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Abstract

In an increasingly globalized world, international rules and organizations have grown ever more crucial to the resolution of major economic and social concerns. How can leaders design international institutions that will effectively solve global regulatory problems? This paper confronts this question by presenting three major types of global problems, distinguishing six main categories of institutional forms that can be used to address these problems, and showing how the effectiveness of international institutions depends on achieving "form-problem" fit. Complicating that fit will be the tendency of nation states to prefer institutional forms that do little to constrain their sovereignty. Yet the least-constraining institutional forms are the very ones that will tend to be the least successful in dealing with global regulatory problems – especially commons problems and threats to human rights. Achieving effective form-problem fit therefore depends on creating institutional structures that can give nation-states adequate assurance that their interests will not be unduly undermined while simultaneously ensuring that global institutions enjoy sufficient independence for solving global problems.

Globalization and the Design of International Institutions

Cary Coglianese[*]

The current period of globalization brings with it calls for international coordination and collective action. Expanding markets lead to the deepening interdependence of economies and the growing demand for coordination in a range of regulatory areas including food safety, banking, and product standards. The increasing speed and decreasing cost of global communication depends in large part on coordinated international action to ensure network compatibility. Global environmental problems such as climate change are also prominent candidates for collective action on an international scale. As the fortunes and fates of people across the globe become more closely linked, continued international action will be needed to address a variety of global problems.

Efforts to solve global problems often center on the creation of varied forms of international institutions. By "institutions," I mean both international rules and international organizations.[1]

[1] *See, e.g.*, Peter Haas, Robert Keohane, & Marc Levy, Institutions for the Earth: Sources of Effective International

International organizations can be both nongovernmental and governmental, though in this chapter my focus is primarily on governmental organizations. Conceived in terms of rules and organizations, international institutions have been the subject of a significant body of research in the field of international relations. Much institutionalist research has focused on why international institutions are created and whether they can independently affect political behavior in a world dominated by nation-states possessing unequal power, divergent interests, and complex domestic politics.[2]

In this chapter, I operate on the premise that institutions can indeed affect outcomes and proceed to raise what has been a less-explored, but no less significant, question: How does the choice of institutional form influence the effectiveness of institutions in solving regulatory problems associated with globalization? My purpose is to suggest that the broad design of international institutions can impact both their effectiveness in addressing global problems and, more importantly, their support from the nation states that create them. In the first part of this chapter I distinguish three major types of problems associated with globalization. In the second part, I set out six broad categories of institutional forms which nations can use in addressing global problems. In the final part, I bring the problems together with the institutional forms to develop an exploratory account of the effectiveness of institutional form. All things being equal, nation-states can be expected to prefer institutional designs that impose the least constraint on their sovereign legal authority. However, some of the least constraining institutional forms will probably turn out to be ineffective in

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Environmental Protection 5 (1993) (defining institutions to "include both organizations and sets of rules, codified in conventions and protocols that have been formally accepted by states.").

[2] For a discussion of the impact of institutions in international politics, see John J. Mearsheimer, "The False Promise of International Institutions," International Security 19:5-49 (1994/95); Robert O. Keohane and Lisa Martin, "The Promise of Institutionalist Theory," International Security 20:39-51 (1995); John J. Mearsheimer, "A Realist Reply," International Security 20:82 (1995).

addressing particular kinds of global problems, especially those dealing with commons problems or with the protection of human rights. The challenge in these cases will be to create institutional structures that provide adequate assurance to nation-states that their interests will not be abused, while at the same time vesting the institutions with the degree of independence needed for them to be effective in promoting global well-being.

I. Globalization and Global Problems

The increasing intensity and extent of global interactions brings with it a variety of challenges for governance. We can distinguish three types of problems which accompany globalization and prompt calls for international action: (1) coordination problems, (2) commons problems, and (3) problems of core values, such as human rights.[3]

Coordination Problems. The first type of problem is one of coordinating global linkages, or exchanges of information, products, services, and money across national borders. When crossing national borders means confronting incompatible requirements or technologies, this will restrict transnational exchanges that people otherwise want to make. Some coordination problems are comparable to deciding what side of the road motorists should use or adopting a common unit of time.[4] For example, the technological advances that have made global communication cheaper depend on the inter-operability of networks and telecommunications services in different parts of the world. Another example is the current concern about so-called "electronic signatures" for internet transactions. Electronic signatures allow firms to authenticate the identity of

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[3] Although these three categories seem to capture many of the major problems that arise under globalization, they are by no means exhaustive. It also bears noting that I have *regulatory* problems in mind in this chapter and expressly leave to the side consideration of other important matters such as international security.

[4] For a discussion of coordination problems, see Cass Sunstein, After the Rights Revolution: Reconceiving the Regulatory State 53 (1990).

contracting partners. Already a number of authentication technologies exist and more will certainly be developed in the future. If different countries require the use of different authentication technologies, cross-national electronic trade would become more uncertain and cumbersome than if countries adhered to a common approach.

