: a sociological analysis* (University of Chicago Press 1996), esp 55-59. For an illustration of such insights in respect of subsidies regulation and the comparability of transactions, see Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC law in Comparative Perspective* (Oxford University Press 2009), chapter 8. See also Matthew Parish, ‘On the private investor principle’ (2003) 28 *European Law Review* 70.

³³ For two examples of the difficulties that this might give rise to in practice, see WTO, *Japan: Countervailing Duties on Dynamic Random Access Memories from Korea – Report of the Appellate Body* (28 November 2007) WT/DS336/AB/R [25]-[29] (regarding the relevant of the different interests of ‘outside’ and ‘inside’ creditors); WTO, *Brazil: Export Financing Programme for Aircraft, Recourse by Canada to Article 21.5 of the DSU – Report of the Appellate Body* (21 July 2000) WT/DS46/AB/R [73]-[74] (showing the range of factors which may be taken into account in determining the comparability of transactions).

fact that this general price is typically a statistical artefact produced in complex ways from multiple actual prices in the market.) Or, take the example from a recent case of the rent charged by a German municipality for the provision of specialised industrial land to Airbus. Is the appropriate comparator the generally prevailing rate for industrial rentals in that municipality, or the rate paid for similarly specialised sites elsewhere in the country or region, or some other rate? If the former, should the generally prevailing rate be modified *upward* to reflect the additional value to Airbus of the specialised nature of the land, and its proximity to its construction facilities – or *downward* to reflect the additional value to the lessor of the long-term nature of the rental agreement, the secure credit of Airbus, and so on?³⁴ The point is that different market participants will make such judgments differently, and that there is therefore no single ‘existing’ market standard by which to make such determinations. Even small differences can in some cases be very significant to the outcome.

A second difficulty with the market-as-is benchmark is that the existing market may be so affected by the measure in question that it does not provide even an approximate indicator of the position which would exist in the absence of that measure. This is a sufficiently common situation that it has led in many cases to the choice of a different benchmark: namely, the *ceteris paribus* benchmark.³⁵ This is an imagined market which corresponds to the existing market in all respects, except that it is free of the impugned measure and its distorting effects.³⁶ But this benchmark brings its own difficulties. One is that it is extremely difficult to control for the indirect, synergistic and long-term effects of a measure, with the result that this imagined market counterfactual may in many cases be unreliable, even on its own terms. Another, as Horn and Mavroidis note, is that this benchmark may be entirely fanciful, for the reason that, in the absence of the measure in question, the government may resort to other measures to achieve the same or similar policy objectives.³⁷ To construct a meaningful *ceteris paribus* benchmark, it follows we must ask what measures it is likely to put in place instead? But how is this to be determined? Here we come for the first time to the central problem: that the bare economic notion of ‘the market’ itself provides no criteria by which to answer to this question, and therefore is inadequate on its own to determine the content of the market benchmark.

A further difficulty with both the ‘market-as-is’ and the *ceteris paribus* benchmarks is that both may represent markets which are heavily ‘distorted’³⁸ – not just by the measure under review, the problem just discussed, but more broadly. If that is the case, then even if we accept that these two benchmarks may help to identify and remove any unfair competition caused by the measure in question, they would still leave in

³⁴ *EC – Aircraft (AB)* [985]-[990].

³⁵ Zheng (n31) 21-28. Note also Diamond’s statement that countervailing duty law require a ‘comparison between two worlds: one in which the government payment has been made and one in which it has not’: Richard Diamond, ‘Economic Foundations of Countervailing Duty Law’ (1989) 29 *Virginia Journal of International Law* 767, 783.

³⁶ It is worth noting that the term *ceteris paribus* benchmark is used in slightly different ways in the literature, and that my use differs here from some others, eg Henrik Horn and Petros C. Mavroidis, ‘United States—Preliminary Determination with Respect to Certain Softwood Lumber from Canada: What is a subsidy?’ in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2002: The American Law Institute Reporters’ Studies* (Cambridge University Press 2005).

³⁷ *Ibid.*, 232.

³⁸ We will see in a moment that this term runs into the same problems as the term ‘market’, but for the moment to speak in such terms makes the point clearer.

place a distorted market characterised by potentially myriad other sources of potential unfairness.³⁹ Normatively, it matters tremendously whether the measure in question is best characterised as a market distortion or a corrective to a pre-existing distortion, but it turns out that neither the ‘market-as-is’ benchmark nor the *ceteris paribus* benchmark takes adequate account of this distinction. Thus, for example, Alan Sykes notes that such benchmarks take no account of “the income, payroll, excise, and other taxes paid by firms ... the regulatory burdens that may be imposed by employment and discrimination laws, workplace safety rules, environmental regulations ... [the impact of] general infrastructure, such as road building and government-owned utilities, [on] the costs of firms ... [or of the way that] the educational system may have aided or disadvantaged an industry”,⁴⁰ all of which may entirely offset or swamp the effects of subsidy. Since it is clearly impossible to control for all of these measures simultaneously, the result is that one has to choose which governmental measures to account of in a benchmark analysis, and which to relegate to a taken-for-granted background. Again, here is our central problem: the bare notion of ‘the market’ provides no help in this regard, and therefore cannot determine the content of the benchmark to be used.

There is a more fundamental problem still. Ignoring for the moment the obvious practical difficulties which it entails, the logical conclusion of this line of reasoning is to choose as one’s benchmark the idealized, perfect market, free of all ‘distortions’. This would seem at first glance to provide a determinate and coherent standard for benchmark analysis, at least in principle. But here we reach the heart of the indeterminacy of the notion of the market. As we have known for over a century, it is in fact impossible to imagine a market free of governmental action.⁴¹ Factors of production are nothing more than legal entitlements, and what is traded in a marketplace are nothing other than legal rights and duties. These legal rights and duties may, of course, take many forms, so that in order to give concrete content to the abstract notion of a ‘market’, one must specify (or implicitly assume) their content. It will be immediately clear that the notion of a ‘perfect market’ cannot without circularity help in that task: it cannot provide the yardstick by which to choose between its own different institutional forms. Nor can it help at all in the crucial task of conceptually separating those laws which establish the necessary conditions for markets to exist, and those which ‘distort’ pre-existing market outcomes. Thus, we discover again that, at its deepest level, the concept of the market is indeterminate in the sense that it does not include within itself the necessary criteria for its own definition. To be clear: this does not mean at all that a particular version of the market cannot be devised and used, but it does mean that the reasons for choosing one version over another are necessarily extrinsic.

The upshot of this literature is that there is clearly no natural, self-evident, objectively determinable baseline against which to identify and evaluate subsidies. It turns out

³⁹ The presumptive logical relevance of this for subsidies regulation is illustrated by the comment of the WTO, *European Communities: Countervailing Measures on DRAM Chips from Korea – Report of the Panel* (17 June 2005) WT/DS299/R [7.175]: ‘without [the] objective of curtailing trade distortion, it would not make sense to impose these disciplines in an international trade agreement.’

⁴⁰ Alan O. Sykes, ‘The questionable case for subsidies regulation: a comparative perspective’ (2010) 2 *Journal of Legal Analysis* 473, 502.

