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Regulating unlawful behavior in the global business environment: The functional integration of sovereignty and multilateralism

Miriam F. Weismann *

Department of Business and Law, Sawyer Business School, 8 Ashburton Place, Suffolk University, Boston, MA, United States

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ABSTRACT

This article uses the Convention on Cybercrime as a case study to illustrate the functional integration of international law into diverse national legal systems through the paradigm of treaty harmonization. Nations control the impact of international regulation on domestic business interests by implementing legislation to preserve fundamental rights. Thus, the sovereignty-based legal harmonization model better explains the baseline characteristics of national sovereignty while recognizing that global cooperation in business is a necessary and positive feature of multilateralism.

Critics dismiss sovereignty as irrelevant, claiming instead that a "new world order" has emerged in its place. That kind of deconstructionist talk typically injects fear of multilateralism into the global business community. However, the premise is flawed because it ignores the actual mechanics of treaty accession and the synergy between international law and commerce in the global legal environment.

The declaration by some legal theorists that national sovereignty has been replaced by the emergence of a new global legal order, premised on such notions as legal and constitutional pluralism, cosmopolitan human rights law, transnational governmental networks and the like, may be premature (Cohen, 2004). Indeed, some scholars now urge the complete abandonment of any future discourse about sovereignty altogether (Rabkin, 2005). While commercial integration and economic interdependence of respective nation states may signal a diminution in national sovereignty, the conclusion that deconstructing sovereignty as a baseline model for explaining all forms of global behavior does not necessarily follow.

This is particularly true in the field of international law and regulation. International jurisprudence is not a one dimensional concept with uniform application across international borders. In fact, just the opposite is true. Modern international law scholars conclude that viewing international law as an "exogenous force on state behavior" is a failed theoretical approach in analyzing the real contours of its application (Goldsmith & Posner, 2006). Historically, legal scholars have carefully assessed the substantive and procedural aspects of international treaty, custom and practice and have generally concluded that overly optimistic predictions about the ability of international law to foster consensus and collective security is not well grounded in political reality (Morganthal, 1940).

Deconstructionist theory ignores both the actual mechanics of international law and the permanent characteristics of international legal institutions. Likewise, it generally fails to differentiate between the varied forms of national legal behaviors in the global environment. For example, the fact of widespread cross-cultural agreement regarding ethical business norms in the global environment does not necessarily result in an internal domestic cultural consensus on the same issues (Weaver, 2001). In the context of international legal regulation, the "devil is in the detail" and when considered, these critical facts dismantle the deconstructionist behavioral conclusions, demonstrating a palpable disconnect between deconstructionist theory and global reality. Theoretical constructs are only as good as their application to practical real world situations and observed institutional behaviors (Buchanan, 2004).

The juridical existence of a body of international law, custom, and practice does not deconstruct sovereignty as a model for understanding global behaviors. Instead, the use of legal harmonization as the mechanism for domestic implementation of international law protects sovereignty by encouraging multilateral global cooperation while mindful of the need to preserve and protect domestic legal rights. Whatever measure of sovereignty is lost on a global scale, the internal political, social, and economic forces at work within the nation state contribute to the voluntary determination, *the choice*, to participate in a particular juridical scheme. Indeed, the internal legal systems of sovereign nations account for international law as part of their respective forms of government.[1] Thus, the fact that voluntary compliance can be

[1] For example, in the United States the constitution provides that treaties, when ratified become the law of the land. They do not "trump" the constitution but they are the equivalent of acts of Congress. Sovereignty is thus a constitutionally embedded condition of self governance and must be considered as an organizing principle in global affairs.

* Tel.: +1 617 305 1975.
E-mail address: mweismann@suffolk.edu.

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interpreted as a diminution of sovereignty may not be the only or correct interpretation. A better interpretation may be that voluntary accession to global legal rules reflects a sovereign and voluntary decision that the particular international rule benefits the state's self-interest and is otherwise consistent with the varied internal domestic interests which do not block consent to its implementation.[2]

This article attempts to expand the dialogue beyond undifferentiated observations about an amorphous global legal order where, at least in the sphere of international legal relations, clearly one does not exist. The case study involving the recent treaty, The Convention on Cybercrime, [Convention] offers a window into one of the first juridical initiatives to eradicate global crime in the world commercial sector (Council of Europe, 2001).[3] It offers support for the article's conclusion that the acknowledged benefits of multilateralism are limited in scope by sovereign national privacy policy which circumscribes the expanse of global juridical authority.

The Convention seeks to criminalize transnational criminal behavior committed by the use of a computer and to eradicate data safe havens for global criminal activity. A major feature of multilateral cooperation in this case study demonstrates the will of national citizenry to limit global regulatory intrusiveness when perceived as a threat to national autonomy and privacy rights. It teaches that domestic resistance to global regulation ultimately diminishes, not sovereignty, but the quality of the accession to multilateralism. This dilemma finds a cure in the drafting of treaty provisions that offer nation states the ability to harmonize obligatory minimum treaty standards with the particular nation's conception of internal civil rights.

