

Proposal to Create a WTO Center for
Global Regulatory Excellence

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British Institute of International and Comparative Law (BIICL)
Eighth Annual WTO Conference
May 13-14, 2008

This presentation is a follow up to the session held at this conference in 2006 and the roundtable organized by John Jackson at Georgetown Law School in November 2007 to look at the responses of national governments and international organizations to the challenges presented by an increasingly interdependent world and the fact that policymakers are being held accountable to propose and implement appropriate regulatory responses to fill perceived regulatory gaps.

It is helpful to remind ourselves what has happened over the last several years. We have seen that the regulatory superpowers of the EU, United States and Japan have been joined by China and India, countries that are increasingly flexing their regulatory muscles and asserting their own regulatory models. As evidenced by the recent financial crisis, regulators are under increasing pressure not to deregulate but to assert positive regulatory influence over complex problems. Many of these problems are seen as global in nature -- be they climate change, financial flows, security or anticorruption -- and call for more global solutions. Meanwhile, the WTO is struggling with its role as a global rule maker and with the potential failure of the Doha Round, there is pressure on the WTO dispute settlement bodies to fill the gap left by the inability to agree on new rules to fill recognized gaps in global disciplines.

I bring the perspective of a practitioner in the field of global regulations. Indeed, this is my maiden voyage into the academic world of global regulation so I am asking for your sympathy and understanding. While trained in the theory of international law and the GATT/WTO and having worked in the US Government negotiating and implementing international agreements, my

experience of the last 27 years has been that of a private practitioner. For the last seventeen years, I worked in a global multinational for which global regulations have become a top corporate challenge. In short, companies like GE have come to recognize that efficient markets require effective regulation. The rule of law is an essential – indeed if you believe Alan Greenspan and Bill Gates -- the essential foundation for global growth and public welfare.

Given this context, I thought it quite appropriate that we use this conference on WTO rules as a platform from which to examine the state of global regulations with an eye to identifying the elements of global good regulation. Identifying the elements of good regulation would help regulators respond to the unprecedented demands they face, namely to fashion affirmative regulatory responses to problems that are truly global in nature. Many of these public policy problems have characteristics that are familiar, addressing a commons problem (oceans and the atmosphere), a public good (security) a network or the reconciliation of competing standards.

However, I would argue that the very nature of these problems is unique because of the degree of global integration that we have achieved, largely as a product of the success of the global system of trade, investment and financial rules. Moreover, the largely proscriptive rules of the international system have given way to the need for more prescriptive rules. Large and complex markets require an equivalent level of sophistication in the regulatory approach to the management of risk. Regulators and policymakers are looking to the identification of principles, methodologies, processes and procedures to guide them in their work of designing affirmative regulatory regimes. Inevitably, these questions raise familiar questions about the appropriate level at which to regulate (local, national, regional and international) and concomitantly what institution should have the lead.

I believe this setting creates an ideal opportunity for the WTO to create an institution dedicated to the principles and methodologies of good regulation. This institution would be a center of excellence for collaboration among regulators, practitioners, theorists and stakeholders. Moreover, this initiative could provide substantive ongoing support to the series of global dialogues such as the Transatlantic Regulatory Forum.

Let us consider then the elements that would provide the main focus of an institution dedicated to global regulatory excellence.

The most important point of departure is to understand the context in which regulators must work. I see this work as operating along two axes.

The first axis has a vertical character. Regulators work in a space where two principles that are often in tension, if not in conflict, must be reconciled. One is the principle that all economics are global and the other is the principle that all politics are local. Regulators work in a kind of cauldron where they must reconcile these often conflicting dynamics, determining thereby to what extent global economics are localized and where local politics are globalized.

The second axis is a more horizontal one, that is, regulators are part of a continuum that runs in one direction to the transactional and in the other direction to policy, which in turn is shaped by politics.

Effective regulation requires that regulators understand and define the space that carries out the policy objectives they are given while staying one level removed from the transactional. Operating in this space, regulators need a set of rules, methodologies and a discipline. Taken together, these concepts lead to criteria that allow an objective assessment and evaluation of the quality of regulations. Regulators need to define and develop these principles as a way to professionalize their vocation.

Fundamental to the discipline of good regulations are three elements:

- Legal principles that flow from the regime of global trade, investment and financial rules;
- Economic principles and methodologies that analyze how a given regulation impacts negatively or positively on the achievement of international integration objectives;

- Methodologies and analytical techniques for comparing and evaluating the effectiveness of regulations across national jurisdictions.

Principles from the Global Regime of Trade, Investment and Financial Rules

Global regulators operate in an environment that is strongly shaped by a network of international agreements designed to reduce and eliminate barriers to flows of global trade, investment and capital. WTO dispute settlement bodies are regularly handing down decisions interpreting and applying global trade rules to national regulations. While not precedent in a strict sense, these decisions are developing a body of legal principles that should be seen as guidance for good regulation, that is, regulations that are consistent with global trade rules. Indeed, it could be argued that the dispute settlement bodies are deliberately seeking to fill the void created by the failure of the WTO legislative capability by developing new principles and rules that complete and extend the parameters of global trade rules.

