

THE VISCOSITY OF GLOBAL GOVERNANCE

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The source of my induction

Before answering the questions posed in the Alter/Meunier memo, it is worth sketching out the empirical cases that form the basis of my answers. The following is a brief summary of the nested and overlapping regimes that were at work in the four cases of international regulation that I have examined at length: Internet protocols, financial codes and standards, genetically modified organisms, and the public health exemption to TRIPS.¹

Internet protocols: In the late seventies and early eighties, there was no international regime governing protocols – they were left to the private sector. States began to become concerned that competing proprietary standards would constrain their utility to governments. Canada, Britain, France and Japan pushed the Consultative Committee on International Telegraphy and Telephony (CCITT) of the International Telecommunications Union (ITU) to develop a non-proprietary standard. At the same time, the US, UK, France, Canada, and Japan to have the International Organization for Standardization (ISO) – a non-governmental organization of technical standard-setters – develop compatible network standards for both private and public uses. The CCITT and ISO efforts were overlapping, but the result was the prevention of a Microsoft-type dominance of network protocols – and the emergence of TCP/IP as the common network standard.

In the nineties, the growth of the Internet and its commercial possibilities triggered disputes over the management of the domain name system. A non-state actor, the Internet Society (ISOC), formed the International Ad Hoc Committee (IAHC) to develop a proposal to manage domain names. The IAHC was an eminent persons group with representatives from ISOC, the International Trademark Association, WIPO, and the ITU. A Memorandum of Understanding was signed, but rejected by the US and EU as not reflecting their interests. The U.S. commissioned a white paper on the future of Internet governance, and created a traveling forum to obtain feedback. At the same time, however, US, EU, and ISOC officials negotiated the creation of the Internet Consortium of Assigned Names and Numbers. ICANN was a private body, with representation from both governments and salient IGOs. Since ICANN's creation, ITU officials have repeatedly tried to exert more influence over Internet governance – most recently through the World Summit on the Information Society. However, WSIS efforts to rein in ICANN have been rebuffed by the United States – most recently, the WSIS agreed to create a non-binding intergovernmental forum to discuss the issue as face-saving compromise.

¹ Daniel W. Drezner, *All Politics is Global: Explaining International Regulatory Regimes* (Princeton: Princeton University Press, forthcoming).

Financial codes and standards: In the wake of the Asian financial crisis, the G-7 countries were committed to ratcheting up the degree of prudential financial supervision and regulation. While the international financial institutions (IFIs) might have been the natural focal point through which to create such standards, the G-7 chose instead to create a new body, the Financial Stability Forum (FSF). The FSF was even more dominated by the G-7 than the IFIs. In the end, the FSF agreed on a set of twelve key codes and standards, despite opposition from the IMF representative. G-7 countries pushed their allies hard to agree to communiqués that recognized the standards as legitimate and authoritative. The stewardship of these codes and standards resided in their originating international organizations and private orders. Monitoring, however, proceeded through the IMF's Article IV consultations and reports on the observance of standards and codes. For some of the standards, enforcement took place outside the IFIs. On money laundering, for example, the Financial Action Task Force (FATF) authorized governments to impose countermeasures against non-compliant states.

Genetically modified organisms: The United States and EU countries developed very different regulations on the treatment on GMOs. The US decided in the eighties that it was unnecessary to develop separate regulations for food safety based on process rather than the product. The European Commission, responding to consumer pressure and guided by the precautionary principle, chose to regulate the process as well, eventually instituting an unofficial moratorium on GM products.

Rival international regimes have been set up that reflect American and European preferences. The United States was the prime mover behind the 1994 Sanitary and Phytosanitary (SPS) agreement established during the Uruguay round of world trade talks. The SPS required WTO members and adjudicating bodies to defer to safety standards established by the Codex Alimentarius Commission to determine whether national food regulations were appropriate or merely a disguised form of protectionism. The EU, in contrast, chose to build upon the 1992 Rio Convention on Biological Diversity, which mentioned the precautionary principle in its initial Declaration on Environment and Development. The US, though not a signatory, participated in the negotiations and tried to shift fora to a WTO working group, but did not succeed. The EU succeeded in enshrining the precautionary principle in the Cartagena Protocol on Biosafety, which covered living modified organisms. The US, meanwhile, filed a suit in the WTO protesting the EU moratorium on approving new GM products, which is still pending. The result, is a legal stalemate, with the biosafety protocol's precautionary principle flatly contradicting the trade regime's norm of scientific proof of harm. Both the US and EU have lobbied other governments to accept their standards and practices governing GMOs.

