

Regulatory Convergence in International Law: Evaluating Models of Global Economic Governance

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Abstract

This essay explores the intersection of international law and economic governance, focusing on the Regulatory Convergence Model as outlined by Daniel K. Tarullo. It examines the processes and challenges in international law-making, emphasizing the role of transnational regulatory standards in global economic governance. The discussion delves into issues of legitimacy and regulatory capture, critiquing the effectiveness of current regulatory approaches. The essay concludes by assessing the impact of these regulatory models on the stability of global financial markets, offering insights into the complexities of international economic regulation in a globalized world.

Keywords: regulatory convergence model, global financial regulation, legitimacy, capture

1. Introduction

The regulatory convergence model of international law-making, as depicted by Tarullo, emphasises the achievement of national convergence and collaboration on international regulatory standards, particularly financial regulatory standards, and advocates the development of common transnational regulatory standards through consultation and agreement among national regulators. This essay will first outline the core concepts of the model and the possibilities Tarullo promotes. It will then analyse this mechanism in terms of legitimacy and the phenomenon of capture, respectively, to assess the strengths and issues involved. Ultimately, the essay will summarise its findings and discuss the prospects for developing the regulatory convergence model in international law and economic governance.

2. Overview of the *Regulatory Convergence*

The expansion of the international economy continues to exacerbate the intersection and conflict between globalization and interventionism and the erosion of the embedded liberal compromise that separates the international economic order from domestic economic policy.¹ In this context, Tarullo argues for a hybrid law mechanism to address the governance challenges of international and domestic economic integration. The regulatory convergence model of international law-making is one of the two governance mechanisms, he proposed to make up the hybrid architecture, which is mixed with the statutory/ adjudicatory model to be a viable new approach to international economic policy problems, even though this model is relatively low in development and application breadth compared with the statutory/ adjudicatory model currently.²

The regulatory convergence mechanism aims to bring States together to construct and refine a cross-country

¹ Gilpin, Robert, and Jean M. Gilpin, (1987). *The Political Economy of International Relations*, Princeton University Press, p. 117.

² Tarullo, Daniel K., (1999). 'Law and Governance in a Global Economy'. *Proceedings of the Annual Meeting (American Society of International Law)*, 93, pp. 105-113.

generic regulatory model. Firstly, the intended target of regulation would be the behaviour of private economies among all participating States, while the regulatory actors would be States and their regulators. Secondly, the establishment and work of the mechanism, including the basic principles and the specific regulatory rules, would be based on proactive exchange, collaboration and shared governance among States. Finally, it also requires a certain degree of independence and professionalism on the part of regulators that function both as departments of national governments and have a greater degree of transnational effectiveness.¹ Therefore, converging perceptions and governance norms across States, ongoing consultation and collaboration are key to this regulatory model.

3. Legitimacy: Idealization in Theory and Doubts in Practice

Andrew Hurrell divides the concept of legitimacy into five dimensions: procedural “input legitimacy”, substantive value, specialisation and professionalism, the effectiveness of decision-making (i.e. “output legitimacy”), and providing reasons and persuasion.² Compared to the WTO (the WTO is pointed out in Tarullo’s article as a concrete manifestation of the statutory/ adjudicatory model³), which has been criticised for “being under challenge on four of the five dimensions”⁴, the regulatory convergence model has a positive tendency to present legitimacy. Generally, it can meet the legitimacy requirement in at least three dimensions, and one of the remaining two is a mixed blessing. The following is an analysis of the regulatory convergence model from the five dimensions of legitimacy.

