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Regulatory globalisation

Peter Drahos

1. Globalisation, but of what?

Globalisation was one of the buzzwords of the 1990s. But almost as soon as it buzzed into the social sciences, it provoked a sceptical reaction (Hirst and Thompson 2003). In one view, globalisation referred to processes of economic integration in which national markets were becoming a part of regional or global markets, in which multinational firms were dominant players. The capacity of states to influence these markets was seen as radically diminished. However, it soon became clear that the economic data could be made to tell different stories. Technical debates arose around whether the indicators used to measure globalisation, such as the rising ratio of merchandise exports to gross domestic product (GDP) using constant prices as a measure, exaggerated the effects of globalisation (Sutcliffe and Glyn 2003). Similarly, depending on how one defined a multinational corporation, there were either tens of thousands (based on a firm with one or more foreign subsidiaries) or very few (based on a firm with an integrated chain of global production). The clearest area of globalisation was the financial sector, where cross-border financial flows between banks and investment in bonds and equities had increased dramatically in scale. Even here, however, in the very heartland of globalisation, there were, and are, stark country differences. For example, expressing foreign assets and liabilities as a ratio to GDP, Lane (2012) points out that advanced economies went from 68.4 per cent in 1980 to 438.2 per cent in 2007,

while emerging markets in the same period went from 34.9 per cent to 73.3 per cent. In other words, the cross-border financial integration of the latter group was considerably less.

These debates about globalisation, at least to some extent, were referring to different processes rather than just one process of integration and interconnection. Globalisation cannot really be understood without distinguishing among the globalisation of markets, the globalisation of firms and the globalisation of regulation (Braithwaite and Drahos 2000: 8–9). These are distinct processes with contingent rather than necessary connections among them.

a) Market globalisation without regulatory globalisation

Markets can globalise even though national regulation remains in place. Amazon, eBay and Taobao are examples of substantially globalised marketplaces that are still regulated nationally.

b) Regulatory globalisation without market globalisation

The globalisation of regulatory standards may end up impeding the integration of national markets. For example, the World Trade Organization (WTO) agreements on phytosanitary standards and technical barriers to trade were intended to create some convergence of standard-setting in these areas, with the goal of this convergence being to facilitate trade.[1] But the evidence suggests that developing countries face problems in achieving the level of scientific capability required by these standards (Athukorala and Jayasuriya 2005). The upshot is that developing countries may lose rather than gain markets as a result of the standards. The increasing globalisation of prescription drug regulation and intellectual property rights has had a varied effect on prices for pharmaceuticals because some states act as monopsony buyers and pharmaceutical companies use intellectual property rights as an aid to price discrimination.

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1   The Agreement on Technical Barriers to Trade and the Agreement on Application of Sanitary and Phytosanitary Measures.

c) The globalisation of firms without the globalisation of markets or regulatory standards

Pharmaceutical multinationals such as Pfizer and GlaxoSmithKline operate in prescription drug markets that have not globalised. Media companies such as Rupert Murdoch's News Corporation have globalised even though the regulation of the media remains substantially a national affair.

2. Explaining regulatory globalisation: Is parsimony possible?

The explanatory approach to regulatory globalisation that is sketched in this chapter draws on the argument by Jon Elster (1989) that connections between events are best explained in terms of mechanisms rather than general laws. Elster is concerned with higher-order mechanisms such as evolution, rationality and reinforcement, whereas here we will be discussing lower-order mechanisms such as coercion and reward. The reason is simple. These kinds of lower-order mechanisms are often observable, so verifying evidence for their operation can be sought. For those who attach weight to parsimony in theory building, a potentially long list of lower-order mechanisms might be seen as unwieldy. Those who work in the political economy tradition, for example, might seek an explanatory framework that reduces rather than multiplies causal variables (see, for example, Mattli and Woods 2009). Can Occam's razor be applied to reduce the number of mechanisms? Can we develop a more general theory that, for example, unites lower-order mechanisms under a master mechanism of some kind?

