

Globalization Colloquium
Outline of Multi-Jurisdictional Regulatory Issues
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Examples of multi-jurisdiction regimes, with different levels of economic and political integration: Federal systems (US, Canada, Australia, Germany, Switzerland, etc.); EU; NAFTA, Mercosur, etc; international

When markets transcend state or national boundaries, decentralized regulation of economic activity may (a) hinder market integration and the benefits that it provides and (b) also prove ineffective in curing market failures.

There are also demands for transjurisdictional regulatory arrangements to protect human rights, labor, the environment, etc., based on (c) political failures at the level of states; (d) arguments that the appropriate polity, demos, or policy-relevant culture is higher-level, and that regulatory arrangements should therefore be set at the higher level; (e) universalist norms

I. SUBJECT AREAS

A. Regulation of Economic Actors

(including governments and government entities as well as businesses, consumers, and others)

Transactional Law and Institutions

Contract
Corporations/business organizations
Financial instruments
Remedies; recognition of judgments

Securities regulation
Accounting regulation

Competition Policy

Monetary Laws and Institutions

Currency/exchange arrangements and regulations
Capital flow regulation
Monetary policies and institutions (e.g. IMF, European Central Bank)
Conditionality on financial assistance (IMF)

Banking Regulation

Minimum capital requirements
Money laundering regulation
Basel Committee

Cross-Border Investment

Regulation of cross-border investments

Protections for cross-border investment – treaties, dispute resolution (e.g. ICSID, NAFTA)

Trade Regulation

WTO, NAFTA, Mercosur, etc.

Goods-- Tariffs (GATT)

Non-Tariff barriers, including regulation (SPS, TBT)

Subsidies

Services-- TRIMS

Access requirements

Intellectual Property Protection/Regulation

TRIPS

WIPO

Taxation

Cross-Border Movement of Persons

Regulation of immigration/emigration

Cross-border mobility of labor

Labor Standards

Wages and working conditions

Worker safety

Organizational and bargaining rights

ILO

Sport

Environmental Health Natural Resource and Safety Regulation

Products

Processes and production methods (PPMs)

Cross-border spillovers

WHO, Codex, Environmental Treaty secretariats, UNEP, UNDP

Use and exploitation of common resources

Oceans and seas --navigation and control

--living resources

--seabed minerals

Instruments of Commerce

Aircraft

Ships (IMO)

Telecommunications and Information Dissemination

Frequency allocation and other property rights regulation (e.g., Internet domain names)

Competition structure

Content regulation

Research/Information -- Right to know laws; restrictions on dissemination

B. Human/Humanitarian Rights and Other Universal Norms

Obligations of governments

Obligations of non-governmental actors

Non-discrimination based on gender, race, religion, ethnicity, sexual preference

Free speech and political rights

Rights to know

Ability to participate in and influence decisions and outcomes

Social, environmental, and economic rights

Rights of indigenous peoples, various ethnic, religious, racial, cultural minorities

Genocide and crimes against humanity

Rights and responsibilities relating to military actions

Protection of the environment

C. Security-Related Issues

International use of force against state aggression or its threat

Collective security arrangements

Nuclear non proliferation regulation

Chemical and other weapons regulation

Humanitarian intervention through use of force

Anti-terrorism

Control of international criminal activity

D. International Movement of Persons

Immigration; guest workers

Refugees

Asylum

International trafficking in women and children

E. Development Assistance

National ODA

Multilateral development assistance (e.g. World Bank, IFC, regional development banks,

UN agencies)

Regulation of recipients through conditionality on assistance; accountability of donor/regulators and non-governmental delivery entities

II. JUSTIFICATIONS FOR REGULATORY HARMONIZATION, REGULATION AT HIGHER LEVELS

A. Decentralization Failure.

Premise of decentralization in regulatory and associated political, legal, institutional arrangements. Regulatory harmonization including higher-level regulation justified only by decentralization failures.

1. Harmonization to promote market and market integration.

Solution of Collective Action Problems –Prisoners’ Dilemma with respect to market barriers; individual jurisdictions will not unilaterally adopt measures, such as tariff reductions or removal of barriers to trade and investment because of fear that they will not be matched by others)

Need for common legal and institutional frameworks to support market integration and trade (e.g., transactional laws, monetary stability and liquidity

Differing regulatory standards and arrangements with respect to product, services, instrumentalities of commerce hinder trade.

2. Harmonization to regulate more effectively market failures.

“Race to the bottom” thesis - -international competitiveness creates regulatory prisoners’ dilemma (labor, environment, banking)

Cross-border activities elude effective regulation at local level (competition policy, tax, instruments of commerce)

3. Public choice arguments for setting norms at higher levels

Political failures at the local level (interest of political and economic elites in resisting open markets, adequate protection of environment, labor, human rights)

4. Arguments based on administrative economies

It may be unduly costly for smaller or poorer jurisdictions or units to independently establish regulatory programs, standards; economies of scale and administrative cost reductions can be achieved by developing standard regulatory methods (which can perhaps then be tailored to individual circumstances.).

