

Understanding the Role of Global Governance Institutions in the Regulation of International Business Transactions

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Assessing the authority of global governance institutions facilitates the study of the international business law. The regulation of international business transactions occurs through a dispersed, diverse and incomplete system of governance at the national, transnational and international levels. Moreover, the various institutions of global governance at the international level take different forms and develop different regulatory products. The authority of these institutions spans a spectrum as well, from those that claim legitimacy by virtue of the consent of states, to those that stake their legitimacy claims on effective products, representative rules or procedurally sound systems for norm development. This diversity poses challenges and opportunities for studying international business transactions law. The continually evolving sets of rules sometimes compete with each other, often overlap, and are subject to different interpretations. We can sort through these complexities by identifying the goals of international business transactions law. Thereafter, assessing the legitimacy of the governance institutions can aid us in better fulfilling those goals.

Global Institutional Types

Students of international business transactions, on both sides of the podium, confront various types of global governance institutions: governmental regulatory bodies, quasi-governmental norm-creating forums and private norm-creating forums. Each of these institutional types develops different products that ultimately may regulate international business transactions and raise different questions and challenges.

Governmental Regulatory Bodies. States sometimes commit themselves *ex ante* to governmental regulatory bodies that have the power to generate norms and rules that will bind the members. These institutions derive authority from their membership.¹ States may make this *ex ante* commitment for various reasons. These institutions sometimes possess efficiencies that make membership appealing.² For example, economic benefits that accrue to WTO members make membership a must.³ Likewise, states may enhance their standing in the community of nations through membership in various regulatory bodies.⁴

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¹ Margaret P. Karns and Karen A. Mingst, INTERNATIONAL ORGANIZATIONS: THE POLITICS AND PROCESSES OF GLOBAL GOVERNANCE 4-5, 8-10 (2004).

² Kenneth W. Abbott and Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RES. 1, 4-5 (1998).

³ See Claire R. Kelly, *Realist Theory and Real Constraints*, 44 VA. J. INT'L L. 545 (2004).

⁴ Edward D. Mansfield and Jon C. Pevehouse, *Democratization and International Organizations*, 60 INT'L ORG. 137, 161 (2006). For example, institutional membership helps leaders sustain domestic democratic reforms. *Id.* Mansfield and Pevehouse note democratizing countries may find that membership in international institutions lends credibility to the leaders of those countries. *Id.* at 141. See also Robert Howse, *The Legitimacy of the World Trade Organization* 356 in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS, (discussing how "sovereigns use international organizations as a means of legitimizing their own power" but questioning who in turn legitimizes the international organization.)

Quasi-Governmental Norm-Creating Forums. Some norms in international business transactions are generated within global institutions constituted by states and then adopted *ex post*. For example, the United Nations Commission on International Trade Law (UNCITRAL) creates conventions, model laws and legislative guides.⁵ The International Institute for the Unification of Private Law (UNIDROIT) also has member states work on harmonizing substantive private law issues⁶ through conventions, principles, uniform laws and guides.⁷ The Hague Conference on Private International Law includes 67 member states which work towards the “progressive unification of the rules of private international law.”⁸ None of these bodies are legislatures or law-creating bodies, rather they are institutions that develop rules and make policy choices that only become law once states choose to adopt them.

Private Norm-Creating Forums. An extremely important set of venues for international business transactions lawyers is outside government entirely. International private norm-creating forums generate rules or standards that private parties or individual states choose to adopt if they think the rules or standards will be useful.⁹ These rules may not be “law” in the traditional sense, they may only become law through the adoption of parties or the continued use as trade practices of industries, but they are a major part of the rules that govern international business transactions. For example, the ICC sets standards that will facilitate business should individual parties choose to adopt them.¹⁰ Among its most notable successes are the Uniform Customs and Practice for Documentary Credits (UCP 500 & UCP 600), which banks routinely adopt to govern their letters of credit, and ICC Incoterms, which parties frequently adopt as a matter of course when engaging in the sale of goods.¹¹ Similarly, the Institute for International Banking Law & Practice has developed the ISP 98 which is considered essential for those using standby letters of credit.¹²