⁴¹ See above n16, also Justin Desautels-Stein, ‘The market as a legal concept’ (2012) 60 *Buffalo Law Review* 387.

that the problem with the market benchmark is not just there is a choice to be made as to *which* market one adopts as one's reference point. The more fundamental difficulty is that all of the available choices are beset by problems of conceptual incoherence, substantial indeterminacy, or both. This is rather important: the concept of the market really is offered as the stable, substantive yardstick by reference to which subsidies are defined, measured, and discipline – but ultimately it is necessary to look beyond and outside this concept for principles both to choose between alternative market visions, and to substantiate them in particular contexts. Where, then, *do* we find the firm ground which provides the substantive orientation for this regime of governance?

Although not always expressed in this way, this set of problems has been well understood within the relevant literature for a very long time. Jackson's seminal 1969 textbook on GATT law, for example, notes that 'almost any tax advantage (interest deduction, accelerated depreciation, or, indeed even low taxes) could arguably be a subsidy'.⁴² 'In some sense,' he also remarks elsewhere, 'every government action that impinges on the economy creates a 'distortion'.⁴³ Hudec, too, notes that, in principle, 'anything the government does which alters [a] producer's costs or revenues in a favorable direction could ... be called a subsidy'.⁴⁴ As scholarship on subsidies reignited in the 1980s, Snape observed, with others, that 'the term subsidy can be all-embracing' and that 'virtually *every* government action can be regarded as a subsidy for someone'.⁴⁵ Tarullo has famously made a similar argument.⁴⁶ More recently, Sykes and Rubini have reflected extensively on the problem and its implications, while Trebilcock and Howse have lamented the 'largely incoherent' ideas at the heart of global subsidies regulation.⁴⁷ Indeed, it is hard to find a single major writer on GATT/WTO subsidies regulation over the last four decades who has not at some point noted the lack of a coherent means for defining what constitutes a 'subsidy'. There is evidence, too, of the same awareness in diplomatic circles. Lamp, for example, tells the story of the group of experts appointed to address the trade impact of agricultural subsidies, who complained of the practical impossibility of measuring such impact, and noted that the degree of protectionism would be 'define[d] by the methods employed for its measurement'.⁴⁸ Lester, too, finds evidence of such awareness during the interwar League of Nations economic conferences.⁴⁹

⁴² John H. Jackson, *World trade and the Law of GATT: a Legal Analysis of the General Agreement on Tariffs and Trade* (Bobbs-Merrill 1969), §8. See also Warren F. Schwartz and Eugene W. Harper, 'The Regulation of Subsidies Affecting International Trade' (1972) 70 *Michigan Law Review* 831–858.

⁴³ John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (MIT Press 1997), 298.

⁴⁴ Cited in Rubini, *The Definition of Subsidy and State Aid* (n32) 92.

⁴⁵ Richard H. Snape, 'International regulation of subsidies' (1991) 14 *The World Economy* 139, 140.

⁴⁶ Tarullo (n31).

⁴⁷ Rubini, *The Definition of Subsidy and State Aid* (n32), especially chapters 2 and 8; Sykes 'The Questionable Case' (n40); Michael J. Trebilcock, Robert L. Howse, and Antonia Eliason, *The regulation of international trade* (4th edn, Routledge 2012) 395. It is worth noting that this is, in the end, just a particular illustration of the broader baseline problem discussed by Sunstein and others: Cass R. Sunstein, 'Lochner's Legacy' (1987) 87 *Columbia Law Review* 873.

⁴⁸ Lamp, 'Lawmaking in the Multilateral Trading System' (2013, unpublished dissertation, on file with author), 253, citing GATT Documents COM.II/103 (29 November 1960) and COM.II/W.7 (23 September 1960). See also Working Party Report on 'Provisions of Article XVI:4' (19 November 1960) BISD 9S 185, noting the difficulties of providing a clear definition.

⁴⁹ Simon Lester, 'The problem of subsidies as a means of protectionism: Lessons from the WTO *EC - Aircraft* case' (2011) 12(2) *Melbourne Journal of International Law* 97, 99.

While such concerns have led some to call for the abandonment altogether of the attempt to craft general rules for subsidies, in this article I want to go in a different direction. How is it that, despite all its fundamental conceptual difficulties, ‘the market’ *is* able to act as a operative benchmark in the day by day, case by case, practice of global subsidies regulation? Given its inherent indeterminacy, how is its stability nevertheless achieved, at least for the purposes of a particular case? What, in short, are the legal knowledge practices by which a particular notion of the market is produced, made to hold, and accepted as the foundation for global subsidies regulation?

III. The market as a construct of legal knowledge

The incorporation in legal texts of economic concepts such as ‘subsidy’ and ‘market’ can give rise to two familiar modes of legal reasoning. In the functionalist mode,⁵⁰ the jurist draws heavily on economic knowledge in her interpretation of such concepts. Such an approach often begins by defining certain issues as questions of fact not law – such as the characterisation and definition of the market, the causal effect of subsidies, and so on – and gives to the tools of economic expertise the primary role in the determination of such facts. In this mode of reasoning, the determination of such facts through the use of economic techniques goes a long way to determining the legal issue which is ultimately in question. As others have noted, law in the functionalist style ‘borrows’ its objectivity from the economic expertise on which it draws – where ‘objectivity’ is understood prominently to include an aspiration towards factual accuracy, or truth-to-nature. The ‘as if’ mode,⁵¹ by contrast, begins with the opposite claim that the incorporation of economic concepts into law transforms their nature: they become *legal* concepts, the defining feature of which is precisely their (potential) divergence from their economic counterparts. In this mode, the questions of market definition and causation are not primarily factual matters, but legal questions, for which economic expertise may be helpful, but very far from determinative. In this mode, the law produces its objectivity precisely as a result of its departure from economic expertise. As others have shown, and as I will illustrate further below, law in this mode produces the stability of its knowledge claims in part through its ability to cut short debates about the adequacy and accuracy of economic expertise, by reference to an alternative set of techniques and criteria of validity, and through the production of legal fictions.⁵²

⁵⁰ See generally Kennedy (n16).

⁵¹ I take inspiration in my use of this term from Annelise Riles, *Collateral knowledge: legal reasoning in the global financial markets* (University of Chicago Press 2011); Karen Knop, Ralf Michaels, and Annelise Riles, ‘From Multiculturalism to Technique: Feminism, Culture and the Conflict of Laws Style’ (2012) 64 *Stanford Law Review* 589. See also Hans Vaihinger, *The philosophy of ‘As if’: a system of the theoretical, practical and religious fictions of mankind* (K. Paul, Trench, Trubner & co., Harcourt, Brace & co. 1924).

⁵² In this section, I follow in the footsteps of others who have investigated the law’s epistemologies, and the ways in which it departs from those of modern science, eg, Alain Pottage and Martha Mundy (eds), *Law, Anthropology and the Constitution of the Social: Making Persons and Things* (Cambridge University Press 2004); Bruno Latour, *The Making of Law: an Ethnography of the Conseil d’Etat* (Polity 2010); Sheila Jasanoff, *Science and Public Reason* (Routledge 2012); Marilyn Strathern, *Kinship, Law and the Unexpected: Relatives are Always a Surprise* (Cambridge University Press, 2005).