Coordination problems are of particular concern to manufacturers who confront different national regulatory standards. National regulations govern both the design and performance of products sold within a country (product standards), as well as the processes by which products are made (process standards). Product standards can vary in terms of required design features, such as for safety or performance, and also in terms of the testing and other procedures used to demonstrate that the product meets the substantive requirements. Different design standards can sometimes force manufacturers to vary their products for different markets, thus diminishing economies of scale. Even if design standards are similar, different testing procedures can lead to additional costs. For example, European and US automobile manufacturers report that the costs associated with complying with different standards amount to 10% of their engineering and design costs.[5]

Of course, the additional costs associated with different standards may well be easily justified if they are offset by additional benefits. Differences in standards may reflect different conditions or preferences within nation-states which more than justify different, even incompatible, standards. In the absence of offsetting benefits, though, variations in regulatory standards tend to reduce competition and lead to inefficiencies.[6] In these cases, variations in product standards might amount essentially to a barrier to entry, since domestic firms in markets having excessively costly standards may be at an advantage in that market over foreign firms. In other

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[5] See "Product Standards, Conformity Assessment and Regulatory Reform," in The OECD Report on Regulatory Reform (1997).

[6] Roger Noll, "Internationalizing Regulatory Reform," in Pietro Nivola, ed., Comparative Disadvantage? Social Regulations and the Global Economy (1997).

cases, firms operating in markets with unduly lax standards for manufacturing processes -- such as countries with weak environmental or labor safety regulations -- may in essence hold an unfair advantage over firms based in countries with higher, socially appropriate standards. In the absence of sound justifications for different regulatory standards in different jurisdictions, the costs associated with divergent standards can lead to inefficiencies in the global allocation of manufacturing and trade.

Commons Problems. A second type of problem associated with globalization is the familiar one of protecting common resources or public goods. Public goods or common resources are nonrivalrous goods for which it is impossible to exclude anyone from using. Consequently, it is not welfare-maximizing to use a pure free market system to allocate their use. For example, as greenhouse gas emissions have increased with the growing use of fossil fuels, global warming has emerged as a commons problem.[7] All countries can use the atmosphere as a place in which to release emissions, and all benefit from the reduction of greenhouse gases regardless of whether they contribute to the reduction. As a result, there is a strong incentive for free riding. In such cases, international institutions, if sufficiently designed, may be able to overcome the free rider problem.

A related problem is the transboundary effects of otherwise domestic activity. Industry in one country, for example, can generate air pollution that moves downwind to another country. Or lax law enforcement in one country may make it a haven for drug traffickers or terrorists who stage their operations in other countries. In these cases, internal action (or inaction) results in negative externalities that are imposed on outside countries. Since the costs are disproportionately borne by others, those producing them have little incentive to invest in the measures needed to prevent them. Consequently international action may be appropriate in these circumstances as well.

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[7] For an extensive discussion of the political economy of climate change, see Jonathan Wiener, "On the Political Economy of Global Environmental Regulation," Georgetown Law Journal 87:749 (1999).

Core Values. A third type of global problem involves the protection of core, or transcendent, values. Moral principles such as equality, liberty, and democracy can be said to transcend current political practices.[8] Principled claims about rights to treatment with dignity and respect inhere in human beings as human beings, and not as citizens of a particular country. Hence, ensuring *at least a minimal amount* of respect for human rights is almost by definition a global problem. Moreover, the current period of globalization may be creating conditions under which important social values are becoming more widely-accepted across the world. Globalization brings with it the increasing ease in the spread of information and ideas, even in heretofore closed political systems. More people in the world today have access to images and ideas from outside their own country than ever before. The increasingly widespread exchange of ideas about cultural and political values may well contribute to broader acceptance of human rights and democratic principles, notwithstanding the positive rights which are (and often are not) protected by particular countries. Since nation-states have not uniformly secured justice and protected the rights of their peoples, effective international institutions may be needed to help guarantee minimal protection of human rights across all nations.

Global Problems and the Demand for International Institutions. I have set out three main problems that in some cases might justify the establishment of international institutions: coordination problems, commons problems, and the protection of core values. To the extent that these problems increase during a period of globalization, then the need for international action also can be expected to increase. This does not mean, though, that international institutions will automatically arise whenever there is a need for them. Nation-states can still be expected to protect their sovereignty and their interests. Indeed, at the same time that the world grows increasingly interconnected on a global scale, many nations have seen a striking resurgence of interest in localism and decentralization. In a number of federal systems, there have been moves to devolve policymaking from the national to the state or

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[8] For an argument about basic political principles which all well-ordered states would respect, see Rawls, The Law of the Peoples (1999).

local levels. In the European Union, the principle of subsidiarity has become a symbol of the national and local institutions that appear threatened by European integration. Isolationist political candidates in countries around the world stir up resistance to new international institutions. It may well be that as the pace of globalization quickens, nation-states and their domestic publics will only become more protective of local instruments of governance.

Other obstacles to international cooperation, such as the incentives for free riding, can also be expected. There are transaction costs to the creation of international institutions. Countries need credible information to decide that cooperation will serve their interests.[9] In addition, they face the time and expense of negotiating with other nations. Notwithstanding these very real obstacles, the number of international institutions has nevertheless grown dramatically during the current period of globalization. The last fifty years have witnessed dramatic growth in various measures of international cooperation and institution-building including an overall increase in intergovernmental exchange, treaties, and international governmental organizations.[10] At least in the near term, we can expect continued interest in developing and strengthening international institutions to respond to the problems of an increasingly interdependent world, even though building these institutions will not occur without difficulty or opposition.