A possible candidate for a master mechanism might be a dialectical one based on materialism (Marx) or non-materialism (Hegel). The difficulty is moving beyond some vague general formulation of the mechanism (in the case of the dialectic, thesis, antithesis, synthesis) to something that strongly relates to all the evidence and allows conditions for its testability to be formulated. The push for parsimony in theory building runs the risk of turning the chosen explanatory variable into a defensive and narrow-lensed paradigm. For example, it might be argued by a realist that states and power are the only variables that one needs to explain regulatory globalisation. It turns out to be surprisingly difficult to define realism. Realism describes a 'general orientation' rather than a specific

theory—an orientation that emphasises the developmental egoism of the state and the centrality of power in advancing its developmental goals in a world of competing egoists (Donnelly 2000: 6). If, under the guise of a single variable, one includes other forms of power such as soft power then parsimony is more or less out the window, as it is when realism and constructivism are combined (see, for example, Barkin 2010). The fact that we may choose to weaken the principle of parsimony in our search for explanations is itself not a problem. The explanation may still continue to connect in important ways with the phenomenon we are studying. The multiplication of explanatory entities may create the conditions for a grander conceptual transformation of our understanding of the world than a parsimonious theory ever could (see Losoncz, Chapter 5, this volume for a discussion of these broader issues).

3. Regulatory globalisation: Key concepts

Three concepts are central to the account of regulatory globalisation that is presented in this chapter: actors, principles and mechanisms. The basic claim is that this form of globalisation is a nonlinear dynamic in which actors contest various domains of regulation by using mechanisms to support principles that best fit their goals in the relevant domain.

Actors

States have been and remain important to explaining the spread of regulation across borders. Since World War II, the US state has been the single most important actor in the spread of regulatory models, including in nuclear power regulation (through its role in the formation of the International Atomic Energy Agency), financial regulation (a manifold influence through, for example, Wall Street innovation and the International Monetary Fund), intellectual property (its influence in bringing intellectual property into the trade regime), competition law (the export of antitrust principles after World War II to countries such as Germany and Japan) and the regulation of illicit drugs (its support for prohibition and its capacity to influence in various ways other countries to take the same approach). Other states have been important as well, such as the United Kingdom in financial and insurance regulation or Germany in environmental regulation; but, for breadth and depth of influence, no state has rivalled the United States. Critical to an understanding of US regulatory power is the role of US multinationals, which can, for example,

through the juridical prowess of their many lawyers, provide the US state with detailed information on the shortcomings of a developing state's intellectual property law—information that US Government officials can leverage in various ways in international negotiations. It is this capacity to deploy combinations of hard and soft power that has made the United States such a central player in the globalisation of regulation.

Regulation does not begin with the modern state, if by the modern state we mean a union of people in which ultimate power resides not in the formal head of the union but in the people—a conception of the state that gathers critical momentum in the seventeenth century (Skinner 1997). The regulation of commerce and trade in medieval Europe cannot be explained without reference to the customary and contractual practices of merchants (the use of bills of exchange and promissory notes). There are debates over the extent to which merchant custom (as opposed to contractual practice) produced a genuinely transnational body of rules (Law Merchant) (see Kadens 2012), but it is clear that it provided states with principles (such as looking to merchant custom to solve disputes) that exercised a lasting influence on state commercial orders. The influence of canon law on medieval law, the role of the Church in the regulation of slavery and the rise of the antislavery movement in late eighteenth-century Britain all provide examples of why a typology of non-state actors is required in any explanatory account of regulatory globalisation. Confining the actions of corporations to the realm of domestic politics and assuming that only states can act in the international sphere ignores the many ways in which corporations act directly as causal agents in creating and globalising regulatory norms (see Tusikov, Chapter 20, this volume). Such a typology should include organisations of states (for example, the Organisation for Economic Co-operation and Development (OECD), the WTO), business organisations (for example, national chambers of commerce, the International Chamber of Commerce), corporations, non-governmental organisations (for example, Consumers International, Greenpeace, International Accounting Standards Committee), mass publics (especially as constituted by reactions to disasters such as nuclear accidents) and epistemic communities (a group of actors united by common regulatory discourse and technical expertise).