It is important to note at the outset that *both* of these modes are powerfully present in the operation of global subsidies regulation.⁵³ There are many features of WTO dispute settlement which attest to the WTO's continuing aspiration to produce objective knowledge (in the sense of knowledge which is true to nature) in the functionalist mode. The WTO Dispute Settlement Understanding makes clear, for example, that one of the core tasks of Panels is to make an 'objective assessment of the facts of the case' before it.⁵⁴ In pursuing this task, Panels have broad powers to consult independent experts on any questions that they think appropriate, and parties routinely use evidence from economic experts in their submissions in subsidy cases.⁵⁵ Indeed, in the Subsidies Agreement this is taken a step further, through the creation of a Permanent Group of Experts, which (in principle at least) is empowered to provide advice in a number of contexts on the existence and nature of subsidies.⁵⁶ Furthermore, the Appellate Body has on occasion powerfully expressed its commitment to empiricism in the determination of the market benchmark wherever feasible.⁵⁷ And there is certainly a very strong strand of secondary literature which exhorts WTO tribunals to rely more heavily on technical economic expertise in its subsidies jurisprudence, or criticises such tribunals for their failure to apply economic concepts and analytical techniques faithfully and rigorously.⁵⁸ WTO dispute settlement, in this view, is committed to truth-seeking in a very basic way, and its legitimacy depends in significant part on the extent to which its procedures for fact-finding 'reliably produce empirically verifiable' knowledge claims.⁵⁹

The focus of this paper, however, is on the legal techniques and practices characteristic of the 'as if' mode. This is largely because the functionalist style is still rather obviously vulnerable to the critiques of objectivity noted earlier, and therefore tells us little about how techniques of economic governance have adapted and responded to such critiques. It is a central claim of this article that whenever such critiques of objectivity are particularly visible or relevant, that is where the legal

⁵³ Bonneuil and Levidow reach a similar conclusion, in the context of their analysis of the *EC-Biotech* dispute: Christophe Bonneuil and Les Levidow, 'How does the World Trade Organization know? The mobilization and staging of scientific expertise in the GMO trade dispute' (2012) 42 *Social Studies of Science* 75.

⁵⁴ Understanding on the Rules and Procedures Governing the Settlement of Disputes (15 April 1994) LT/UR/A-2/DS/U/1 ('DSU') art 11.

⁵⁵ DSU art 13.

⁵⁶ SCM Agreement arts 24.3, 24.4 (though this body has never been used). See generally J. Kazeki, 'Permanent Group of Experts under the SCM Agreement' (2009) 43 *Journal of World Trade* 1031.

⁵⁷ See, for one among many examples, WTO, *United States: Subsidies on Upland Cotton Recourse to Article 21.5 by Brazil – Report of the Appellate Body* (2 June 2008) WT/DS267/AB/RW [356] and surrounding.

⁵⁸ See, eg, Luca Rubini, 'What does the recent WTO litigation on renewable energy subsidies tell us about methodology in legal analysis? The good, the bad and the ugly' EUI Working Paper 2014/05; Christopher Thomas, 'Of Facts and Phantoms: Economics, Epistemic Legitimacy, and WTO Dispute Settlement' (2011) 14 *Journal of International Economic Law* 295, including the material cited in footnote 69 of that article. Also note Andre Sapir and Joel P. Trachtman, 'Subsidization, price suppression, and expertise: causation and precision in Upland Cotton' (2008) 7 *World Trade Review* 183, 205-6: 'Just as biology provides the best tools available to determine whether there is a scientific basis for a sanitary measure, modern economics provides the best tools available in order to determine the effects of subsidies on prices. So, where the SCM Agreement calls for a determination by a Panel of whether a subsidy has caused significant price suppression, a Panel would be wise to use the tools provided by economics, or to engage expert economists, or to evaluate reports provided by expert economists.'

⁵⁹ Thomas (n58) 300.

techniques and knowledge practices associated with the ‘as if’ mode become predominant – and that the more such critiques are generally internalised, the more that the law will work in this latter mode. It is worth noting that none of the legal techniques I discuss in this section are in themselves particularly new – in fact they are quite standard practice in many areas of law. That is not the point. What I aim to show in this section is how the application of such techniques to the notion of the ‘market’ in global subsidies regulation produces an artefact which is very different from the objectified ‘market’ produced by modern economics (and, by extension, from that which is produced by the law working in the functionalist mode). In particular, I want to show that the core features of this artefact are its *partiality*, *purposive quality*, and *context-boundedness* – in direct contrast with the aspirations to holism, observer-independence, and generalisability characteristic of the knowledge claims produced by the techniques of statistics and economics.

First, as to the question of *partiality*. Here, I simply want to call attention to those moments in which WTO tribunals put an end to debate about the appropriate market benchmark to be used by self-consciously calling attention to the necessary partiality of their own perspective. For example, in the original panel proceedings in *Brazil-Aircraft*, one of the questions was whether certain elements of Brazil’s export financing programme were protected by the wording of Item (k) of the Illustrative List of Export Subsidies. Brazil argued that the payments in question were not ‘used to secure a material advantage in the field of export credit terms’ but instead merely offset Canada’s subsidies to its own aircraft industry, and addressed the ‘Brazil risk’ that the market priced into credit terms given to Brazilian companies (in part on account of economic policies of the Brazilian government itself).⁶⁰ This argument raised directly the difficulties referred to earlier, concerning the slippery distinction between measures which distort and those which correct pre-existing distortions, and the question of what governmental measures to take as given for the purposes of subsidies analysis. But the panel dealt with such problems swiftly, short-circuiting potentially complicated analysis with a simple legal technique, noting the absence of any *express* textual support for such a position in the SCM Agreement:

In no case is it suggested that whether or not a benefit exists would depend upon a comparison with advantages available to a competing product from another Member ... Nor can we find any suggestion in either Article 3.1(a) of the SCM Agreement or the Illustrative List of Export Subsidies that whether a measure is a prohibited export subsidy should depend upon whether the measure merely offsets advantages bestowed on competing products from another Member.⁶¹

For good measure, the Panel went on to note in addition that ‘there is no hint that a tax advantage would not constitute an export subsidy simply because it reduced the exporter’s tax burden to a level comparable to that of foreign competitors’.⁶² This was so, even though such questions would matter tremendously if one were to assess the competitive effects of the subsidy holistically, with a view to correcting market

⁶⁰ WTO, *Brazil: Export Financing Programme for Aircraft – Report of the Panel* (14 April 1999) WT/DS46/R (‘*Brazil-Aircraft (Panel)*’) [7.21]-[7.22].

⁶¹ *Brazil-Aircraft (Panel)* [7.24]-[7.25]. It is worth noting that the opposite interpretation was textually open, precisely because the notion of ‘benefit’ is not defined in the agreement, and the guidance provided by the context (notably Article 14) is so thin.

⁶² *Brazil-Aircraft (Panel)* [7.25].

distortions or leveling the competitive playing field. In an interesting way, the legal objectivity of the Panel's analysis here is shored up precisely by its adoption of a self-consciously partial benchmark – entirely inadequate from an economic perspective – apparently dictated by the text of the agreement.