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[9]   Once institutions are created, however, they may help reduce some of these costs. Haas, Keohane, & Levy, supra note 1.

[10]   David Held, Anthony McGrew, David Goldblatt, & Jonathan Perraton, Global Transformations 52-57 (1999). However, the rate of growth for some of these institutions, particularly international governmental organizations, has not always corresponded directly to the pace of globalization. For example, the number of international governmental organizations has declined since the 1980s. See James Hawdon, Emerging Organizational Forms: The Proliferation of Regional Intergovernmental Organizations in the Modern World-System 13 (1996); Cheryl Shanks, Harold Jacobson & Jeffrey Kaplan, "Inertia and Change in the Constellation of International Governmental Organizations, 1981-1992," International Organization 50:593 (1996).

II. Forms of International Institutions

How should international institutions be designed? Nation-states have choices in how they respond to global problems. They can choose not to act, leaving open the possibility that norms or other coordinating mechanisms will develop through the marketplace or through networks of non-governmental organizations. At other times, nation-states can seek to address international problems through domestic legislation, either imposing domestic standards on products entering its trade or coordinating domestic regulations with those of other countries. Still other times, nations can work directly with other nations to develop strategies for recognizing each others' internal norms or to create mutually acceptable international norms. In addition, nations also sometimes create international organizations possessing delegated authority to study global problems, generate recommendations or policies, implement programs, or enforce rules and settle disputes.

These responses vary in terms of the amount of authority which remains vested in the nation-state, as opposed to being transferred to other states or international organizations. Table 1 summarizes six major options, or institutional forms, countries can choose to take in response to global problems, with each form listed according to how much policy authority remains with the nation-state. In crafting responses to global problems, nation-states can choose from among this range of options, and any individual country can (and will) engage in many of these options at any given time. If globalization increases the demand for international action, we should expect to see greater use of these options, especially those involving mutual recognition, consensus, and delegation. However, initially we can expect that countries will tend to respond to new global problems with options that least impose upon state sovereignty.

Table 1: Institutional Forms for Responding to Global Problems

	Description of Institutional Form	Legal Authority Remaining at the Nation-state Level
Non-State Action	Non-state organizations or policy networks create norms of conduct.	All
Internal Control	Nation-states exercise authority through internally-created policies.	All
Mutual Recognition	Nation-states agree to recognize under specified conditions the internally-created policies of other nation-states which, in turn, reciprocate with recognition.	All, but under certain conditions the nation-state acquiesces in the authority of other nation-states.
Consensual Rules	Nation-states consent to international policies created through negotiation with other nation-states.	All, but authority is constrained by bargaining process with other nation-states.
Delegation	Nation-states delegate policy authority to international institutions. Delegations can be loose or tight.	Some
Withdrawal	Nation-states abandon or cede their policy authority altogether to another state or institution.	None

Non-State Action. The first option is for nation-states to take no action whatsoever, thereby leaving a global problem either unresolved or allowing non-state actors to attempt to solve it. The absence of state intervention does not necessarily mean that the global problem will persist unaddressed, for markets, transnational social norms, and private standard-setting organizations may step in to try to solve or prevent certain kinds of global problems.[11]

Market dynamics can sometimes lead to coordinated action. In the absence of any formal product standards, markets may settle on a de facto industry standard. The dominance of the Windows operating system as a standard for PC software development, for example, has arisen from the market dominance of Microsoft rather than from any particular governmental standard. Even in the face of different governmental standards, though, manufacturing practices may still converge (on the most stringent standard) if it is cheaper for companies to meet that standard than to design different products.

Social norms can also serve a regulatory function.[12] In the international realm, networks of professionals and other elites can diffuse norms even in the absence of intervention by nation-states. Norms may also be generated or sustained by domestic publics. Current protests against labor conditions in Third World clothing factories, for example, hold the potential for entrenching norms about the treatment of workers by multinational corporations operating in developing countries.

Private standard-setting organizations promote coordination among international businesses without intervention by the state. The International Electrotechnical Commission and the International Organization for Standardization (ISO) are both international,

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[11] Cf. Lawrence Lessig, "The New Chicago School," Journal of Legal Studies 27:661 (1998).

[12] Research on social norms is vast. For recent discussion of norms in the legal literature, see Robert C. Ellickson, Order without Law: How Neighbors Settle Disputes (1991) and Cass Sunstein, "Social Norms and Social Roles," Columbia Law Review 96:903 (1996).

nongovernmental standard-setting organizations. ISO standards "govern" a broad range of products and business practices, from film speed to corporate environmental management systems.