Principles

If we think of the word 'norm' as referring to a general category, we can distinguish different kinds of norms, all with regulatory effect, such as legal, social, moral and customary norms. There are other ways in which to draw distinctions between regulatory norms, including between rules and principles or performance standards and prescriptive standards. Different types of norms have different effects in processes of regulatory globalisation. Customary norms may not be transferable in the way that statutory-based systems of regulation are, but different customary norms may sometimes give rise to a unifying principle such as the recognition of indigenous peoples' laws and customs. Principles are recurrently important in the globalisation of regulation (Braithwaite and Drahos 2000: Chapter 21). One way in which to draw the distinction between rules and principles is to argue that principles are open-ended as to the range of actions they prescribe, while rules prescribe specific actions. In the process of regulatory globalisation, actors will often promote some principles and other actors wishing to contest the practices grounded by those principles will counterpoise different principles. By way of example, transnational corporations may defend principles of deregulation and lowest-cost location to be able to arrange the management of their labour force, their tax affairs and their environmental obligations, while green groups, for example, may argue for corporate regulation based on principles of regulation and sustainable development. Framework treaties such as the Convention on Biological Diversity or the United Nations Framework Convention on Climate Change articulate core principles that then drive the evolution of detailed rule-based national regulatory schemes. Principles do not need the vehicle of law to have regulatory impact, as demonstrated by the practices in corporate culture based on principles of lowest-cost location, total quality management and continuous improvement. Aside from the principles already mentioned, a list of key principles that has been important across many domains of regulation includes harmonisation, rule compliance (doing no more than the rules require), transparency, reciprocity, national treatment, most favoured nation, national sovereignty, strategic trade and world's best practice.

Mechanisms

The spread of regulation across borders involves different types of actors and different types of norms and is linked to the operation of different kinds of mechanisms. For present purposes, mechanisms can be thought of as devices or tools that are consciously used by actors to bring about their desired ends. For example, in a bilateral trade negotiation between the United States and a developing country, intellectual property will always be on the table. In reality, the principle of strategic trade is at issue since the United States will be pushing for intellectual property forms of regulation that advantage its exporters and avoiding those that do not (for example, the greater protection of traditional knowledge). The US negotiator will never refer to strategic trade, but will, rather, make rhetorical use of a principle such as world's best practice (meaning US practice), arguing that the developing country should adopt higher standards of intellectual property protection. A standard move by a developing country negotiator is to say that the developing country is not obliged to follow these higher standards (the principle of national sovereignty) and, in any case, it does not have the capacity to implement the administrative and judicial infrastructure to run a high-standard intellectual property system. A US negotiator may offer some financial assistance (the mechanism of reward) as well as indicating that various experts will be found to instruct the developing country in the mysterious arts of intellectual property (the mechanism of capacity building), or, if the US negotiator is losing patience, he may dangle the threat of trade sanctions, suggesting that the country is in fact in breach of its international obligations on intellectual property (the mechanism of economic coercion).

Historically, the transfer of entire systems of rules from one country to another has generally travelled along paths of military conquest and colonisation. British laws were applied to Australia after Britain invaded Australia and crushed the resistance of Indigenous people. Aspects of Japanese domestic law ended up applying to Korea as Japan progressively integrated it into its empire, annexing it in a treaty in 1910. Japan was on the receiving end of this process of regulatory imposition— its antimonopoly law of 1947 being the product of US occupation. The globalisation of regulation through the conduit of military coercion is not just a matter of antiquarian interest. After the US invasion of Iraq, the Administrator of the Coalition Provisional Authority, Paul Bremer, promulgated an order that brought aspects of Iraq's patent law up to

international standards.[2] There are many other examples of a conqueror's regulatory systems following the conqueror into a territory and, more often than not, remaining there well after the conqueror has departed or been thrown out. The continuing influence of Roman law is perhaps the most spectacular example of how regulatory conquest outlives military conquest.

Another mechanism of central importance to regulatory globalisation has been modelling. In the abstract, this is a process of observational learning in which an actor sees, interprets and reproduces the actions of a model (Bandura 1986). Learning and interpretation distinguish modelling from simple imitation. Within the regulatory context, a number of variables affect the direction in which the modelling mechanism causes the diffusion of regulatory models. Having the status of a hegemonic superpower increases the probability of having one's regulatory models adopted. Other countries study the regulatory models that underpin US innovation even if the scale of the US economy means that those models are likely to be inappropriate for most countries. A shared ideology increases the likelihood of a modelling interaction between countries. China, in the early years of its planned economy, looked to the former Soviet Union for regulatory guidance in the implementation of its five-year plans. The influence of US telecommunications deregulation captured the attention of UK policymakers because of a shared interest in deregulatory models.