Brazil subsequently amended its measure, so that the interest rate payments in question were tied to a market benchmark related to the prevailing US Treasury Bond 10 year rate, plus an additional spread of 20 basis points. Again, the difficult question was raised whether this rate represented a reasonable approximation of what a commercial actor in the market might ask. But again the question was avoided through the use of a fictional benchmark referred to in the text of the agreement. Given the express reference in item (k) of the Illustrative List to 'international undertaking[s] on official export credits', the Panel (following an earlier Appellate Body ruling⁶³) determined that one appropriate benchmark would be the relevant OECD Commercial Interest Reference Rate, as calculated according to the methodology set out in Article 16 of the OECD Arrangement.⁶⁴ Aware that this reference rate may or may not correspond to a 'true' market rate, the Panel made it clear that it was open in principle for Brazil to prove that lower rates were actually commercially available on the market – even if in practice the prevalence of government involvement in this sector made finding appropriate commercial comparators almost impossible.⁶⁵

The same self-conscious adoption of a fictional or partial benchmark can be seen in some of the Panel decisions in the Softwood Lumber litigation. One question which famously arose in that litigation was whether the domestic Canadian market for stumpage provided an appropriate benchmark, given the thorough degree to which it was structured and affected by government action. In *US – Softwood Lumber III*, the Panel explicitly eschewed the economist's preferred benchmark of a 'hypothetical undistorted or perfectly competitive market.'⁶⁶ Without contesting the substantive claim that the domestic market was in some sense fundamentally distorted, the Panel noted that 'if the drafters of the SCM Agreement had wanted to exclude the use of market prices in case of price suppression due to the government's involvement, they would have explicitly provided so, but they have not.'⁶⁷ A subsequent Panel noted, significantly, that 'we do not believe that it would be appropriate for this Panel to substitute its economic judgment for that of the drafters.'⁶⁸ It is true that this approach was subsequently revised by the Appellate Body, which found textual support for the rejection of such a distorted benchmark in certain circumstances. But the Appellate

⁶³ WTO, *Brazil: Export Financing Programme for Aircraft – Report of the Appellate Body* (2 August 1999) WT/DS46/AB/R ('*Brazil-Aircraft (AB)*') [182].

⁶⁴ WTO, *Brazil: Export Financing Programme for Aircraft Recourse to Article 21.5 of the DSU by Canada – Report of the Panel* (9 May 2000) WT/DS46/RW ('*Brazil-Aircraft (21.5, Panel)*') [6.84] and surrounding.

⁶⁵ WTO, *Brazil: Export Financing Programme for Aircraft Recourse to Article 21.5 of the DSU by Canada – Report of the Appellate Body* (21 July 2000) WT/DS46/AB/RW ('*Brazil-Aircraft (21.5, AB)*') [64].

⁶⁶ WTO, *United States: Preliminary Determinations with respect to Certain Softwood Lumber from Canada – Report of the Panel* (27 September 2002), WT/DS236/R ('*US-Lumber CVDs Prelims*') [7.50].

⁶⁷ *US-Lumber CVDs Prelims* [7.52].

⁶⁸ WTO, *United States: Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada – Report of the Panel* (29 August 2003), WT/DS257/R [7.59].

Body still drew a clear line between the legal benchmark defined in the text of the agreement, and the sort of market benchmark used in economic analysis.⁶⁹ And again, it was precisely the drawing of this distinction – the assertion of a distinction of the legal concept of a market from that which obtains in economic analysis – as well as the deliberate blindness to some of the facts of the situation, which provided an indication of the legal objectivity of its decision.⁷⁰

One can, furthermore, see a similar dynamic at work in the Boeing and Airbus decisions, which concerned the competitive subsidization of the world's two largest manufacturers of civil aircraft. Notwithstanding the fact that the two cases together found *both* manufacturers to be subsidised, in each case a partial benchmark was adopted which reflected an imagined market in which only *one* side's subsidies were removed. Not only were such benchmarks mutually inconsistent, they contained more than a small degree of obvious fictionality, given the dependence of these subsidies on one another.

In all of these cited instances, then, the benchmarks used represented explicitly 'distorted' markets, or fictions which bore no necessary connection to any known market, as their basis to define, characterise, or determine the effects of, the measures in dispute. In such cases, we search in vain for a naturalized, objectified image of 'the market' as the benchmark by which to identify and assess subsidies. It may well be responded that this approach has a certain pragmatic utility – but of course this is precisely the point. The aspiration of the legal knowledge practices at work here is not the production of 'true' knowledge claims about the nature of the measures in question, their overall competitive effects, or the broader dynamics of the market in question. On the contrary, there is a deliberate eschewing of this aspiration, in favour of avowedly partial knowledge claims.⁷¹

⁶⁹ WTO, *United States: Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada – Report of the Appellate Body* (19 January 2004), WT/DS257/AB/R ('*US – Lumber IV (AB)*') [100]-[101].

⁷⁰ For purposes of my argument, it does not ultimately matter whether this outcome was or was not mandated by the text of the agreement – what matters is that the legal system (whether as a result of the action of the drafters or the interpreters) self-consciously deploys a partial benchmark, and explicitly turns a blind eye to certain facts which would be relevant from the perspective of normative economic analysis.

⁷¹ It is worth noting also that certain factual presumptions are commonly used in legal proceedings, but which are known to be strictly unjustified as accurate descriptions of reality. Sykes, for example, notes that the adverse competitive effects of subsidies depend, among other things, on whether the subsidy has an effect on the output of the recipient firm – but that WTO law does not on the whole require proof of such an effect, thus 'presuming' its existence as a practical matter: Alan O. Sykes, 'The Economics of WTO Rules on Subsidies and Countervailing Measures', June 2003, U Chicago Law and Economics Olin Working Paper No.186, 20-1. For some other examples, see Joost Pauwelyn, 'Treaty interpretation or activism?: comment on the AB report on United States - ADs and CVDs on certain products from China' (2013) 12 *World Trade Review* 235, 237-8; Richard Diamond, 'Privatization and The Definition of Subsidy: A Critical Study of Appellate Body Textualism' (2008) 11 *Journal of International Economic Law* 649, 672-3; J. Miranda, 'Causal Link and Non-attribution as Interpreted in WTO Trade Remedy Disputes' (2010) 44 *Journal of World Trade* 729, 734. Of course, it is perfectly possible to interpret these examples not as the production of true legal fictions in the sense described here, but merely as 'good enough' approximations of the truth: DP Steger, 'The Subsidies and Countervailing Measures Agreement: Ahead of its Time or Time for Reform?' (2010) 44 *Journal of World Trade* 779, 780.

A second characteristic of the knowledge claims I am interested in is their *purposive quality*. If the objectification of the market requires knowledge claims which aspire to observer-independence, the legal construction of a market benchmark does precisely the opposite, producing images of the market which are explicitly contingent, in the sense that their validity purports only to be relative to the purposes for which they are produced. In the *US-Foreign Sales Corporation* case, a similar question arose as referred to above, namely whether it is appropriate to take into account the extent to which an apparent export subsidy may be justified because it corrects for an existing market disadvantage faced by domestic exporters.⁷² Here, the disadvantage was caused by the US decision – unlike other tax jurisdictions – to impose income taxes on resident corporations in respect of transactions occurring wholly outside US territory. Again, the Panel refused to consider this disadvantage as relevant. This time, significantly, it justified its decision by reference to its own limited mandate, and the tax sovereignty of WTO members:

the United States is free to maintain a world wide tax system, a territorial tax system or any other type of system it sees fit. This is not the business of the WTO. What it is not free to do is to establish a regime of direct taxation, provide an exemption from direct taxes specifically related to exports, and then claim that it is entitled to provide such an export subsidy because it is necessary to eliminate a disadvantage to exporters created by the US tax system itself.⁷³

The important point here is that the Panel's choice of benchmark flowed directly from its understanding of the institutional context in which it operated: from where it stood, and given its mandate, it had no choice but to take the sovereign tax choices of WTO Members as given.