Even though non-state norms may emerge from private standard-setting bodies, markets, and social networks, this does not mean that these norms will always be followed. Without the involvement of the state and its enforcement mechanisms, norms can be relatively easy to ignore when the costs of compliance get high. On the other hand, to the extent that norms penetrate throughout social networks and become internalized by leaders and publics across the world, their effects potentially could be quite significant.[13]

Internal Control. The second option is for nation-states to exercise control through their own internal lawmaking processes. This approach maintains the maximum domain of a nation-state's sovereign authority, but it is limited by the national reach of that sovereign jurisdiction and by the likelihood that different states will adopt different standards. The global problems set forth in Part I of this chapter are vexing precisely because nation-states are ill-equipped on their own to promote coordination, preserve global commons, and protect core values.

This does not mean that internal control can never affect international problems. Long-arm legislation is sometimes used to extend a nation-state's domestic authority beyond its borders, regulating outside firms that engage in transactions with residents. Moreover, under some circumstances, nation-states may be able to coordinate their internally-created policies by following what other nation-states do. Countries with large economies, or especially high reputations for effective governance, may function as regulatory leaders that other nations follow, thus resulting in some regulatory convergence without formal efforts at international coordination.[14] However, harmonization without international cooperation is time-

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[13]   See Joseph S. Nye, Jr., "Soft Power," Foreign Policy 153 (Fall 1990).

[14]   See David Vogel, Trading Up: Consumer and Environmental Regulation in a Global Economy (1995).

consuming and cumbersome. There are hardly any guarantees that nations will align their policies with each other.

Even if internal control is limited in the face of transnational problems, the actions of national governments do remain vital to nearly every approach to addressing global problems. Even when international institutions are needed to allow states to solve global problems, these institutions almost always depend on national decisions for their implementation.[15] For example, treaties will often require implementing legislation, and national governments are often responsible for monitoring and enforcement of international rules within their borders. It would be inaccurate, therefore, simply to juxtapose internal control with international control. What distinguishes internal control from the remaining institutional forms is the absence of any international institutional coordinating mechanism, such as an agreement, treaty, or international governmental organization.

Mutual Recognition. The third form of international institutions, mutual recognition, involves the acceptance of coordinating principles by nation-states under which they recognize, under certain circumstances, the policies adopted by other nation-states.[16] This approach provides a basis for determining which rules should apply to transactions that involve firms or individuals from different countries. Two or more countries adopting mutual recognition each maintain internal control within their respective borders, but agree to a set of principles that will govern situations which involve an interaction between the countries. So, for example, Nation A may agree to permit the sale of certain products that meet Nation B's safety standards, even though they do not meet the precise standards set by Nation A for products produced within its borders. The recognition is mutual when Nation B then agrees to permit the sale of Nation A's products within Nation B.

Mutual recognition agreements have been used most notably in Europe, where member states of the European Union recognize

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[15]   See Haas, Keohane, & Levy, supra note 1, at 16-17.

[16]   See Kalypso Nicolaïdis, "Mutual Recognition of Regulatory Regimes: Some Lessons and Prospects," in OECD, Regulatory Reform and International Market Openness (1996).

products manufactured in each other's jurisdictions. The EU has also pursued bilateral negotiations with Australia, New Zealand, Canada, Japan, and the US. At the present, mutual recognition negotiations have tended to center around bilateral negotiations on specific products, such as food, medical devices, and telecommunications equipment. [17] In these negotiations, a key issue for nations has been to ensure that there is a measure of equivalency in the regulatory standards in the nations that would fall under the mutual recognition agreement. Hence, mutual recognition is an option available mainly to those countries that have already achieved a measure of regulatory convergence.

<u>Consensual Rules</u>. Consensual rules -- treaties -- are the fourth form of international institutions. Through the creation of international treaties or covenants, nation-states commit themselves not just to recognize each others' domestic rules, but actually to create a new set of common, transnational rules. [18] While treaties seldom are backed by a formal enforcement mechanism,[19] they remain a frequently-used form of international cooperation. More

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[17] See "Product Standards, Conformity Assessment and Regulatory Reform," in The OECD Report on Regulatory Reform (1997); National Research Council, Standards, Conformity Assessment, and Trade: Into the 21st Century (1995).

[18] Of course, with multilateral treaties, it is always possible for nation states to adopt reservations to the treaty, so the precise obligations imposed by a treaty may still vary from state to state. For a discussion of the challenges created by reservations, see David M. Leive, International Regulatory Regimes 133-52 (1976).

[19] See Abram Chayes & Antonia Handler Chayes, "Compliance Without Enforcement: State Behavior under Regulatory Treaties," Negotiation Journal 7:311 (1991); Abram Chayes & Antonia Handler Chayes, "On Compliance," International Organization 47:175 (1993).

than 34,000 treaties are registered with the United Nations, with more than 500 of these being major multilateral treaties.[20]

Since each nation-state must consent to the policies contained in the treaty, policy authority still remains embedded within the nation-state.[21] In practice each nation's decision will be constrained to some degree by the bargaining process, as what emerges in a treaty may not be identical to each nation's first best policy choice. Powerful states also tend to dominate weaker states. However, each state still possesses full authority to decide whether to agree to the treaty. This preservation of authority comes at its price, of course, as rulemaking based on consensus can be time consuming, subject to the lowest common denominator effect, and biased in favor of the status quo.[22]

Delegation. The fifth institutional form, delegation, is a special form of consensual rulemaking and it theoretically holds the promise of overcoming the limitations inherent in negotiating multilateral treaties. When countries delegate authority, they consent to the transfer of authority to an international organization to take specific actions.[23] The organization can take actions on its own accord, so countries need not negotiate treaty language to govern every decision needed to address a complex problem. In this way, international organizations can provide a forum for ongoing international cooperation. By the mid-1990s, national governments

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[20] Thanks to advances in global communication, a database of all the treaties deposited with the United Nations can now be found on-line at: http://untreaty.un.org/English/access.asp.