Models begin life as prescribed actions in symbolic form, meaning that, among other things, they are relatively cheap to devise. The barriers to entry to using modelling as a mechanism are not as high as they are for military or economic coercion or for systems of reward. Modelling is a mechanism within the reach of many weak actors. The weak, through the invention of models, can contest the models of the powerful. Consumer groups, women's groups, indigenous groups and poor farmer groups can, through modelling, offer countervailing regulatory prescriptions (consumer protection laws, antidiscrimination laws, land rights, rights to save seeds, and so on) to the models of the powerful—prescriptions that evoke different identities and values. On a structural account of power, the consumer reforms proposed by the activist Ralph Nader in the 1960s that led to safer cars, safer airline travel and rising safety standards for

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2   Coalition Provisional Authority Order Number 81: Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law, 26 April 2004. Available at: www.wipo.int/wipolex/en/text.jsp?file_id=229977.

many other products should not have succeeded in the United States, let alone globalised to other countries. A raft of social science theory ranging from class power to the logic of collective action would have predicted Nader's failure rather than what transpired: his astonishing success and the modelling of his crusader approach by activists in other countries.

Modelling is at its most influential in moments of disaster and crisis. It is when, for example, there has been an accident at a nuclear power plant that models for the regulation of nuclear power are likely to have an attentive political audience or when, after a global financial crisis, states are facing fiscal hard times that they are likely to pay much more attention to models for combatting the global tax evasion strategies of multinationals. Crises on this scale trigger media frenzies and mass demand for a response. Those individuals and organisations that have a regulatory solution to the problem are presented with a global modelling opportunity. The successful diffusion of modelling depends on the involvement of a range of actors: model missionaries who preach its virtues, model mercenaries who see how they might profit from its adoption, model mongers who float models as part of political agendas, model misers who adopt rather than invest in models of their own and model modernisers who support the model because they seek to come under its halo of progressiveness (Braithwaite and Drahos 2000: Chapter 24).

4. Regulatory webs, network enrolment and forum shifting

Actors, principles and mechanisms are categories that lay the foundation for an explanatory framework for globalisation. Which actors, mechanisms and principles have been important in a given domain is a matter of empirical investigation. This explanatory framework can be deepened by the addition of three more concepts: regulatory webs, network enrolment and forum shifting. The addition of these concepts provides a better explanation of how individual agents may and do intervene in globalisation processes to affect their outcomes. Instead of confining globalisation to macro–macro processes (systems or states acting on other systems or states), it becomes possible to detect and explain micro–macro processes (individual agents acting to bring about changes in systems). Regulatory webs can be thought of as connected

strands of weak or strong influence or control, with actors in a regulatory domain having one or more such strands at their disposal. Regulatory webs can be divided into webs of coercion and reward and webs of dialogue. In webs of dialogue, actors meet informally or formally to talk or deliberate about their interests and the interests of others. Dialogue is a general mechanism—one of persuasion rather than control. In regulatory contexts its efficacy is often dismissed on the grounds that where sanctions are not involved talk is cheap. However, even in contexts where a dialogic web is not intertwined with a web of coercion and reward, dialogue may help actors to better understand their interests, enabling them to understand that they may be in a situation where reciprocal coordination makes sense (for example, to settle a common technical standard). Those who operate within global regulatory circles generally prefer to work through dialogue—one obvious reason being that coercion and reward are both costly. Following through on, for example, the threat of trade sanctions, which must be done from time to time if the threat is to remain credible, generates diplomatic, economic and domestic political costs for the coercer country. The United States has a lot of countries on its various trade watch lists, but the instances of where it moves to sanctions are comparatively rare. Those in US government would think hard about responding to every demand from US business groups to impose trade sanctions on, for example, India because India is an important partner on security issues.