B. Arguments Based on Higher-Level or Differently Configured Demos, Polity, or Culture

A justification for rejection the presumption of decentralization is that the appropriate demos, polity, or policy-relevant culture exists at a higher level, or at on a reconfigured (territorially, institutional) basis at the current level, and that regulations to promote the goals of that demos or polity should be established by a jurisdiction congruent with that demos or polity. Reconfiguration may require the intervention of higher level institutions.

C. Universalist Norms

Regulatory norms are claimed to be universal to humankind and should therefore be globally harmonized. Such claims usually involve the discourse of human or humanitarian rights, and can include economic and social rights.

III ARGUMENTS AGAINST HARMONIZATION, HIGHER-LEVEL REGULATION

Tendency of harmonization, higher-level regulation to excessive uniformity and rigidity; unresponsive to local circumstances and change.. Because of these factors, higher level regulation may be unduly costly, ineffective in many applications, normative authority compromised.

Problems in securing effective implementation at the local level (especially in international context)

Displacement of local innovation, diverse experimentation

Displacement of local political self-determination

Control, accountability of higher level decision-making institutions; inequitable distribution of benefits and burdens among local jurisdictions.

IV ALTERNATIVE PATTERNS OF ALLOCATION OF REGULATORY RESPONSIBILITY

Options for allocation of regulatory decision-making, implementation responsibility among jurisdictions, institutions

Principles for choosing among alternative allocations of regulatory responsibility among jurisdictions and institutions (e.g., subsidiarity principle, economic efficiency)

Alternative patterns of allocation of responsibility among jurisdictions in practice, and likely consequences and implications of those alternatives

V METHODS OF HARMONIZATION

[In the international context, unlike federal nations or the EU, there is generally no supranational legislative authority. However, methods, measures and policies determined in specialized institutions such as the WHO, IMO may provide guidance for many states, and may have particular influence where these bodies provide technical assistance for implementation.]

Informal coordination/of regulatory practices by state governmental officials e.g., practice of mutual recognition, principle of functional equivalence, coordination of monetary, competition, banking etc policies.

Coordinated harmonization of domestic laws and regulations by states.

Bilateral and multilateral treaties or agreements

Establishing international organizations, tribunals to implement and enforce harmonized regulatory standards, usually pursuant to treaties: e.g., WTO, Montreal Protocol; European Court of Human Rights.

Adjudicatory harmonization by domestic, federal, supranational, or international tribunals (including negative harmonization by invalidating domestic laws that are contrary to the free trade regime)

Regulatory conditions on grants, loans, assistance by one state to another or by IOs; e.g., World Bank, IMF requirements for domestic economic policies; environmental, labor, human rights standards in MDB assistance, ODA.

“Soft” international regulation/harmonization (including encouragement for voluntary measures by multinational business, business-NGO partnerships, etc.)

VI. REGULATORY INSTRUMENTS AND TECHNIQUES

Command and control regulation

Economic incentives (taxes, tradable pollution permits, economic sanctions, economic inducements)

Information-based strategies

Organizational rights (consumers, labor)

Conditions on subsidies, grants, loans, assistance, transfers

Regulatory aspects of transactional and other facilitative or development based laws and institutions

Arrangements for monitoring and securing compliance with regulatory requirements

Use of economic/trade incentives, sanctions to promote compliance with higher-level regulatory standards (e.g., Montreal Protocol)

Distribution of regulatory benefits and costs (including how influenced by choice of regulatory jurisdiction and regulatory strategy)

VII THE POLITICAL ECONOMY OF TRANSJURISDICTIONAL REGULATORY HARMONIZATION, LEVEL-OF-REGULATION CHOICES

From a positive perspective, what factors determine the extent of harmonization and the allocation of regulatory responsibility among jurisdictions and institutions?

VIII. NORMATIVE CRITERIA FOR TRANSJURISDICTIONAL REGULATORY ARRANGEMENTS

Promotion of overall (e.g., global) economic welfare and security

Promotion of open markets as a distinct goal

Distribution of economic benefits: between nations and regions; within nations (criteria – e.g., Rawls; Pareto-superiority; justice to future generations, etc.)

Protection of non-commodity values (environment, human rights, cultural values)

Process and procedural rights: Transparency and rights of participation in transjurisdictional regulatory decisionmaking, including role of NGOs

Legal accountability of transnational regulatory decisionmaking (herein of international administrative law)

Political accountability of transnational regulatory decisionmaking to national governments and polities, international civil society, international authorities and organizations, etc.

Preserving national sovereignty, local political, economic, and cultural self-determination and associated values

IX GOVERNANCE INSTITUTIONS FOR MULTIJURISDICTIONAL REGULATION

See Kingsbury, Krisch and Stewart Article