“Input legitimacy” focuses on whether the decision-making process reflects justice. At the level of modern international law, on the one hand, it emphasises the equal participation and voice of States. On the other hand, it also cares about the voice of related non-governmental actors in decision-making. The orientation of regulatory convergence orientation in this dimension is positive. Firstly, it relies on an approach in which States reach consensus through interaction and discussion, which coincides with the requirement of input legitimacy that every State be able to participate in decision-making and exercise its voice. Secondly, national regulators in the regulatory convergence model will be more transnational, which means that while they will remain departments of the national government, they will no longer reside exclusively under the internal policies of States but will be more internationalised, specialised and relatively independent. These attributes and tendencies will result in the voice of the regulated private economy being heard and taken on board more often. However, this structure of shared participation, enhanced transparency, and shared governance inevitably would lead to increasingly visible decision-making inefficiencies as the number of participating States increases, as will be detailed later in the analysis on “output legitimacy”.

The second dimension of legitimacy relies on substantive values, and to satisfy this requirement, the core principles and objectives of the system must be as closely aligned as possible with universal values and common goals. In other words, it emphasizes the substantive justice with the spirit of natural law. At this level, the regulatory convergence model is not under attack, as it is based on the “convergence” of States’ informed consent. In the mechanism of regulatory convergence, States’ regulators regularly consult and debate on jointly developed rules, resulting in regulatory standards that are more balanced among States’ needs and more conducive to achieving international substantive values and common goals. In addition, long-term and frequent exchanges in themselves provide an opportunity to broaden consensus and create converging ideas. A good example is antitrust regulation: States have had a long period of interaction and cross-fertilisation of principles and technical issues in this area, and there is now a convergence of regulatory regimes in this area.⁵

Legitimacy of relying on expert knowledge is the easiest of the five latitudes to achieve. Among the mechanisms of regulatory convergence are the relative independence of the regulatory agencies from domestic governments and the presence of more technocrats in the regulatory agencies responsible for professional and specialized supervision. These settings align with the legitimacy of this latitude, but there is a hidden danger of “capture”, which will be analysed in detail in the corresponding section later.

In the regulatory convergence mechanism, the requirement of output legitimacy, which emphasizes decision-making efficiency, conflicts with input legitimacy to some extent. Since the approach of this type of governance mechanism is continuous consultation between States and their regulators, there is an inevitable

¹ Ibid 108.

² Hurrell, Andrew, (2005). Legitimacy and the Use of Force: Can the Circle be Squared? *Review of International Studies*, 31(S1), pp. 18-25.

³ Tarullo (n 2) 109.

⁴ Narlikar, Amrita, (2005). *The World Trade Organization: A very Short Introduction*. Anonymous Translator (New York, Oxford, Oxford University Press), p. 295.

⁵ Tarullo (n 3) 108.

defect that the efficiency of output decision-making could be higher. When there are fewer participating States or when there is already a partial alignment of regulatory objectives or capabilities, the barriers to common regulatory standards are relatively low. However, if there are too many participating States, the original ideas diverge too much, and the system is at risk of this imbalance.¹ However, given that the regulatory convergence of consciousness is a necessary prerequisite for the mechanism to function, the challenge of output legitimacy may be solved if, as expected, the model establishes the regulatory concept of convergence in early interactions and debates.

For the regulatory convergence model of international law-making, the legitimacy of providing reasons and persuasion is the most difficult to achieve. This dimension of legitimacy requires more effective transparency and accountability. Since transnationally convergent regulators are somewhat divorced from the domestic administrative system, it is more adaptable to rely on specific regulatory standards agreed upon by States on an ongoing basis but correspondingly less transparent in its decision-making than it would have been if it had operated as a domestic institution.

4. Capture: Inevitable Issue of Regulators

Capture phenomenon is a common problem for all regulatory mechanisms. In the Regulatory convergence model of international law-making, two aspects will be discussed. One is capture of regulators by large transnational private economies. The other is the capture of regulation by the dominant States.