Intellectual property rights (IPR) and public health: In the early nineties the advanced industrialized states succeeded in shifting IPR enforcement from WIPO to the WTO with the creation of the TRIPS regime. Health advocacy groups, developing countries, and IGOs such as the World Health Organization and UNAIDS began to lobby the TRIPS Council for greater flexibilities within TRIPS to allow for compulsory licensing of pharmaceuticals that help combat HIV/AIDS. The United States resisted this

move, but at the 2001 Doha Ministerial acquiesced to a declaration asserting that TRIPS, “does not and should not prevent members from taking measures to protect public health.” Since the Doha Declaration, the public health waiver has been institutionalized in the form of an amendment to the TRIPS accord. At the same time, after Doha the US, EU, and EFTA countries acted to impose greater legal barriers for most countries to use the new flexibilities. These countries also enshrined “TRIPS-plus” arrangements into new free-trade agreements. Pharmaceutical manufacturers have moved beyond patents to insist on the exclusivity of test data as a way of extending their patents.

The fruits of induction

For each of these cases, nested politics were at play in the creation and enforcement of rules. With the Internet, the United States had to cope with the ITU’s clear interest in playing a greater role in the governance structure, as well as the fact that ISOC members had a comparative advantage in terms of expertise. As time has passed, WSIS participants have displayed a growing interest in poaching onto ICANN’s legal domain. In finance, the shadow of the IFIs affected G-7 tactics and strategy to create more rigorous financial codes and standards. In both the GMO and TRIPS cases, different state and non-state actors advanced their own interests by exploiting the contradictory impulses and norms contained within different international regimes.

Drawing inductively from these cases, there are a number of insights that can be drawn from the literature on nested and overlapping regimes. The most useful construct I have found in the literature is Raustiala and Victor’s concept of a “regime complex.” Some of the cases (finance and the Internet), fit an almost neofunctionalist conception of regime design – in that the different parts of the regime complex complement rather than substitute for each other. In the case of financial codes and standards, for example, the FSF and more specialized regimes like the Basle Committee on Banking Supervision functioned well as the progenitors of new regulations, while the IMF was tasked with the job of monitoring and surveillance. When there was great power conflict, however, the regime complex more closely resembled the complex forum-shopping and efforts to inject “strategic inconsistency” into the legal lay of the land.

The path dependent nature of regime complexes – stressed by both Raustiala & Victor and Jupille & Snidal – is somewhat useful. Even with the existence of a great power concert, the G-7 did not cut out the IFIs completely in the development of a new regulatory architecture for finance, which may be related to the legal standing of the IFIs. In the absence of a great power concert, pre-existing institutions also cast a shadow over the emergence of any new regime. In the case of GMOs, for example, the pre-existing regimes in the GATT/WTO and the Codex Alimentarius Commission imposed formidable legal constraints on using regulatory strictures to block the imports of GM crops and products.

That said, path dependence for these cases does not seem to be that powerful a constraint – either for reasons of legitimacy or bounded rationality. New governance structures were created in most of these cases (ICANN, WSIS, FSF, G-20, Cartagena Protocol, etc.). This might be because the stakes for each of these regulatory arenas was sufficiently high to prompt searches away from the local equilibrium. The cases we care

about in the study of world politics, however, are more likely than not to possess that attribute.

This relates to the question of counterfactuals. The central thesis I divine from the examined cases is that the resulting regime complex, on the whole, reflected the distribution of great power and preferences – but the TRIPS case is a clear exception. The initial inclusion of TRIPS within the WTO makes sense from a realist perspective, but the subsequent amendment to TRIPS was a surprising outcome – and largely a function of the large WTO membership and the norm of consensus decision-making. If the costs of forum-shopping had been minimal, then one would have expected the US and EU to set up a new IPR regime to reflect their preferences. However, the past history of TRIPS – in particular, the push by the developed world to get TRIPS into the WTO in the first place – increased the viscosity of rulemaking. The subsequent proliferation of “TRIPS-plus” provisions within American and European FTAs is consistent with Raustiala and Victor’s concept of strategic inconsistency. CAFTA, for example, contains both TRIPS-plus provisions and a side letter stating that nothing in CAFTA abrogates anything in the Doha Declaration. This kind of legal uncertainty allows power to more directly affect actors’ calculations about which course of action to pursue in the future.