Another clear example of this comes from the recent case of *Canada – Renewable Energy*, in which it was alleged that a series of measures taken by the Ontario government constituted impermissible subsidies to domestic producers of renewable energy. One of the claims made by the complainants in that case was that the prices paid to such suppliers under long-term contractual arrangements were so high as to constitute a subsidy, and the question arose as to how to define the appropriate market benchmark for purposes of comparison. Should the benchmark prices be calculated taking the government-mandated energy-supply mix as given, or should it be calculated as if such a policy regarding the appropriate supply was absent? Although the Panel (majority) and the Appellate Body differed on certain matters, in one aspect they were agreed: the energy supply-mix should be taken as given for the purposes of benchmark analysis:

Government intervention in favour of the substitution of fossil energy with renewable energy today is meant to ensure the proper functioning or the existence of an electricity market with a constant and reliable supply of electricity in the long term ... Although this type of intervention has an effect on market prices, as opposed to a situation where prices are determined by

⁷² WTO, *United States: Tax Treatment for 'Foreign Sales Corporations'* – Report of the Panel (8 October 1999) WT/DS108/R ('*US – FSC (Panel)*') [7.121].

⁷³ *US – FSC (Panel)* [7.122].

unconstrained forces of supply and demand, it does not exclude *per se* treating the resulting prices as market prices *for the purposes of a benefit analysis* under Article 1.1(b) of the SCM Agreement .. Thus, where the government has defined an energy supply-mix that includes windpower and solar PV electricity generation technologies, as in the present disputes, a benchmark comparison for purposes of a benefit analysis for windpower and solar PV electricity generation should be with the terms and conditions that would be available under market-based conditions for each of these technologies, taking the supply-mix as a given.⁷⁴

Again, this conclusion is best understood as following from a particular understanding by the Panel and the Appellate Body of their own limited roles and tasks. The energy supply-mix was a central mechanism that the Ontario government used to pursue its social and economic objectives as it established wholesale energy markets, and it was neither the purpose of subsidy regulation, nor the task of WTO dispute settlement, to call those social and economic objectives fundamentally into question.⁷⁵ The point here is crystal clear: what is happening in these and other⁷⁶ examples is not the objective definition of a subsidy by reference to an idealised natural market; instead, there is the contingent claim that a certain kind of measure should (or should not) be treated *as if* it were a subsidy for present purposes, based on a particular understanding of the objectives of the Subsidies Agreement, and the institutional role of WTO dispute settlement. The notion of a subsidy, in other words, is only ever defined for a specific purpose and relative to a particular context.

The same feature is also characteristic of scholarship addressing the benchmark problem in subsidies regulation. The very simple point that I wish to make here is that, when commentators seek to define the benchmark to used, they do so in the characteristic manner of lawyers: not by reference to some ideal of a neutral or objective standpoint, but by reference to their understanding of the purposes of the WTO's subsidies rules. Thus, for example, Horn and Mavroidis, when considering the desirability of one suggested 'no-subsidy benchmark' note that the:

main virtue of this definition is ... that it is intimately related to the assumed purpose of the agreement, in that it neither directs Members to choose particular policies, nor to maximise some notion of global welfare, but to refrain from behaving in a beggar-thy-neighbour fashion.⁷⁷

In a separate publication, Grossman and Mavroidis come to certain conclusions about how a Panel ought to identify and measure the effects of a subsidy through a process of reasoning that begins with the claim that the primary objective of the SCM Agreement is to 'discourage subsidies that might harm [foreign] producers'.⁷⁸

⁷⁴ WTO, *Canada: Certain Measures Affecting the Renewable Energy General Sector – Report of the Appellate Body* (6 May 2013) WT/DS412/AB/R [5.190] (emphasis added). See also WTO, *Canada: Certain Measures Affecting the Renewable Energy General Sector – Report of the Panel* (19 December 2012) WT/DS412/R ('*Canada – Renewable Energy (Panel)*') [7.308]-[7.313].

⁷⁵ See *Canada – Renewable Energy (Panel)* [7.309] and [7.312]. For a similar reading of the case, which sees such considerations at its heart, see Rubini, 'The Good, the Bad and the Ugly' (n58) 19-20.

⁷⁶ One may cite, for example, *US – Lumber IV (AB)* [100]-[101].

⁷⁷ Horn and Mavroidis (n36) 233.

⁷⁸ Gene M. Grossman and Petros C. Mavroidis, 'United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom:

Diamond argues that certain kinds of governmental measures are excluded from the scope of the SCM Agreement because it is ‘doubtful they will be manipulated for protectionist purposes’.⁷⁹ Zheng criticises the AB’s use of the ‘undistorted market benchmark’ on the basis of the ‘disconnect’ between that benchmark and what he sees as the goals of countervailing duty law.⁸⁰ Rubini, for his part, argues in certain circumstances for the use of a *ceteris paribus* benchmark on the basis that the purpose of subsidies regulation is (in significant part) to remedy distortions of competition.⁸¹ Indeed, along with Sykes, Rubini is the scholar who has most clearly and unequivocally noted that one’s definition of subsidy *necessarily* depends on one’s view as to the purpose of subsidy regulation. He captures the point well, when he says, adapting the words of Hart, that the concept of a subsidy in WTO law is ‘not a fact, but an artificial construct of a given legal system for a practical purpose’.⁸² The claim, then, is never that something *is* a subsidy, but that it should be treated as if it is one, given the purposes of global subsidies regulation. Far from offering a general truth about the social world as it is, such claims purport only to be valid in the context, and for the purposes, for which they are produced. The contrast with the sorts of knowledge practices which seek to produce an objectified image of the market – and as a consequence an observer-independent definition of subsidies – is clear.

The third characteristic is in some respects the logical counterpart to the first two: *context-boundedness*. The sorts of knowledge practices associated with the modern discipline of economics tend to be oriented towards the production of facts which ‘travel’⁸³ – that is to say, facts which are valid and usable beyond the contexts in which they are produced. Precisely the opposite is true, however, in the case of the knowledge claims made in the context of global subsidies regulation. Almost everything about the institutional context in which they are produced serves to limit their applicability and validity outside that context. Part of this has to do with the fact that the field of international trade law is a highly specialised one, which has historically cultivated a degree of detachment from other fields of international law, as well as from domestic regimes of economic governance. Given the WTO’s relatively self-contained nature, and its somewhat unique purposes and history, claims made about the nature and effects of subsidies for the purposes of WTO law tend to achieve little circulation outside that context, and are accorded little relevance once they do. There is, after all, no reason why the concept of a ‘subsidy’ in some *other* body of law should be identical to that contained in the WTO’s Subsidies Agreement. Still less is there any reason why economists (say) working in fields outside international trade should pay any attention whatsoever to the ways in which the WTO defines the concept of subsidies, or indeed the methodologies by which it does

Here Today, Gone Tomorrow? Privatization and the Injury Caused by Non-Recurring Subsidies’ in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001: The American Law Institute Reporters’ Studies* (Cambridge University Press 2003) 186.