The Legitimacy of Global Governance Institutions

Where multiple institutions develop norms to regulate international business transactions, institutional legitimacy questions arise. Given the increasing number of global institutions that regulate international business transactions and the breadth of

⁵ *The UNCITRAL Guide: Basic Facts about the United Nations Commission on International Trade Law United Nations*, 29-47 (2006), available at <http://www.uncitral.org/pdf/english/texts/general/V0650941.pdf> (last visited August 15, 2007).

⁶ See Statute of the International Institute for the Unification of Private Law art. 1, Mar. 26, 1993, 15 U.S.T. 2504. See also Int'l Inst. for the Unification of Private Law, About UNIDROIT at <http://www.unidroit.org> (last visited

⁷ *Id.*

⁸ Statute on the Hague Conference on Private International Law (Hague Statute) art. 1., formulated Oct. 9-31, 1951, 15 U.S.T. 2228, 220 U.N.T.S. 121 Also available at http://www.hcch.net/index_en.php?act=conventions.text&cid=29 (last visited December 1, 2007).

⁹ See, e.g., Alan Schwartz and Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995) (examining “large private law making groups.”)

¹⁰ ICC Constitution, Art. 1 available at http://www.iccwbo.org/uploadedFiles/ICC/ICC_Home_Page/pages/Constitution8101907E.pdf, last visited August 9, 2007.

¹¹ See generally Henry Gabriel, *International Chamber of Commerce Incoterms 2000: A Guide to Their Terms and Usage*, 5 VINDOBONA J. INT'L COMM. L. & ARB. (2001).

¹² See Institute for International Banking Law and Practice, home page <http://www.iiblp.org/> (last visited August 9, 2007). Another example of a private norm creating institution is the Comité Maritime International Comité Maritime International which promotes the unification of maritime law. Home Page, available at <http://www.comitemaritime.org/ratific/ratitle.html> (last visited August 9, 2007). Still another is the International Standards Organization. See ISO Standards Home page available at <http://www.iso-standards101.com/> (last visited August 20, 2007).

issues that they now address, it is not surprising to see that these institutions sometimes compete and sometimes collaborate to address complex problems. Which norms should govern a particular dispute is a question faced by business people, dispute resolution panels and students alike. Legitimacy analysis can help us answer this question.

The sources of institutional legitimacy vary. Legitimacy may come from the consent of those bound by the rules. Thus, UNCITRAL's Convention on Contracts for the International Sale of Goods (CISG) binds those states that have acceded to it.¹³ WTO members are bound to the WTO treaties because they have acceded to them. Likewise private parties that adopt Incoterms 2000 will find it difficult to complain that they should not be bound, absent some indication that their consent was not truly voluntary.¹⁴ Consent as the basis of legitimacy may exist in connection with any of the three types of institutions above.

Nevertheless, sometimes states and individuals who have not consented to particular rules or norms will be affected by them. For example, norms that regulate cross-border insolvency may effectuate policy choices that impact states and parties that have not consented to those norms. Or, as in the case of intellectual property, competing normative prescriptions may emanate from different institutions with different constituencies.¹⁵

Alternative legitimacy criteria are available where affected parties have not consented to the application of an institution's norms. One can claim legitimacy by assessing the effectiveness of the institution, (*i.e.*, whether it promulgates norms that are useful, and that are indeed used.) Using effectiveness, or output criteria, as some call it, to assess the legitimacy of an institution requires a normative prescription as to what is a good or effective outcome. Alternatively, one may claim legitimacy because the institution is representative of countries, or because it employs good procedures. These input criteria may or may not lead to more effective rules, but they may lead to rules that are perceived as authoritative.