[21] Robert Keohane, "The Demand for International Regimes," in Stephen Krasner, ed., International Regimes (1983).

[22] See Cary Coglianese, "Is Consensus an Appropriate Basis for Regulatory Policy?" in Eric Orts & Kurt Deketelaere, eds., Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe (2000).

[23] In this section, I am specifically concerned with international *governmental* organizations, since non-governmental organizations do not depend on delegated authority from nation-states.

had created more than 250 international governmental organizations. [24] Among these are such well-known organizations as the United Nations, European Union, and World Trade Organization (WTO), along with many lesser-known organizations including the Codex Alimentarius Commission (which issues international food safety standards) and the International Telecommunications Commission (which sets standards for telecommunications services). Nation-states have established these and other international organizations to take a range of actions, from studying transnational problems and issuing recommendations, to creating or implementing transnational policy, to enforcing policy and settling disputes between countries.

Delegation does not mean that nation-states completely give up their authority over a policy issue to an international organization. Indeed, national leaders can be expected to ensure that their countries' interests will not be undermined by any new institutions that they create at the international level.[25] As such, countries will delegate with caution, paying attention to the terms of any delegation and the decision-making structure of the new institution. In this respect, national leaders' concerns about delegating authority to international organizations are not unlike those of a legislature delegating authority to an administrative agency or of any private actor delegating business or other decisionmaking authority to a third party. In such cases, tensions can arise between the interests of the nations delegating their authority and the interests of the organization receiving this authority. This is the well-known principal-agent problem, where the potential exists for the agent to act in ways that do not conform with the goals of the principal. The goals of the WTO, for example, may center more on the maintenance of competitive markets than some member countries and their publics are willing to accept, especially if the promotion of free trade comes at the expense of

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[24]   Held, et al., supra note 10, at 53.

[25]   Leaders can be expected to protect their own institutional power and this may make them wary of creating powerful international institutions. Domestic publics concerned about a lack of sovereignty and democratic accountability may also encourage leaders to be cautious in creating international institutions.

other social values, such as perhaps the environment or indigenous cultures. For any individual country, the question must arises before it gives authority to an international organization: To what extent will the decisions made by the organization diverge from the overall interests of the nation?

Since international organizations are created by the consent of those nations who will be subject to the organization's authority, we can expect the structure of international organizations to bear similarities to delegations of authority in other contexts, such as legislative delegations to administrative agencies. [26] In order to minimize the potential for agents to act in ways incompatible with the interests of their principals, delegations often include measures designed to allow principals to monitor and control the actions of their agents.[27] Delegations of governmental authority are often accompanied by one or more similar features designed to constrain the discretion of the organization to which authority is being transferred. These four features can be grouped into four categories: (1) delineation, (2) monitoring, (3) sharing, and (4) reversibility. [28]

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[26] *See, e.g.,* David Epstein & Sharyn O'Halloran, Delegating Powers: A Transaction Cost Politics Approach to Policymaking under Separate Powers (1999); Matthew McCubbins, Roger Noll, and Barry Weingast, "Administrative Procedures as Instruments of Political Control," *Journal of Law, Economics, and Organization* 3:243 (1987); Matthew McCubbins, Roger Noll, and Barry Weingast, "Structure and Process, Politics and Policy: Administrative Agencies and Political Control," *Virginia Law Review* 75:431 (1989).

[27] For an overview, see John Pratt and Richard Zeckhauser, "Principals and Agents: An Overview" in John Pratt and Richard Zeckhauser, *Principals and Agents: The Structure of Business* (1985).

[28] For a discussion of these four features in the context of federalism, see Cary Coglianese & Kalypso Nicolaïdis, "Securing Subsidiarity: Legitimacy and the Allocation of Governing Authority" in Kalypso Nicolaïdis and Robert Howse, eds., The Federal Vision: Legitimacy and Levels of Governance in the US and the EU (Oxford University Press, in press).

Delineation refers to the standards or principles setting forth the jurisdiction of the organization -- its scope, tasks, and functions. Monitoring encompasses those procedures that ensure decision-making is transparent and that require certain kinds of analysis and reporting to be conducted before making decisions. Sharing arrangements provide for the involvement and representation of member states in the organizational decision-making process. Reversibility refers to escape clauses by which countries can withdraw from the jurisdiction of the organization under certain circumstances.

