

Roma Tre Presentation: Effects of Globalization on Domestic Regulation

March 27, 2007

Professor Gregory Shaffer, Wing-Tat Lee Chair of International Law, Loyola University
Chicago School of Law

I have been asked to address the impact of globalization, international law and transnational networks on law within the state. This of course is a huge topic. I will address the issue first positively and then normatively. I will raise some questions on its application in specific areas, such as that of food safety regulation, and in particular that of novel foods such as GM foods as I am completing a book on this subject while in Rome. As I have worked a great deal on the WTO, I will address its role and the constraints on its impact and am open to any further questions you may have.

I have been asked to speak about the impacts on European countries. You of course know this impact much better than me, but I will try to open a discussion in two ways: (i) by providing competing analytic frameworks for such assessment; and (ii) by giving specific examples from case studies.

I. Overview of frameworks for analysis that have been put forward

A. Causes: Functional, Constructivist, Power

(i) functionalist explanations- rationalist- Keohane; principal-agent (Pollack)

(ii) constructivist explanations- role of norms- affecting our perception of interests and identities (Koh)- power of legitimacy of law (Franck)

(iii) power: see in concept of globalization vs glocalization: cf comparative impact of WTO law on national law

- conceptions of power (a) resources- material and ideational- realists; (b) institutional; (c) subjective interests (Lukes); (d) identities- Foucault- market consumer man

B. Transmission Mechanisms

1. role of governmental networks: (a) Slaughter New World Order (transgovernmental networks- largely functionalist account- fast, flexible, efficient- more democratic than global government)

-eg competition law; MRAs- telecoms law

(b) earlier book by me and Pollack, *Transatlantic Governance in the Global Economy* broke down conceptually into 4 types of networks (inter-governmental, transgovernmental, transnational, hybrid), asking which are most important, and under what conditions—ie who governs?

- viewing the EU as sandwiched between the international and MS- 2 or 3-level games- can see much of these processes transmitted via the EU to member states

(i) example re impact in EU: De Burca & Scott- EU says can't market cosmetics that contain ingredients tested on animals; concern with animal suffering

- what is the problem re WTO?- restricts trade in cosmetics based on EU legislation- Commission says may be contrary to WTO requirements

- what does EU do?- (i) revises legislation to prohibit testing in EU, but not marketing of products; (ii) promotes negotiations in OECD re use of alternative methods to extent available

(ii) example re impact of EU- EU as pooling of sovereignty to enhance global leverage- see EU impact on US in financial services, Elliott Posner in Pollack & Shaffer 2005 (EUI)

c. *Transnational Transformations of the State project*: Shaffer & Damian Chalmers (LSE)

(i) re what state does- TA for LDCs; centralization of authority (EU); diffusion of authority- contracting out- standards

(ii) re how state organized- new ministries; ministries with foreign portfolios- new contacts with foreign regulators, with private parties

(iii) re legitimacy claims- (a) new governance techniques (benchmarking, monitoring);

(b) to whom regulators accountable

2. role of IOs- Jose Alvarez;

a. regime complexes and fragmentation of IL: Raustiala; Koskinen

b. regimes complementing each other- bankruptcy law- World Bank, IMF, UNCITRAL (Halliday)

c. regimes in tension- Shaffer & Pollack (hard & “soft” law)

d. impact of WTO and Codex on food safety law- whether positive or negative?

3. role of transnational legal process- Koh

a. impact of private parties within state- *Public-Private Partnerships in WTO Litigation* (book on US & EU, and article in JEPP)

b. new article on Brazil with ICTSD- academic initiatives (course, PhDs, study groups), private sector initiatives (negotiations & litigation), consultancy initiatives (ag negotiations); law firm initiatives (investment)- internship program at missions- 40 so far in Geneva

4. hybrid networks

- see in domestic level and international level- example is Public-Private Partnerships and WTO

5. GAL- NYU and Prof Cassese and Viterbo projects

- look at all of the above in admin law context- Shaffer & Nicolaidis in MRAs in this context

II. Caution- Limits of Global/Transnational Impacts- need for studies over time

1. need for NLR: A new legal realist (NLR) approach takes both a top-down and a bottom-up approach in terms of how international economic law is made and how it is received. It combines them to have a better understanding of international law and its impact. It looks at the role of individuals, groups and states in the law’s making; and it looks at the effects of international economic law among and within states and society,

how it is translated, transplanted and resisted. From such study, one can see the ways in which the national/local and international/transnational are linked, the ways in which they reciprocally inform and affect each other- address the *recursive qualities* of law, the way law and legal actors interact and reciprocally affect each other in the process

- see work of Halliday; Garth & Dezalay; new Shaffer paper
- empirical work- qualitative to complement quantitative

2. Quick Notes from Case Study of GMOs and Risk Regulation

- a. different approaches become embedded- institutional & sociological institutionalism
- b. failure of transatlantic networks
- c. competition between IOs- EU exports reg to Bioasafety Protocol; US brings WTO case; problems in Codex
- d. response to WTO decision

IV. Normative Framework

1. a response to GAL project in Shaffer & Nicolaidis in LCP- re role of MLR networks

2. CIA- (i) definition- have applied to trade-environment & HRs re shrimp-turtle and GSP cases- here will apply to GMO case

(c) institutional choices faced by WTO panel: MS deference; injunction; centralization, court balancing; hybrid proceduralist approach

(d) limits on panel- judges viewed as political actors- dispute settlement vs court

(e) what panel did

(f) first evidence of its impact- limited- why

V. Conclusion: 3 main points

1. importance of globalization, international networks and *state transformations*- impacts within the state: can't understand European state regulation without understanding EU; can't understand EU without understanding global institutions and processes

2. caution re overstating impact via study of "formal" law

- need *NLR approach* in case studies to assess

3. normatively- put forward *comparative institutional analytic approach* to assess the relative attributes and detriments of alternative institutional processes, each of which is imperfect