Dialogue is also important to understanding how power in global regulatory contests is harnessed and exercised. Social science theorising has moved away from seeing power exclusively as a static property of X to theorising it as something that flows through networks (Foucault 1980) or is translated into action by networks (Latour 1986). Influencing the course of global regulation requires multiple capacities and resources at technical, legal and political levels—capacities that no one actor possesses. Power in global regulatory contests is harnessed by enrolling the capacities of others into a network that works towards a common purpose. These networked flows of power explain the emergence of different regulatory standards such as a food standard at a committee of the Codex Alimentarius Commission or technical wi-fi standards by a private standard-setting body, as well as the imposition of trade sanctions that coerce a developing country into a compliance strategy. Network enrolment is fundamental to understanding the processes and outcomes of regulatory globalisation.

An equally fundamental strategy is forum shifting. Forum shifting is made up of three basic strategies: moving an agenda from one organisation to another, leaving an organisation and pursuing agendas simultaneously in more than one organisation (for the general theory of forum shifting, see Braithwaite and Drahos 2000: Chapter 24). A classic example of forum shifting is the way in which the United States was able to shift the issue of intellectual property into the Uruguay Round of trade negotiations, despite developing country opposition to such a move (Drahos and Braithwaite 2002). Forum shifting can occur across regimes or within a regime. An example of the latter is the WTO in the trade regime. It has become subject to forum shifting as states have become highly active in preferential trade negotiations while the pace of multilateral trade has slowed. The basic reason for forum shifting is that it increases the forum shifter's chances of victory. The rules and modes of operation of each international organisation constitute the payoffs that a state might expect to receive if it plays in that particular forum. Forum shifting is a way of constituting a new game. Facing defeat or a suboptimal result in one forum, a state may gain a better result by shifting its agenda to a new forum. Sometimes forum shifts are transparent, but, on other occasions, they can be far less visible, as in the case of the transnational non-state regulatory regime that is evolving for the global enforcement of intellectual property rights in movies, music and brands based on trademarks (see Tusikov, Chapter 20, this volume).

To initiate and develop a global forum-shifting sequence is a hugely resource-intensive exercise that requires the coordinated deployment of webs of coercion and reward. For the most part, forum shifting has been used by powerful actors. That said, in today's world, which is dense with non-governmental organisation (NGO) networks, forum shifting rarely goes unnoticed or uncontested. During the 1990s, the use of bilateral trade agreements by the United States to achieve its intellectual property agenda was largely ignored by NGOs, as they were primarily focused on the effects of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This has changed, with preferential trade negotiations such as the Trans-Pacific Partnership being closely tracked and analysed. Big business coalitions deploying forum-shifting strategies have to confront a lot more horizontal and vertical complexities, with the payoffs from forum shifting being much less certain. NGOs reframe earlier losing contests of principles (such as private property versus piracy, which helped produce TRIPS) using other principles (monopoly privileges versus access to medicines or monopoly

privileges versus farmers' right to save seeds). One response of big business is to retreat to less transparent forums (the case of transnational non-state regimes).

For weak actors, there are payoffs from forum shifting, but they can be a long time coming. Indigenous groups were among the first practitioners of forum shifting after colonisation. Unable to find land rights justice at the hands of settler societies, some indigenous groups from countries such as Australia, Canada and New Zealand in the nineteenth and early twentieth centuries took their cause to seats of power in Europe, generally with very little success (Drahos 2014: 74–5). But in the second half of the twentieth century, indigenous movements and their leaders became much more successful, using the United Nations (UN) system to articulate principles for indigenous people, entrenching them in treaties and employing them in domestic litigation and negotiating strategies.

5. Intervening in regulatory webs

As argued above, the globalisation of a given regulatory domain can never be understood in terms of a one-actor, one-mechanism model. Instead, actors find themselves in moments of historical legacy, enmeshed in regulatory webs about which they have imperfect information, using principles that have been fashioned in previous contexts and with varying access and capacities to enrol other actors into the networks needed to alter the standards of regulation. There is a measure of indeterminacy in historical legacy such that individuals with an understanding of webs of influence can become agents of profound regulatory change. Behind some cases of regulatory globalisation lie inspirational stories of individual moral agency such as that of Raphael Lemkin, the Polish lawyer who invented the term 'genocide' and then became the 'one-man, one-globe, multilingual, single-issue lobbying machine' that drove states into drafting, signing and then ratifying the Convention on the Prevention and Punishment of the Crime of Genocide (1948) (Power 2003: 61).