The way each of these features is constructed in specific cases will affect what might be considered the tightness of the delegation. Delegations can be tight or loose, depending on the nature of their delineation, monitoring, sharing, and reversibility. Delineations can be specific or general. Monitoring can be extensive or limited. Sharing arrangements can require full consent of all member states or something less than full representation or unanimity. The conditions for reversibility can be ones that can be easily met or ones which require a compelling case. The tighter the delegation, the more control countries retain over the decisions and direction of international organizations. The looser the delegation, the more discretion the organization possesses.

<u>Withdrawal</u>. A final institutional form is worth noting, though perhaps more for theoretical symmetry than for its use in practice. The option of withdrawal lies at the opposite end of the spectrum from options in which legal authority rests solely within the nation-states. With withdrawal, a nation-state gives up or transfers its claim to policy authority altogether. It either abandons its exercise of authority or makes a complete, irreversible delegation to another institution. The main instances of withdrawal occur when nation-states merge or are subsumed by other states, such as with the recent German reunification.[29] Otherwise, the option of withdrawal

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[29] International treaties disavowing sovereign claims over Antarctica and outer space are akin to a withdrawal, although in these cases no nation possessed full sovereignty over these territories in the first place. See The Antarctica Treaty, 12 U.S.T. 794 (Dec. 1, 1959); The Outer Space Treaty, 18 U.S.T. 2410 (Jan. 27, 1967).

remains largely an aspiration of those who advocate so-called "world government" as a replacement for a system of governance organized around nation-states. When it comes to dealing with global problems, the main action will continue to revolve around non-state actors, nation-states, and international negotiations over mutual recognition, consensual rules, or delegations to international organizations.

III. The Choice and Impact of Institutional Form

The nations of the world have numerous options available to them for responding to global problems. As I have just set forth, nations can choose from six broad categories of institutional forms. Within each of these broad institutional forms, there is also a myriad of more specific policy choices. I have said virtually nothing, for example, about the *substance* of treaties: the different kinds of requirements that nations can agree upon in seeking to solve different kinds of problems. The specific requirements within treaties are obviously the subject of intense negotiations, and we know that some types of requirements turn out to be more effective than others. Ronald Mitchell has shown that, in a treaty designed to prevent oil tanker pollution, provisions which required tankers to install specific equipment were more effective in inducing compliance than were provisions which specified discharge limits.[30] Choices such as these -- between technology-based and performance-based standards, or between any number of other types of regulatory approaches -- will almost certainly matter in affecting the performance of international rules. For the sake of this analysis, though, I would like to distinguish these kinds of "operational" choices from choices about broader institutional form. After all, performance-based or technology-based standards could in principle be adopted in domestic legislation, recognized in a mutual

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[30] Ronald Mitchell, "Regime Design Matters: Intentional Oil Pollution and Treaty Compliance," International Organization 48:425 (1994).

recognition agreement, codified by treaty, or proposed by an international governmental organization. The question I pose here is whether these various institutional forms matter, all things being equal, in terms of effectively addressing global problems.

By the effectiveness of institutional form, I mean both (1) the extent to which the international institution's design contributes to the solution of the global problem which it was intended to help solve (policy effectiveness), and (2) the political legitimacy of the institution and the support it garners from national governments and their domestic publics (political effectiveness). I draw attention here to legitimacy as a separate conception of effectiveness because institutions that lack legitimacy are unlikely to be able to work effectively in terms of the first conception. As Dani Rodrik has cautioned in connection with the globalization of markets, "[i]nstitutions that lose their legitimacy can no longer function."[31] This is particularly the case with international institutions which depend on national governments for their continued existence and for the implementation and enforcement of international rules.

In this final part of this chapter, I seek to bring together the three types of global problems discussed in the first part of the chapter with the institutional forms discussed in the second part. I show how certain institutional forms seem to fit better with certain types of global problems and hypothesize that this fit influences the policy effectiveness of international institutions. I further suggest that the institutional form is related to the political effectiveness, or legitimacy, of the institution. As with any claims about the effectiveness of policies and institutions, these are all subject to testing with empirical research.[32] Nevertheless, an initial step along the path toward empirical testing is to generate hypotheses about how the form of international institutions may be related to policy effectiveness and political legitimacy.

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[31]   Dani Rodrik, Has Globalization Gone Too Far? (1997).

[32]   Such tests can be difficult to make because, as Robert Keohane and Lisa Martin have noted, "[r]arely, if ever, will institutions vary while the 'rest of the world' is held constant." Robert O. Keohane and Lisa Martin, supra note 2, at 47.

Form-Problem Fit.   In the first part of this paper, I distinguished between problems of coordination, commons, and core values that arise acutely in a period of globalization. If institutional form makes a difference in how effectively international institutions can solve these problems, then analysts and policymakers will need to take care in selecting the institutional forms to be used in addressing the different kinds of problems.   They will need, in other words, to make sure that the institutional form fits the problem that needs to be solved.

Coordination problems will probably not be easily solved by the first two forms shown in Table 1: (1) non-state action and (2) internal control. While it is possible for coordinated behavior to develop without international agreements of any kind,[33] the problem of coordination is most salient when nation-states have already internally adopted incompatible regulations.   In cases where standards are already divergent, and where the divergence is not justified, nation-states will most likely need to take some form of collective action if they are to resolve the incompatibility. Consensual treaty-making would work, since agreement on treaty language (without any significant reservations) will forge a common set of standards. However, in some cases, reaching consensus on common standards will prove to be difficult, especially if nation-states are trying reconcile more than two divergent standards into one common treaty. Delegating the task of coordination to a group of experts could help break deadlock, assuming agreement could be reached on how the expert commission would be established.