⁷⁹ Diamond (n71) 665 (a position which implicitly but clearly links the definition of ‘subsidy’ with an assumed anti-protectionist purpose of the agreement). See also generally Lester (n49).

⁸⁰ Zheng (n31), 45ff.

⁸¹ Rubini, *The Definition of Subsidy and State Aid* (n32), 17 and L. Rubini, ‘Ain’t Wastin’ Time No More: Subsidies for Renewable Energy, The SCM Agreement, Policy Space, and Law Reform’ (2012) 15 *Journal of International Economic Law* 525.

⁸² Rubini, *The Definition of Subsidy and State Aid* (n32), 17.

⁸³ I use the term in the same sense as in Peter Howlett and Mary S. Morgan, *How Well Do Facts Travel?: The Dissemination of Reliable Knowledge* (Cambridge University Press 2011).

so. This is particularly the case given the self-consciously partial and purposive nature of such definitions, just noted.

In addition, this context-boundedness is also an effect of the particular style of decision-making often adopted in the WTO subsidies cases. For one thing, the highly fact-intensive nature of most subsidies decisions makes it difficult for many parts of the decisions to have great resonance and application beyond their own context. In addition, it is not uncommon for WTO tribunals to make decisions based heavily on the way that parties frame their arguments in the context of litigation. The most obvious examples are where the tribunal decides by reference to the absence of evidence or the burden of proof.⁸⁴ Another illustration can be taken from the *EC-Aircraft* case, where the Panel assessed the appropriate interest rate benchmark to be used to determine whether certain Launch Aid funding conferred a ‘benefit’ on Airbus. The parties submitted very different assessments as to what an appropriate market benchmark might be, but what is important here is that the Panel managed to avoid making its own specific, quantified determination of the benchmark. Instead, it offered complex arguments concerning the methodological flaws of each party’s evidence, and noted simply that the relevant risk premium lay somewhere between the benchmarks offered by the two parties. This, it turned out, was sufficient in the end to ground a finding of ‘benefit’ in respect of these measures.⁸⁵ This characteristic vagueness, and the reluctance precisely to quantify, is also a feature of many countervailing duty cases, in which panels not uncommonly prefer to find general flaws in the benchmark adopted by the domestic tribunal, without unnecessarily taking the extra step of precisely determining their own.⁸⁶

A further illustration of this sort of context-dependent knowledge claim can be found in the practice of list-making. In the years before the creation of the Subsidies Agreement, one of the important techniques that negotiators used to define the object of subsidies regulation was the illustrative list. I referred above to the production in 1960 of an illustrative list of export subsidies during the subsidies negotiation, and its incorporation, almost twenty years later, in the Tokyo Round Subsidies Code. Other lists of a similar nature were produced by specific countries in the context of GATT trade negotiations.⁸⁷ GATT case law on subsidies also provided, in effect, the functional equivalent of an illustrative list, in the sense that the cases could be, and were, used to generate a series of examples of what was considered a subsidy within GATT circles during the time. Even after the adoption of the Subsidies Agreement, with its general definition of subsidies, this kind of ‘definition by list-making’ continued. As noted already, a further illustrative list of prohibited export subsidies was annexed to the agreement itself. Furthermore, the requirement to notify domestic subsidies under Article 25.4 of the agreement has yielded thousands of pages of reports listing subsidy measures established by WTO Members – even if such lists are uniformly criticized as incomplete and unreliable.

⁸⁴ See, for a few of many possible examples, *Brazil-Aircraft (AB)* [183]-[185]; *Brazil-Aircraft (21.5, Panel)* [6.93]-[6.106]; *Canada – Renewable Energy (AB)* [5.246]; *US – Lumber IV (AB)* [122].

⁸⁵ *EC-Aircraft (Panel)* [7.489] and surrounding.

⁸⁶ WTO, *Japan: Countervailing Duties on Dynamic Random Access Memories from Korea – Report of the Panel* (13 July 2007) WT/DS336/R [7.304]-[7.315].

⁸⁷ Some are referred to in Gary N. Horlick, ‘A Personal History of the WTO Subsidies Agreement’ (2013) 47 *Journal of World Trade* 447, at footnote 5; also (n31) 10.’

While list-making works to create a functional understanding of does and does not constitute a subsidy, it does so in an accretive rather than deductive manner. Such lists do not, that is to say, lay down a general definition of subsidies, such that specific cases of subsidies are determined through the application of this general definition. Rather, they refer to past practice as their pragmatic guide. They simply purport to record, at different points over time, what a relatively small group of people tends to treat as subsidies in the specific context of trade negotiations. These lists build on one another over time, in the sense that prior lists form the basis of subsequent lists, and inclusion in a series of lists over time is what passes for agreement that a particular kind of measure 'is' a subsidy. They are open-textured, in the sense that the list is envisaged to alter over time, and are typically stated to be non-exhaustive. It will be clear that this sort of knowledge practice does not seek to ground its epistemic legitimacy in the sense that these lists constitute definitive, accurate, generalisable rigorously coherent measures of what 'truly' counts as a subsidy – quite the opposite in fact, as such a claim would reduce rather than enhance their credibility. Rather, their durability and legitimacy derives precisely from the limited and modest nature of the claims that they embody: merely that certain measures are to count as subsidies, in a certain context, and for certain purposes.

Viewed as a system for identifying and measuring subsidies and their effects, then, the global trade regime operates in precisely the opposite way from modern objectivist economic science. While the scientific project consists in turning local observations into general, 'mobile', universally valid facts, the global trade regime works in the reverse manner, taking economic knowledge and, by incorporating it into formal and informal processes of legal reasoning, turning it into a set of highly context-bound, institution-specific knowledge claims about what constitutes a subsidy for local purposes. Indeed, I would argue that this is the trade-off at the heart of 'as if' knowledge practices: they are able to generate stability, effectively cutting short the debates to which the critiques of market objectification give rise; but they achieve this only by localising their claims to validity, and thereby giving up their ability to produce facts which 'travel'.

IV. Governing 'as if'

In the previous section I asked what, precisely, is the nature of the knowledge claims at the heart of global subsidies regulation (in their post-functionalist, 'as if' mode)? We are now in a position to provide a list of some of their core features. First, as I have said, their claim to validity extends only to the context in which they are produced. Second, the representational quality of these knowledge claims is not central to their operation. 'As if' knowledge practices have very little aspiration to facticity: they do not seek to accurately represent the social world, but rather offer themselves as a tool for action within it.⁸⁸ True, if they departed too radically from what counts at any point in time as commonsense reality, their ability to elicit acceptance would be undermined. But what matters much more is their ability to enable practical action. Third, 'as if' knowledge practices do not work by acting on our beliefs, but instead on our actions. They make no demands that we believe that this or that 'really is' a subsidy, or that the market 'really would' operate this or that

⁸⁸ See Knop, Michaels and Riles (n 50), 77.

way in its natural and undistorted state. Instead they work by structuring our action – by embedding themselves as the premise of a domain of practical governance, and by inviting us to enrol ourselves in that domain of governance. Fourth, ‘as if’ knowledge claims have a particular logical structure. Objectifying knowledge claims take the logical form of ‘is’ statements: ‘this is a subsidy’. ‘As if’ knowledge claims take a different form: ‘this counts as a subsidy for certain purposes’. This is an adaptation of John Searle’s formulation of ‘institutional facts’: ‘X counts as Y in context C’.⁸⁹ I find this a helpful formulation because it makes clear that an ‘as if’ knowledge claim always works in two directions: first, it defines a relation of practical equivalence (X counts as Y), and second, it specifies the context in which that relation holds (context C – here, the trade dispute at issue).