More often than not, though, coalitions of business elites are the ones to exploit the indeterminacies of historical legacy, creating monopolies where citizens would like competition and finding ways to restrict or evade regulation where citizens would like it. The globalisation of intellectual property rights was the work of a small group of Washington-based policy entrepreneurs who, in the 1980s, were able to convince the chief executive officers (CEOs) of some major US

companies such as Pfizer, IBM and DuPont to back the idea of creating an agreement on intellectual property in the trade regime. Once these CEOs were on board, they were able to begin the processes of network enrolment and inner circle consensus building that culminated in one of the most powerful business coalitions ever assembled, backed in the end by the United States, the European Union (EU) and Japan.

Yet this case also reveals how in a world where the exercise of power is deeply contingent on network enrolment and dialogic webs of influence, power can ebb away and be made to flow through different network architectures. By 2001, a network of health activists and developing countries had managed to create a consensus around the importance of public health that led to adoption at the 2001 Doha WTO Ministerial Conference of the Declaration on the TRIPS Agreement and Public Health (Odell and Sell 2006).

The scale and scope of these kinds of successful interventions in global regulatory webs by civil society groups will, of course, vary. The important point is that they are possible. Taking as their goal the defence or recapture of people's sovereignty against business sovereignty, Braithwaite and Drahos (2000) outline five basic strategies of intervention that weak actors might use to ratchet up regulatory standards where business might oppose higher standards and four strategies to counter the entrenchment of monopolies by business.

Strategies for ratcheting up standards:

1. exploiting strategic trade thinking to divide and conquer business
2. harnessing the management philosophy of continuous improvement
3. linking Porter's (1990) competitive advantage of nations analysis to best available technology and best available practice standards
4. targeting enforcement on 'gatekeepers' within a web of controls (actors with limited self-interest in rule-breaking, but on whom rule-breakers depend)
5. taking framework agreements seriously.

Strategies to counter monopoly:

1. using competition policy to divide and conquer business
2. harnessing continuous improvement in competition law compliance
3. building epistemic community in competition enforcement
4. transforming the consumer movement into a watchdog of monopoly.

Since the publication of *Global Business Regulation* in 2000, the relevance of these strategies has increased rather than decreased. Aided by increasingly powerful information communication technologies, networks, as Castells (2000) has argued, have become the organisational form of choice to manage complexity. The world has become saturated by NGOs that are involved in continuous processes of network formation and alliance creation. The networks of state power that Braithwaite and Drahos found to be most relevant to explaining global regulation were, at their core, based on a US–EU duopoly. In the past decade, this duopoly has had to confront new circuits of power, as the importance of its traditional partners has faded and new state players and alliances have emerged. In the 1980s, the 'Quad' (the United States, European Union, Japan and Canada) dominated the negotiations around the General Agreement on Tariffs and Trade. In 2008, Pascal Lamy, then Director-General of the WTO, pointed out that:

> the QUAD is dead and we talk about the G-4 (US, EC [European Commission], India, Brazil). Moreover, it is not possible to propose any new rule without testing the waters with countries like China, South Africa and Indonesia just to name a few of them.[3]

Since Lamy's words, new and potentially powerful nodes of financial governance have appeared in the global web of financial regulation. Brazil, Russia, India, China and South Africa established in 2015 the New Development Bank, and China in the same year established the Asian Infrastructure Development Bank (AIDB). The New Development Bank is headquartered in Shanghai and the AIDB in Beijing. The air may not be as clean in these cities as in Washington, DC, where the International Monetary Fund (IMF) and World Bank are headquartered, but perhaps potential borrowers may get better terms than in Washington, DC.

Summing up, the categories of actors, mechanisms and principles provide the basis for a more finegrained causal account of global regulatory processes. A conceptualisation of regulatory webs, network enrolment and forum shifting provides an understanding of how actors intervene in these processes.

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3   See: wto.org/english/news_e/sppl_e/sppl94_e.htm.

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