A potentially more feasible approach would be for the various nation-states to negotiate mutual recognition treaties with each other. As noted in Part II, mutual recognition can require an initial degree of regulatory convergence. As long as the various standards are roughly equivalent, countries may be willing to use mutual recognition to achieve coordinated trade.   A mutual recognition agreement would probably be easier to achieve because it would not require nation-states to change their own existing standards or testing procedures, or demand that negotiators come to a complete meeting of the minds on a common set of detailed standards.

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[33]   Robert Axelrod, Evolution of Cooperation (1984).

It is harder to see how mutual recognition could help address commons problems or problems of core values. Of course, internal control cannot be expected to solve these problems either because the problems stem from actions by individual nation-states either to permit the depletion of a public good or the violation of a core value. With commons problems, individual nation-states are less likely unilaterally to internalize the social costs of their actions. The most promising option for commons problems, and perhaps also for problems of core values, would seem to be treaty-making, which could establish credible rules (and perhaps authorized sanctions) to facilitate cooperation. Not surprisingly, this has been the strategy nation-states have pursued recently on environmental issues such as ozone and climate change, leading with mixed results to the Montreal Protocol[34] and the Kyoto Protocol,[35] respectively. In the course of climate change negotiations, delegation (as an institutional form) has come into play with the creation of organizations such as the Intergovernmental Panel on Climate Change that provide scientific assessment information that can be used in the course of further treaty negotiations. Delegations to organizations charged with studying and reporting recommendations may help generate information that can feedback into processes for creating other institutional forms.

As noted earlier, the internal decisions of nation-states do remain important to policy success even when international institutions are created to address global problems. In the context of human rights and other core values, nation states may well enter into international treaties but not honor them when dealing with heated domestic conflicts or, in some cases, even in the ordinary course of affairs. These challenges certainly can arise outside the realm of human rights too, but the nature of an international system which protects national sovereignty in "internal" affairs can make it especially difficult to enforce treaties which essentially protect

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[34] Montreal Protocol on Substances that Deplete the Ozone Layer, 1522 U.N.T.S. 3 (Jan. 1, 1989).

[35] United Nations Framework Convention on Climate Change, FCCC/CP/7/Add.1 (issued Mar. 25, 1998), reprinted at 37 I.L.M. 22 (1998).

citizens from their own governments. For these reasons, as well as for other reasons such as the lowest common denominator problem, international institutional forms can sometimes turn out to be weak and ineffectual. In such cases, it bears returning to non-state action as a potentially viable, long-term strategy. The pressures of non-governmental actors and the acceptance of soft law and non-state norms by domestic elites and publics may take time, and may often exhibit little progress, but this approach may ultimately hold the most promise for creating better conditions for solving global problems and building effective international institutions.

Form and Legitimacy. The importance of the nation-state in the creation and implementation of international institutions makes political support and legitimacy a key facet of institutional effectiveness. However, international institutions are not unique when it comes to the need to take politics into account. Domestic policymaking is also very much the art of the possible, aiming for the most effective policy among those that are politically feasible. Moreover, in both domestic and international contexts, authority will be most effective when it is perceived as *legitimate* authority. Although national governments have centralized police and court systems, the state cannot be watching every person's every move. Compliance is certainly affected by the existence and use of monitoring and sanctions, but it is also influenced by internalized moral norms and the perceived legitimacy of the regulatory institution.[36]

An institution's legitimacy or public support can be both specific and diffuse.[37] Specific legitimacy refers to the acceptance

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[36]   For an extensive discussion of compliance, see Tom Tyler, Why People Obey the Law (1990).

[37]   The distinction between specific and diffuse legitimacy is a familiar one in evaluating domestic governmental institutions, such as the Supreme Court. For a recent debate on the legitimacy of the Supreme Court, see James Gibson, "Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance," Law & Society Review 23: 469 (1989); Tom Tyler & Kenneth Rasinski, "Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson," Law & Society Review 25: 621 (1991); James Gibson, "Institutional Legitimacy,

of the outcomes generated by that institution in particular instances. Someone who disagrees with the WTO's US-Shrimp action[38] would view the trade body as having little specific legitimacy in that case. However, that same person could still view the WTO with diffuse legitimacy if she concluded that the procedures used by the body were fair and reasonable, or that over the long term the outcomes are or will be generally the right ones, even if in some particular cases the WTO made mistakes. A major challenge for the WTO at present seems to be how to strengthen and broaden its diffuse support among the public during a time when it has been issuing decisions that have been met with substantial criticism.