The treaty provisions in the Convention aptly illustrate the application of the sovereignty-based legal harmonization model in the global business environment where national self-interest has prioritized the eradication of unlawful and costly security breaches in the corporate environment. As such, the model provides a reliable basis upon which to predict national behaviors in commerce. In a real sense, economic realism is a consequence of demonstrable regulatory and legal compliance behaviors. Legal harmonization is the organizational tool for augmenting the functional integration of multilateral behavior into a national legal system. It provides the context in which economic behaviors are interpreted as part of global economic realism.

This article concludes that national comfort in the stability of the organizing principles of state sovereignty promotes treaty accession and the growth of multilateralism and co-operation in the sphere of global business activity. When that perception is threatened, domestic influences will act to block implementation of global regulation particularly where domestic civil rights are implicated.

1. Commerce in the framework of international law

As a necessary first step in the analysis, it is important not to confuse global systems of trade and communication with the framework of the international political and legal systems in which they function. Since the emergence of the Law Merchant, (Lex Mercatoria), the informal international legal system shared by merchants in the middle ages, (Scrutton, 1909), sovereign nations have consistently recognized the need for multilateral cooperation in commerce to ensure stability and predictability of commercial transactions in the marketplace. Economic realism, however, is not alone sufficient to displace the Westphalian notion of differentiated authoritarian governments and legal systems in favor of a global new world order. That argument assumes uniformity in process and purpose as between economic, political, and legal sectors and for that reason, it assumes too much (Neyer, 1998). Perhaps, a better explanation is that since the charter grant in 1600 from Queen Elizabeth I creating the East India Company, sovereign nations have historically responded to economic global commerce based upon principles of economic self-interest and the desire for profit. Considering world trade in this perspective illustrates that consensual economic interdependence guaranteed by treaty in an integrated world market unquestionably reflects a diminution in sovereignty but one which is limited in scope and degree to the goals of controlled market entry and competitive market advantage.[4]

Conversely, international law and international legal institutions by design exist in large measure as a compromise to preserve sovereignty while achieving the important goals of world order and security. This point is aptly illustrated by the theory of "constructive ambiguity" where norm crystallization gives way to treaty compromise. Here, the meaning of the treaty terms intentionally remain unsettled and are left to the dictates of sovereign implementation at the national level (Moraitis, 2004). Indeed, it is unlikely that voluntary global legal cooperation would flourish in the modern world in the absence of significant limitations on global institutional form and substantive rule-making authority, grounded in the juridical model of national legal harmonization. Legal harmonization provides a functional bridge between global cross-cultural acceptance and domestic implementation of all international law. These institutional and juridical limitations demonstrate that both the process and purpose of the international legal system are specifically formulated to protect state sovereignty (Conforti, 1993).[5] As previously noted, the national comfort in the stability of the organizing principles of state sovereignty promotes treaty accession and the growth of multilateralism and co-operation in the sphere of global business activity. However, domestic political and economic influences will combine to block implementation of global regulation in the national sphere, particularly where domestic civil rights are implicated.

There are four principle limitations governing global institutional form and juridical substance under the sovereignty-based model of legal harmonization. First, international law is technically and legally unenforceable. It requires voluntary compliance and voluntary accession to the jurisdiction of international courts by each treaty signatory. Perhaps, the best and most recent example of this point was the decision of the United States Supreme Court in *Medellin v. Dretke*.[6] The Court found that the ICJ ruling, under its compulsory

[2] We will see, as demonstrated by the case study, how the impact of domestic resistance to international regulation can diminish its global utility. . .the other side of the proverbial deconstructionist coin. Indeed, classic political theory recognizes that "the more actors there are within a political system with authority to block the enactment of policy—known as veto points—the more likely existing policies are to be maintained..[reducing] the credibility of any [governmental promise] to adopt political or economic reforms. . ." Frieden and Lake (2005).

[3] It is not the only such initiative. The recent promulgation of U.N. Global Compact, Principle 10 is an agreement that nation states will refrain from engaging in forms of bribery and extortion in international commerce as "a way of doing business." However, the Compact remains somewhat ambiguous and aspirational in its language. It is more in the nature of an ethical principle as opposed to defining substantive offense conduct. United Nations Global Compact, http:\\www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/anti-corruption.html (accessed March 9, 2008).

[4] Krasner might call this "organized hypocrisy" where countries will rhetorically endorse the normative principles or rules associated with sovereignty which nations will frequently not adhere to when it is in their own best interest to engage in different forms of functional behaviors.

[5] Conforti's conclusion that the proliferation of international legal norms over the last forty years had not led to corresponding developments in international judicial decision-making or corresponding enforcement procedures, remains equally true today.

[6] Medellin v. Dretke, 125 S.Ct. 2088 (2005).