Although I have used global subsidies regulation as my illustration, we should not imagine that this mode of governing is confined to the WTO. The practice of market benchmarking is everywhere in contemporary governance of economic life: as a fundamental part of international accounting standards; as a tool for determining the level of compensation for the expropriation of property; as the basis for the determination of market power in competition regulation – and so on. In all of these areas, one can point to a long tradition of post-objectivist thinking about the indeterminacy of the concept of the market and market prices. And, I suspect, one could tell a similar story to that which I have told about the movement in each of these governance regimes from a naturalised conception of the market produced by economic and statistical techniques, to one which operates on an ‘as if’ basis through the production of the market as a series of case-specific legal fictions.

As I noted at the outset, Shapin and Schaffer have described the project of modern science as defining an objective reality in which we might all believe, and which might therefore form the shared epistemic basis of social order and political community. ‘As if’ knowledge practices, by contrast, seek to solve the problem of social and political order in the absence of a shared epistemic foundation. Their role, in the context of economic governance, is not the fabrication of ‘the economy’ or ‘the market’ as an object of shared knowledge, nor the stabilisation of a particular way of understanding the ‘market’ as the common basis for our intervention into it. Rather, they ask us merely to accept the utility of a certain way of defining ‘the market’ for certain specific purposes and contexts. The result is a self-conscious multiplication of many different images of the market, proliferating throughout different sites and locations of economic governance, none of which purports to have general validity or authority outside the context or dispute in which it is produced. If Shapin and Schaffer are correct in the historical story that they tell, we might reasonably expect that this way of solving knowledge controversies might give rise to very different modes of political practice, and it is part of the burden of this paper to pose the question of what they might be.

If we fail to understand the nature of ‘as if’ knowledge claims, then we risk making interventions on questions of economic governance which miss the mark in profound ways. It is very common to criticise institutions of liberal market governance – including the World Trade Organization, but not only it – for governing by reference

⁸⁹ John R. Searle, *The Construction of Social Reality* (New Ed. Penguin 1996), 28 and generally.

to an idealised, naturalised vision of a perfect free market.⁹⁰ I noted at the start of this paper that much of the last century or so of progressive thinking about the neoclassical conception of the market can be understood as the iterative development of four related critiques of market objectification: its *falsity* as a description of ‘real’ economic practices; its *value-laden* quality; its reification of what is in truth a *socially constructed* entity; and its *conceptual indeterminacy*. We have seen a surge after the global financial crisis of projects of this sort, which seek to re-found regimes of economic governance on conceptions of the market which take such critiques more fully into account. But, as Sloterdijk observed many years ago, ‘as if’ knowledge claims are always already ‘reflexively buffered’⁹¹ against this sort of criticism – precisely because they self-consciously foreground, and draw their strength from, precisely their fictionality, value-ladenness, constructedness and indeterminacy.

For similar reasons, regimes of market governance organised in an ‘as if’ mode are equally resilient in the face of equally familiar criticisms of their narrowness of vision. In the context of WTO subsidies regulation, for example, the argument might be run that a fuller and more comprehensive evaluation of the desirability of a subsidies measure would take into account not only the trade impacts of the measure, but also its environmental, social, industrial and other objectives as part of a more holistic evaluative process of regulatory review. And of course this is just one instance of the ubiquitous criticism which is made of many regimes of market governance – that such regimes are too often guided solely by an assessment of economic impacts, to the exclusion of equally important social or environmental concerns. The reason that such criticisms miss the mark when they are directed against instances of ‘as if governance’ is that ‘as if’ knowledge claims draw their power precisely from their partiality, not in spite of it. The *point* of these knowledge claims is to cut short calculation, to exclude certain things from view, so as to enable action for a specific purpose.⁹²

Ezrahi has, rightly in my view, suggested that with the rise of post-objectivist thinking, we have seen the ‘decline of coherence as a norm or an ideal of public action’. In contemporary society, he notes,

coherence tends to stand for pretense, untenable claims of knowledge and authority, and the unacceptable exercise of power. Incoherence, by contrast, seems to indicate humility, a refusal to suppress subjectivity and diversity, the toleration of numerous notions of purpose, causation and reality.⁹³

Where market governance is organised in an ‘as if’ mode, any knowledge claim that purports to provide an overall view – a more holistic or comprehensive perspective – is presumptively *irrelevant*. It is precisely the claim to provide a detached view – a ‘view from nowhere’ or a ‘view from everywhere’⁹⁴ – which can find no home in institutions of governance which operate on the basis of ‘the view from here’.

⁹⁰ For one clear example in subsidies context, see, G. Gagné, ‘Policy Diversity, State Autonomy, and the US-Canada Softwood Lumber Dispute: Philosophical and Normative Aspects’ (2007) 41 *Journal of World Trade* 699, drawing on Tarullo (n31).

⁹¹ Sloterdijk (n13) 5.

⁹² Riles, n51.

⁹³ Ezrahi, n11, 283-4.

⁹⁴ Sheila Jasanoff, ‘Objectivity in Regulatory Science: Sites and Practices’ in by Charles Camic and others, *Social Knowledge in the Making* (University of Chicago Press 2011).

Conversely, the power of ‘as if’ knowledge claims comes from their explicit suitability to the particular objectives to a specific field of governance. ‘As if’ knowledge claims may be weak in the sense of having no validity or utility outside the field of governance for which they are produced, but what they give up in mobility and universality, they gain in strength and stability within their own space. It turns out that ‘as if’ knowledge claims can only be effectively contested by other ‘as if’ claims. What I mean by that is that they can only be contested by equally context-bound knowledge claims, which explicitly demonstrate their relevance to the purposes and objectives of a particular regime of governance – or to an alternative version of those purposes and objectives.

At the heart of ‘as if’ modes of governance is what Riles refers to as their ‘hollow core’,⁹⁵ a space of ‘epistemological openness and ambivalence’.⁹⁶ Global subsidies regulation, that is to say, does not operate by reference to a particular, substantive vision of the market, disciplining deviation from it. Rather, as I have said, it provides us with a set of relatively open-ended legal knowledge practices to define the relevant market benchmark on a case-by-case, context-by-context basis. Now, it will be argued in response that this hollowness is more apparent than real – that while the notion of the market may be indeterminate in principle, when operationalised in practice there are certain logics which operate to valorise and solidify a *particular* market vision at the regime’s heart. It may be argued, for example, that certain dominant visions of the purposes and objectives of the trade regime are what gives content – contingently, but nonetheless durably – to the market benchmarks operative in global subsidies regulation. Or that the underlying material logics at work in the field of international trade politics will ensure that the regime as a whole works in the interests of a particular set of powerful actors – who will be able to take advantage of the indeterminacy of the notion of the market to define it in ways which operate to their benefit. On this view, the *apparent* contingency and openness at the heart of global subsidies regulation may operate primarily to mask the underlying structural logics which durably and predictably determine its content. The task, from this perspective, is primarily to investigate the provenance and operation of such structuring logics.