More research would be needed to understand the full range of determinants of diffuse legitimacy of international institutions. One factor that could affect support for international institutions is the degree of sovereignty the institution preserves or protects for the nation-state. We might predict that, all things being equal, those institution-building efforts that least impose restrictions on state sovereignty will be perceived as more legitimate. Consequently, those institutional forms that preserve sovereignty the most would tend to garner the most political support from nation-states: internal control will generally be preferred over mutual recognition, consensual rulemaking over delegation. Things are not always equal, of course, and there may be times when states will see that the benefits of delegating authority to global regulatory organizations are greater than the costs, such as presumably has happened with the WTO. Yet, for right or wrong, intense debate has emerged about the nature the WTO's institutional structure and whether the institution has too much independent authority. Since the effects of international institutions can be difficult to determine -

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Procedural Justice, and Compliance with Supreme Court Decisions: A Question of Causality," Law & Society Review 25:631 (1991).

[38] World Trade Organization, United States-Import Prohibition of Certain Shrimp and Shrimp Products, Oct. 12, 1998, WT/DS58/AB/R, reprinted in 38 I.L.M. 118, 121 (1999) (adopted Nov. 6, 1998) (appellate body report). In this action, the WTO body found that the United States' efforts to protect endangered sea turtles violated trade rules.

- since we do not have a control group with different institutional forms -- the challenge is to decide whether the WTO could achieve its free trade goals as effectively if its institutional structures were more transparent and tightly linked.

  The Delegation Dilemma. The recent controversy over the WTO simply highlights a more general challenge for delegation as an institutional form. In an increasingly interdependent world, the need for delegation may grow to respond more rapidly to global problems. Delegating authority to international organizations, however, runs into two potential limitations. The first potential limitation is that the organization will be too constrained. The more narrowly delineated an organization's authority, for example, the harder it may be for that organization to respond to problems that change over time or to address unanticipated problems that do not fit neatly into the delineated categories. Another way an organization can be constrained is in how independently it can make decisions. In organizations where authority is shared coterminously (i.e., where decisions of the organization must be made with the consent of all the member states), the organization may become hobbled since fully coterminous organizations do not really possess delegated authority at all. They simply provide a forum for international consent to take place. Requiring unanimous consent of all the member states basically institutionalizes the underlying collective action problems that delegation possibly could have solved.[39] Organizations that are tightly constrained in these ways will be less capable of responding to problems in a timely, effective manner.

  The second potential limitation to delegations, though, is that they will be too *un*constrained. If nation-states in fact cede a lot of unconstrained authority, international organizations will be better poised to respond effectively to new and challenging problems. But they will also be better empowered to make mistakes or act in ways contrary to the interests of some member states. International organizations that are too powerful, and which exercise their power carelessly, can lose legitimacy among the nation states that created these institutions. Nation states may therefore resist the work of

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[39] See Haas, Keohane, & Levy, supra note 1, at 417.

organizations that become too powerful or may invoke reversibility provisions to withdraw from under the purview of these institutions.

In other words, a tension may often exist for international governmental organizations between policy effectiveness and political effectiveness. A balance must be achieved between creating organizations that are sufficiently independent to operate effectively and maintaining the support of nation-states which are understandably wary of the powers possessed by new organizations. Any new organization's authority must be sufficiently unencumbered to make the organization capable of solving global problems yet also sufficiently encumbered to make the organization acceptable to the nation states who must agree to establish and maintain it. In order to optimize along these two dimensions, nation-states can seek to exploit different combinations of the four features of delegation described above. For example, nation-states can be predicted to require less sharing of decisions in organizations that contain narrowly delineated jurisdictions. As a result, organizations established to address relatively narrowly defined global problems may well depend less on power sharing or monitoring. However, organizations which are established to address a broad range of policy issues -- institutions like the EU -- will be based on more extensive arrangements for sharing power with member states.

Conclusion

Finding the appropriate balance between control and discretion in delegating authority to international institutions will take time, experimentation, and learning. Indeed, such a balance may really never be "found" at all as new problems will arise that seem to require more control or more discretion, and ideas will change about the proper location of policy authority. Of course, it is the presence of change that will probably make the choice of institutional forms all the more important. In a world with both changing problems as well as changing ideas about how to solve those problems, arrangements will be needed that allow nation states to create international rules and organizations -- as will be

arrangements that give nation-states flexibility to redirect these new institutions when a change in course seems needed to fit better the problems at hand.

We should expect international institution-building to result in a use of varied institutional forms. Such variation provides opportunities for further research, as not all institutional forms will work equally well with different kinds of global problems. A transition from a system of dominance based on nation-state authority to one based on even more complex and interdependent global relationships has already begun, but it will also continue to move in fits and starts. Although the conditions of globalization would seem increasingly to make it in states' interests to cooperate and perhaps even to delegate to international institutions, national leaders will always need to be convinced that new institutions will indeed be used to their nations' overall benefit. We might see greater importance given to mutual recognition agreements, treaties, and international organizations. But when new international institutions result in unpopular decisions that adversely affect powerful nation-states -- even if these decisions are otherwise in the overall global interest -- it will have an effect on the future development of additional international institutions. Similarly, when international institutions appear to be ineffectual in the face of pressing global problems, that too will have an effect on future institutional development. Any transition to a so-called "new world order" will not be a smooth one. However, over time, we can hope that institutional forms will be used in ways that seem to strike the appropriate balance, at least for some extended period.