The “capture” of regulators is, above all, corruption. When isolated national regulatory bodies are linked and developed into a transnational regulatory regime, their oversight and accountability by governments and the public might become harder. Moreover, expertise and information asymmetry are important causes of “capture”. Regulators often need in-depth knowledge of the intricacies and technical details of regulated industries, and this information is often not readily available. The regulatory convergence model’s solution to this problem is to bring in experts to guide the work of regulators, which is how the model specialises and legitimises the specialisation mentioned earlier: hiring technocrats. It should be noticed that one of the characteristics of international law is “fragmentation”, which is diagnosed by the proliferation of new areas of specialisation since 1989.² Thus, while the employment of technocrats may solve the problem of regulatory capture in specific areas of specialisation, the regulatory convergence mechanism will inevitably move towards redundancy due to the proliferation of areas that require the involvement of experts in guiding the regulation.

In these cases, regulators may be more susceptible to the influence of interest groups in the industries they regulate when setting standards and rules. In international law-making, it is not uncommon for specific interest groups to join forces with “professional” actors charged with safeguarding the public interest to harm it. For example, Appalachian soft-coal interests and Western environmentalists have been accused of working together to create air quality regulations that allow air pollution.³

In addition, regulatory convergence is also likely to be politically influenced and captured by States with strong economic positions. Schneiderman argues that international investment law is to some extent comparable to colonialism during the imperial era in that both made poor states less interventionistic in their economies. And there are cases in which the establishment of institutions and rules are actually guided and shaped by professionals (e.g., lawyers, entrepreneurs) from powerful States. In essence, this has led to the benefit of States already occupying a robust economic position, so there is a suspicion of economic colonization in the new era.⁴ This suspicion also exists in the regulatory convergence model, which emphasizes consensus and co-governance.

It is worth noting that whenever the issue involves “voluntary consent” between States, this nominally consensual consensus is often effectively passive acceptance by States in a position of apparent weakness. Just as the takings rule in the US constitutional law has profoundly shaped the relevant rules of international investment law,⁵ the established powers that know this well have strong skills, institutions and power advantages in creating international order and establishing transnational “consensus”. Therefore, even if the

¹ Ibid 111.

² Koskeniemi, Martti, and Päivi Leino, (2002). ‘Fragmentation of International Law? Postmodern Anxieties’. *Leiden Journal of International Law*, 15(3), pp. 553.

³ Mashaw, Jerry L., (1997). *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law*. Anonymous Translator (London, New Haven, Conn, Yale University Press), p. 21-25.

⁴ Schneiderman, David, (2022). *Investment Law’s Alibis: Colonialism, Imperialism, Debt and Development*. Anonymous Translator (New York, NY; Cambridge, United Kingdom, Cambridge University Press), p. 16-56.

⁵ Schneiderman, David, (2008). *Constitutionalizing Economic Globalization Investment Rules and Democracy’s Promise*. Anonymous Translator (Cambridge, Cambridge University Press), p. 47.

theory is fair and idealized, the hidden danger of power politics in the practice of the regulatory convergence model is difficult to ignore and root out.

5. Conclusion

According to the above analysis, it can be found that advantages of the regulatory convergence model of international law-making have been well played on the basis of legitimacy. Firstly, because the establishment of institutional consensus and co-governance as the origin and continuous consultation and collaboration as the way, it will build understanding and trust among States, which will foster greater international cooperation among states. Secondly, regulatory convergence also has the potential to improve the efficiency and effectiveness of international law-making, as it aims to harmonize and standardize the regulations of different countries or regions and promote mutual recognition among the regulatory authorities of the States, which can reduce the overlap and conflict of regulations.

However, this model does not resolve the usual conflicts between legitimacy, universality and efficiency, which makes the feasibility of its development and expansion into the desired global mechanism difficult. Moreover, the regulatory convergence mechanism still faces the possibility of capture, and the harm of capture will be made more severe by its globalization, which may well lead to a democratic deficit or, in effect, a new type of colonization.

In conclusion, the strengths of developing the regulatory convergence model lie in enhancing national collaboration and the establishment of consensual and adaptive regulatory standards, which could help to address some of the shortcomings of the existing model, particularly in terms of legitimacy, and thus preserve the stability of global financial markets. Nevertheless, before that, there are gaps between its theory and practice that need to be overcome, including efficiency, universality, and the credibility and sovereignty issues that result from capture.

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