The cases I have investigated do suggest a need to rethink one dimension of the politics of nested and overlapping governance that the literature has put forward. For example, both Aggarwal and Alter & Meunier posit that because international law remains non-hierarchical, states and courts can face complexity in trying to implement policies that lie at the “joints” of these regime complexes. The cases I have examined, however, suggest the presence of hierarchy in legal regimes on at least three dimensions. First, there is a distinction between “hard law” and “soft law” elements of any regime complex.² Part of this comes from the legal status of different governance structures – for example, although the Financial Action Task Force forty recommendations on money laundering have achieved widespread compliance, FATF itself is not a treaty-based organization, nor is it an emanation of one.³ Neither is the FSF – which is one reason why the US and EU were eager to have the FSF’s recommendations into implementation by the IMF. John Eatwell concludes, “the IMF is using a treaty-sanctioned surveillance function to examine adherence to codes and principles that are not themselves developed by accountable treaty bodies.”⁴ The hard law/soft law distinction is useful in discerning between which parts of a functional regime complex are used for rule creation and which parts are used for monitoring and enforcement.

Second, even between treaty regimes there is a distinction between those regimes that contain significant enforcement provisions and those that do not.⁵ In the conflict over GMOs, for example, the WTOs sanctioning authority would tend to lend a greater

² Duncan Snidal and Kenneth Abbott, “Hard and Soft Law in International Relations.” *International Organization* 54 (Summer 2000): 421-456

³ FATF originated from the 1989 G-7 summit.

⁴ John Eatwell, “The Challenges Facing International Financial Integration.” Unpublished MS, Queens College, Cambridge University, Cambridge, UK, 2000, p. 10.

⁵ Even controlling for enforcement, another hierarchical distinction in international law could be where a particular legal principle is contained within a hard law treaty. For example, there is a difference between mentioning the principle in a preamble (as in the 1992 Declaration on Environment and Development for the Rio Convention) versus explicitly codifying the principle into European law with the 1997 Treaty of Amsterdam, or inserting it into the main text of the 1999 Cartagena Protocol.

compellence to the trade-related aspects of GM products, when they come into conflict with the Cartagena Protocol. This is consistent with Emilie Hafner-Burton's statistical finding that human rights provisions that are linked by hard law to preferential trade agreements have a more significant effect on human rights performance than similar "soft law" provisions – both of which outperform the effect of United Nations human rights treaties.⁶

Finally, even in a situation where different aspects of regime complexes contain similar levels of codification and enforcement provisions, power differentials will become salient. The reason the US and EU benefit so much from the World Trade Organization is not just that they can sanction countries that violate WTO rules – but that other countries have limited sanctioning power in dealing with their legal infractions.

I will close with one counterfactual and one conceptual variable that would merit further investigation. Clearly, the literature has demonstrated that great powers are willing to substitute different decision-making fora and exploit situations of nested and overlapping governance in order to advance their interests in world politics. In determining the necessary and sufficient conditions that would lead a great power to employ that strategy, we should also ask the reverse question - under what conditions will great power governments be constrained from forum-shopping? When are the costs associated with complexifying a regime too prohibitive? Jupille & Snidal suggest bounded rationality as one possibility, but there may be more. It is also worth considering whether the constraints to forum-shopping are constant over time; it may be the case that to better understand when forum-shopping is costly, John Kingdon's concept of "policy windows" needs to be transplanted to the global stage.⁷

Similarly, one variable we should consider in discussing nested and overlapping regimes is "viscosity." Some IR scholars believe that globalization has facilitated "the 'fluidization' of regulatory space."⁸ In fluid mechanics, viscosity is the resistance a material has to change in form – i.e., its internal friction. It is worth contemplating whether some regime complexes suffer from higher rates of viscosity than others – and also whether some regime complexes grow more or less viscous over time.

⁶ Emilie Hafner-Burton, *Globalizing Human Rights? How Preferential Trade Agreements Shape Government Repression, 1972-2000*, Ph.D. dissertation, University of Wisconsin, Madison, WI, June 2003.

⁷ John W. Kingdon: *Agendas, Alternatives, and Public Policies*, 2nd edition (New York: Longman, 1997).

⁸ Ronnie D. Lipschultz and Cathleen Fogel, "Regulation for the Rest of Us?" in Rodney Bruce Hall and Thomas J. Biersteker, eds., *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002), p. 122.