

Mapping Out Global Institutions Regulating International Business Transactions: What Are at Stake?

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Prologue

The urgency of global intervention in major regulatory areas, ranging from climate change to financial services, has recently been mounting against the backdrop of a number of depressing developments, such as the melting of ice in the Arctic region and the international financial turbulence originating from the U.S. sub-prime mortgage crisis. These global regulations, which are public responses to these various, old and new, regulatory challenges, affect *directly* and *indirectly* international business activities. In this brief presentation, I would like to offer a cognitive lens through which we can structure these challenges and responses from the standpoint of global institutions which connote norms and organizations.

Challenges

In a borderless world consisting of both online and offline reality where money and products can travel at the speed of light, all economics is international, as Peter Drucker once observed. Undoubtedly, this technology-driven globalization which denotes ever-increasing level of interdependence and integration of once isolated national markets is bliss to international businesspeople that are relentlessly searching for new markets and new opportunities. They may wish for care-free operations and transactions unhampered by trade barriers. Yet there exists no Hayekian paradise. Domestic governments regulate whatever they think should be regulated. Even a global market can fail for many reasons, including the emergence of market abusers which might attempt to manipulate the global market at the expense of global competition. The international market should not be left to a total anarchy.

The problem, however, is that different countries have different regulations. This regulatory heterogeneity imposes painful costs to international businesses. For example, some governments want to ban internet gambling for socio-political reasons (e.g., the recent U.S. “Unlawful Internet Gambling Enforcement Act (UIGEA)”) while others just want to regulate (e.g., European countries). Even if national regulations are legitimate (non-protectionist) on their own terms, those divergent regulations stemming from different values (e.g., Washington consensus v. European way v. Asian value) incur often insurmountable transaction costs to global businesspeople who desire to capitalize on the borderless economy. Finally, there are also “developmental” concerns to this regulatory heterogeneity. Poor countries lacking capacity (resources and technology) cannot meet all the sophisticated regulatory standards imposed by rich countries. Thus, poor countries’ businesses are often marginalized from the mainstream of the global trading community.

Responses

The plethora of international (regulatory) organization nowadays represents governments' enlightened responses to the aforementioned challenges. International organizations (IOs) are "public goods" designed to tackle an increasing number of collective problems of both trade failure and regulatory failure. These IOs operate in two different vectors: de-regulatory and re-regulatory. First, many IOs aim to persuade member countries to eliminate red tapes and privatize inefficient public sectors. For example, the Organization for Economic Cooperation and Development (OECD) encourages member governments to implement various regulatory reform programs to create more business-friendly (transparent) regulatory environment. Second, other IOs exist to address shared regulatory challenges, such as the environmental protection or international financial stability. Domestic regulations alone are sub-optimal in responding to these *global* challenges. The International Monetary Fund (IMF) and the Bank for International Settlements (BIS) are to regulate, and re-regulate, domestic financial policies which in turn affect international financial transactions.

IOs' missions, which are to address these challenges by designing various institutional responses, tend to bestow themselves an aura of authority. IOs can enjoy a certain level of operational autonomy vis-à-vis their member countries to the extent that IOs achieve their goals. This operational authority manifests itself in two major forms: adjudication and harmonization. First, some IOs, such as the World Trade Organization (WTO), boast well-developed dispute resolution system which produces rich jurisprudence. This jurisprudence (case law) has direct and indirect effects on international businesspeople, such as importers and foreign producers. Second, IOs often house various issue-specific "transgovernmental networks." Comprising public, and often private, experts in sector-specific regulatory areas, these transgovernmental networks produce regulatory standards, guidelines and other regulatory prototypes which are not binding per se yet highly respected and observed. Domestic statute often "hardens" this "soft law."

Admittedly, IOs' operational autonomy is not without criticisms. Critics often raise the so-called "democracy deficit" of IOs. While substantially affecting international businesses, neither those adjudicators nor transgovernmental network participants have been elected. For example, Kal Raustiala criticized that the WTO produce "quasi-constitutional" rules ("generativity") flowing from the confidential WTO tribunal ("insularity"). Nonetheless, it is IOs' member states themselves which accord IOs their legal personality and autonomy in the first place. The fact that members have ratified charters of IOs via democratic processes tends to warrant IO's professional accountability, albeit not democratic legitimacy in a domestic analogy.

How the IALS Helps

The IALS can make its own contribution to the achievement of IOs' missions. As a global association of legal educators, it can help nurture future global regulators by assisting law schools to develop curricula on IOs and equipping students with sensitivities on international socialization among like-minded regulators. In ideal situations, the IALS can team up with willing IOs in launching internships and training programs. Practical steps in this regard would include signing Memoranda of Understanding (MOUs) with prominent IOs such as the WTO and the World Intellectual Property Organization (WIPO).