Global regulators are finding themselves in two camps. Those who operate without an understanding of how global rules affect their decisions are finding their authority undercut by WTO dispute settlement bodies concluding in certain cases that their regulations are inconsistent with the WTO. These regulators and their national authorities must either rewrite the regulations or face retaliation from their trading partners. By contrast, regulators schooled in these global rules are often able to work within the rules, even taking advantage of exceptions and benefiting from the general tendency in the WTO to give great deference to the authority of national regulators.

The kinds of principles that flow from the global framework of rules on trade, investment and finance fall into several broad categories. There are those of a constitutional character such as non-discrimination, national treatment, MFN, reciprocity and transparency. There are minimal standards of treatment governed by concepts like “fair” and “equitable”. There are procedural safeguards governing notice, publication, and public participation.

And there are interpretations of exceptions for such things as health and safety, environment and security.

Regulators and their national governments must be guided by principles of global good governance that flow from these agreements. There is much work to be done to understand which principles should guide good regulations and what it means to be “guided by” these principles.

Economic Methodologies to Analyze the Impact of Regulations on Global Integration Objectives

The tremendous success of the GATT/WTO system in gaining adherents and liberalizing global markets has been the result in part of a healthy collaboration between lawyers and economists. That collaboration led to the development of both tools and methodologies that once applied provided analyses that policymakers have used to make the case for liberalization. Meanwhile, policymakers have embraced further liberalization objectives whether barrier free trade in APEC by 2010/2020 or a single transatlantic market for goods, investment and capital.

The problem is that there is a disconnect between these political objectives and the actions of regulators whose decisions do not necessarily take into account either the global rules as discussed above or the economic policy objectives of greater integration. One solution to this problem is to require an impact analysis as part of the regulatory decision-making process which would focus on the impact of a given regulation on global integration from both a legal and an economic point of view.

The advantage of this approach is that it would stimulate the private sector to provide and fund much of the analysis that regulators would need to consider. Over time, this analysis would create a body of work that could inform regulators across the globe seeking to solve similar problems. This work would be a major focus of the Center for Regulatory Excellence as it would allow studies of both methodologies and outcomes to see how best to improve the tools and what regulations best solved the problems facing the regulators.

Methodologies for Comparing and Evaluation Regulations across Countries

The World Bank has done some pioneering work on comparing regulations across countries. Their *Doing Business* report is an analysis and comparison of 178 countries across ten criteria covering the ease of doing business. The methodology involves the development of a set of objective criteria that are applied by a panel of experts for each country and then compiled in a global ranking. While the methodology has been subject to criticism, it has also attracted increasing attention from governments that seek to improve their standing and, consequently, the report is a valuable catalyst to competitive liberalization.

This project provides a third area for methodological study and evaluation. Regulators need to understand the best methodologies for evaluating regulations across countries and can learn from them how best to position themselves in that global spectrum.

Outcomes, Justiciability and Anti-corruption

Before I conclude, I would like to cover a number of related points. The first is that this initiative is different from many of the regulatory harmonization initiatives that have been pursued in the past. As explored in some detail in the 2006 BIICL Panel on Global Regulatory Convergence, there is reason to be sceptical about efforts at global harmonization and mutual recognition. While there is great value in consistency and the need for private parties to have predictability in the regulatory regimes they face, there are considerable downsides to efforts at regulatory convergence. Decentralized regulatory approaches promote innovation in problem solving. Harmonization rests on an outmoded faith in a singular optimal approach to policy problems. This faith is especially challenged in institutional environments that lack transparency, accountability and participation.

Efforts to have regulators decide among themselves how best to harmonize or give effect through mutual recognition to their respective regulations have often run into the problem that regulators are not answerable to one another but to their home country political masters. Thus, there is a value in stepping back

from directly negotiating outcomes and looking at methodologies to see what tools and approaches are best suited to regulatory problem solving. Adoption of common methodologies and tools could lead to parallel outcomes.

This approach does not mean that there would not be scope for agreements on common regulatory schemes. Indeed, the WTO has shown that in areas like technical barriers to trade and standards, regulators can agree on new rules. But respect for the autonomy of regulatory authorities leads one to conclude that it is best to see enforceable agreements as a second stage that will more likely come if regulators can work together to solve common problems without having to carry the burden of agreeing on a single approach at the outset.

Finally, a word about corruption is in order. Good regulations are a subset of good governance. An important contribution to the battle against corruption would be the elaboration of a set of methodologies and principles that would inform good regulations. Regulators working together across borders to solve common problems would evolve the elements of professional best practices, ultimately a code of professional ethics that would help shield them from corrupt and illicit practices.

Conclusion

To summarize my conclusions:

- The WTO should create a WTO Center on Global Regulatory Excellence as a contribution to the global initiative for good governance.
- The Center would concentrate on methodologies and principles of good global regulation drawing on work in at least three areas.
- First, the principles that can be derived from the global set of trade and investment rules.
- Second, legal and economic analyses to understand the impact of regulations on global integration objectives.
- Third, methodologies for comparing and evaluating regulations across countries.

- The overall goal of this initiative would be to bring the best thinking to bear on WTO challenges and to project externally some of the best solutions to global regulatory challenges.