These logics are important, but in my view they represent only half the story, and perhaps not even the most important half. The crucial point is that regimes of ‘as if’ governance derive their power and stability *precisely from* their ‘hollow core’, and that power is therefore exercised in such regimes just as much by active processes of ‘hollowing out’ as by processes of ‘filling in’ that core. I have said that the ‘as if’ knowledge claims derive their claims to acceptability not from their truth but from their pragmatic utility – they offers themselves as tools and techniques which enable practical action, not as a stable epistemic foundation for the formation of shared norms and goals. What gives such regimes their durability, then, is their ability to serve as the means for a variety of different ends, to offer techniques which are of use to as wide a range of actors as possible. Global subsidies regulation, in other words, is made stable precisely because, and to the extent that, it offers a set of techniques which can be used by China as much as the US, by West African cotton producers as much as European farmers. It is made stronger, rather than weaker, by the fact that many of us disagree about its underlying purposes – precisely because this

⁹⁵ Riles (n 50), 24.

⁹⁶ Knop, Michaels and Riles (n 50), 77.

disagreement shows its ability flexibly to adapt itself to a variety of different interests and goals, both individual and shared, as the context requires.

What this means is that there is a deeper structural logic at work, working precisely against the determining logics referred to above. The legal techniques themselves, in a manner of speaking, resist the attempts to give them a substantive core. If it is true that we must pay attention to the work which is always being done to stabilise a particular vision of the ‘market’, it is at least as important to attend to the huge amount of work which is constantly required to hollow out, de-structure, and re-open the epistemological heart of the regime, so as to ensure the regime’s continued stability. While we are now more than ever attuned to the existence of epistemological openness, we still tend to think of such openness solely as an inherent characteristic of knowledge itself – and to see epistemological closure as the result of an exercise of power. But, in fact, openness and contingency are just as much an effect of power as epistemological stability.⁹⁷ To the extent that we focus our attention on the structuring logics which give a certain substantive direction and orientation to a regime of ‘as if’ governance, we risk overlooking the forms of power which actively work to hollow that regime out, to render it accessible to its subjects only as a technique or form.

Such forms of power work, we might say, through the modes of *evacuation* and *alignment*. As an illustration of the former, think of the way that the regime of global subsidies regulation is organised so as to remove space for the collective definition or redefinition of its underlying purposes.⁹⁸ As a general matter, negotiations in the WTO virtually never foreground issues of purpose and objective, instead focussing on the give and take of mutual concessions. In part as a result, there is no Preamble to the Subsidies Agreement which sets out an agreed set of objectives which it seeks to achieve. To the extent that such objectives *are* referenced – say, in WTO public relations material, or in the vernacular ways in which trade officials describe their jobs – it tends to be in terms so general and apparently self-evident that they serve mainly as empty placeholders. And, as I discussed earlier, where we do get evocations of the purpose is in the process of interpretation of the legal texts themselves – especially in the pages of scholarly journals, where lawyers and others argue about how the law ought to respond to a specific interpretive challenge. But it is in the nature of legal reasoning that the purposes of legal texts are treated as already given, to be inferred from existing practices and texts, rather than open for discussion. In other words, legal knowledge practices supply a space for the contingent production of local, individual and specific conceptions of the law’s purposes, rather than a space for producing a deeper underlying intersubjective consensus amongst regime participants, which may serve as the regime’s substantive foundation. In this sense, where regimes of knowledge founded on modern scientific practices are epistemically and normatively integrative, ‘as if’ governance regimes are (and must be) the opposite.

⁹⁷ To be clear, I am not saying here that ‘contingency’ is an ideological effect, which obscures the logics at work in a regime of governance. I am suggesting that the epistemic openness of ‘as if’ governance is real but that it is actively produced, in precisely the same way as epistemic closure and stability – power works symmetrically on both sides, even if its techniques are different in each case.

⁹⁸ In prior work I have invoked this argument as a criticism: Andrew Lang, *World trade law after neoliberalism: reimagining the global economic order* (Oxford University Press 2011), but in light of these reflections it remains an open question whether and how far such a form of politics is possible within, and even normatively compatible with, modes of ‘as if’ governance.

As to ‘alignment’, what I have in mind is the process of mutual readjustment which occurs in the interaction between a ‘tool’ and its ‘user’. If the knowledge claims characteristic of ‘as if’ governance offer themselves not as truths to be believed but as means to our ends, then the durability of this sort of governance regime depends on a resilient fit between the ‘means’ provided by the legal techniques in question, and the ‘ends’ of its users. Creating this durable bond is a process of *mutual* readjustment, consisting not only of the ongoing alignment of the law to the interests of its users, but *also* of the production of ‘users’ who define their interests by reference to the means that the law makes available. It is in part through the use of the practical tools that a field of governance offers to us that we come to define our goals, both institutional and individual, in the way that we do. Such processes of individual and collective subjectivation remain thoroughly under-explored in the context of international economic governance. While it is clear that the WTO provides a set of legal techniques for its Members to deploy to further their objectives in international economic relations, to what extent is it also true that its Members end up defining their objectives in terms of the successful use of those techniques? There are certainly suggestions of such a process in that way that developing countries have come to see bringing successful WTO cases as a core goal of their trade policy. Similarly, the health and success of the WTO is often measured by reference to the conclusion of trade rounds and the smooth functioning of its dispute settlement system – that is, whether or not the techniques of governance which the regime makes available are actually being deployed.

V. Conclusion

In this paper, I have sought to re-describe global subsidies regulation in the WTO as a regime of ‘as if’ economic governance. In this regime, ‘the market’ is produced as a different kind of artefact from that with which we are familiar: in place of the objectified market of economic knowledge, which confronts us as a fully naturalised entity with its own internal laws of motion, the market comes to be produced merely as series of a case-specific legal fictions. The concept of the market is deployed as a tool to act with, rather than a means of finding out the truth about the world – still less as a regulative ideal. It is the product of knowledge practices which self-consciously draw attention to their own partial perspective, their fragmentary and fictional quality, and their purely local acceptability. It turns out that this kind of epistemological artefact is vastly more stable, vastly more resilient to critique, than the objectified market more familiar to us. Whether or not this modality of governance has become or is becoming a general phenomenon – and I would agree with those who suggest that it is – it is certainly an important part of contemporary global economic governance, and we are only beginning to understand how it works. What range of subjectivities does this modality of governance elicit on the part of its subjects? To what new relations and associations does it give rise – both in terms of our relation with the law, and with other subjects of it? What new sites and techniques of power come into being in its operation, and what are the dynamics by which they are operationalised? To the extent that we continue to critique regimes of economic governance for their adherence to a naturalised image of the market, these are the questions we fail to ask.