Institutional Legitimacy and the Study of International Business Transactions Law

The basis of institutional legitimacy matters because it informs how we resolve the conflicts and ambiguities that naturally flow from multiple global governance norms. The various sources of global norms create both conflict and ambiguity. Students must reflect upon the goals of international business law. Such goals may include fairness, stability, efficiency or flexibility. We may have different views concerning which global institutions are more likely to achieve these goals. I suggest that assessing institutional legitimacy may aid our inquiry.

Conflicts and interpretive challenges in international business law stem from the various sources of law. Any time there is more than one source of authority that

¹³ Although as we know, it may also, through its choice of law provision, bind a non contracting party if the rules of private international law would point to the law of the member state.

¹⁴ Although sometimes the ICC's Incoterms may be assumed as a matter of trade usage. *See St. Paul Guardian Insurance Company*, 2002 U.S. Dist. LEXIS 5096 (S.D.N.Y. 2002).

¹⁵ Thus, while the Trade Related Aspects of Intellectual Property Agreement (TRIPS) may require strong protection for patents, such protection may conflict with norms set under the International Covenant on Social, Economic and Cultural Rights. Patrick Wojahn, Comment, A Conflict of Rights: Intellectual Property Under TRIPS, The Right to Health, and AIDS Drugs, 6 *UCLA J. Int'l L. & Foreign Aff.* 463, 466 (2001/2002).

purports to provide rules to govern transactions there is a chance of conflicts between the alternatives. Thus, The Hague Rules and the Hamburg Rules on carrier liability differ and carriers need to know when one set of rules rather than the other might apply. Likewise, the norms promulgated by the UNIDROIT might conflict with those adopted by UNCITRAL.¹⁶ Interpretive questions are also prevalent in international business transactions law. Naturally, as international norm-generating institutions struggle to develop widely-acceptable and effective norms, they compromise. One consequence of such compromise is ambiguity. Thus, for example, although states may consent to the CISG, questions of validity are specifically excluded from the scope of the CISG and the parameters of validity are left ambiguous.¹⁷

Conflicts and interpretative questions cause us to reflect upon what it is that we want from international business transactions law. We may want fairness. Where parties feel they are treated fairly or that rules which may put them at a disadvantage were nonetheless developed fairly, they may be more supportive of international business transactions governed by these rules. Or, we may value predictability most highly. Knowing how to predict costs allows parties to insure for them effectively and plan their affairs. Predictability also promotes efficiency. Efficiency might also be promoted by rules that employ cost benefit analysis or impose burdens on the least cost avoider. Where parties believe a rule or norm is predictable and therefore efficient, they may be willing to follow it even in those instances where they find themselves disadvantaged. Or, we may want flexibility. Global institutions need to be able to respond to the changes that are currently unimaginable. Containerization, the internet, sovereign wealth funds, all challenge global institutions to keep up with business or become irrelevant. Where parties can see the flexibility in rules or norms governing international business transactions, they may be willing to tolerate their ambiguities.

The challenge, of course, is that different global institutions may better facilitate some values than others because of the basis of their authority. Institutions that claim authority by virtue of consent may be more “fair” than others. But both governmental regulatory bodies and quasi-governmental norm-generating forums that rely on consent may also lack flexibility. Institutions that claim legitimacy on the basis of output criteria may be effective, efficient, and flexible, but they may also undermine fairness especially where the rules have not been consented to by all those affected by them. Institutions that rely upon input criteria (representation or process) may be fair but they may be neither effective nor flexible. Thus, a preference for one institution’s norms over another may reveal a preference for one particular set of goals for international business transactions. Neither teachers nor students need to prioritize a particular set of goals, but we should learn how to navigate the conflicts and make persuasive arguments in favor of one approach or another.

Conclusion

The range of norm-setting global institutions for international business law provides opportunities to develop flexible, efficient and fair rules to govern conduct. Students and scholars can, and should, critically examine claims by these institutions of flexibility, efficiency and fairness. I believe that one part of that critical analysis must include an inquiry into the legitimacy of the promulgating global institution.

¹⁶ Not to mention the possible conflicts with national laws.

¹⁷ CISG, Art. 4.