



Ratcheting Up and Driving Down Global Regulatory Standards

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ABSTRACT Based on a large empirical study of the globalization of business regulation, John Braithwaite and Peter Drahos show that both races to the bottom and races to the top are common in the world system. The focus is on understanding ratcheting up mechanisms. Can health NGOs put these to work to lift public health standards globally?

Global business regulation

The race to the bottom is a common theme in the globalization literature. It is part of the reality of globalization that competition for investment can include auctions for less costly regulatory standards. For example, in the 1970s quite a lot of asbestos manufacturing shifted to developing countries.

According to the race to the bottom analysis, globalization places health standards in a vice. Health services financing is a major victim of global competition to drive down corporate tax rates. The other side of the vice is that regulatory standards are driven down by the race to the bottom.

While there is validity to this analysis, in this article we show that there is no inevitability about a race to the bottom. Ratcheting up of regulatory standards is also part of the story of globalization. Standards like capital adequacy for banks were driven down by the Reagan and Thatcher regimes of the early 1980s, then ratcheted up by those same governments later in the decade in response to banking crises.

It must be said that not all the ratcheting up dynamics are good for health. The ratcheting up of intellectual property protections has blown out health budgets through longer patent terms. It has rendered some AIDS drugs unaffordable in developing countries which are forbidden from compulsorily licensing of patented life-saving drugs.

The macro picture

In *Global Business Regulation* (to be published by Cambridge University Press in 2000), we advance a micro–macro method for an anthropology of global cultures. We seek to understand the most macro of phenomena (globalization of regulation) from the most micro source of data possible – key individual entrepreneurs of global regimes. We have interviewed 500 of these since 1990.

We found that regulation of the environment, safety and financial security have ratcheted up more than they have been driven down by globalization. While ratcheting up is more common than races to the bottom in the regulation of safety and environment, the opposite is true of economic regulation. In domains of economic regulation beyond those that anchor financial security (e.g. capital adequacy standards for banks), we find that ratcheting down has been the dominant dynamic, globalizing deregulation. The striking exception to this dynamic in economic regulation has been intellectual property, which has been ratcheted up.

Among the environmental, safety and financial security domains that have been ratcheted up are chemicals regulation, oil spills at sea, ozone-depleting substances, whaling, acid rain, nuclear safeguards and safety, occupational health and safety, discrimination in employment, freedom of association, child labour and slavery, the regulation of prescription drugs, illicit drugs and tobacco, food standards, safety at sea, motor vehicle standards, air safety, prudential regulation, accounting standards, regulation of corruption, securities and money laundering.

Among the other domains of economic regulation where the dominant dynamic of the past quarter century has been more one of deregulation are licensing restrictions on financial institutions, exchange rate controls, tax competition driving rates down and eliminating taxes, some (quite limited) driving down of corporate law standards through corporate law havens and competition toward limited liability, reduction and elimination of tariffs, technical barriers to trade, restrictions on the free movement of investment, labour markets and professional services (beyond the domain of core security standards), breaking up of cartels and

restrictive business practices, telecommunications and the economic regulation of air transport.

How does ratcheting up occur?

Having summarized the macro pattern of both considerable ratcheting up of regulatory standards combined with a lot of racing to the bottom as well, we now consider how ratcheting up happens and how NGOs might exploit these global dynamics to improve public health. Five dynamics will be considered:

- Disasters, framework agreements and regulatory ratchets;
- Exploiting strategic trade thinking to divide and conquer business;
- Harnessing the management philosophy of continuous improvement;
- Linking Porter's competitive advantage of nations analysis to Best Available Technology and Best Available Practice;
- Targeting enforcement on 'gatekeepers' within a web of controls – actors with limited self-interest in rule-breaking, but on whom rule-breakers are dependent.

They will be considered from the normative perspective of equity and health, which we think requires the illumination of strategies that enable weak actors in civil society to prevail in campaigns for health objectives over strong actors in international business.

Disasters, framework agreements and regulatory ratchets

Thalidomide is one of dozens of cases in *Global Business Regulation* of regulation ratcheted up following a disaster. Not just state regulation but self-regulation as well – for example, Responsible Care as a self-regulatory programme of the chemical industry following Bhopal.

The lessons for reforming NGOs is that rather than have a proactive strategic plan that prioritizes campaigning on the most important issues, they should be more reactive and flexible. They should have developed a great variety of reform plans that

they have ready to pull out of their top-drawer as soon as a disaster occurs. And they should have a capacity to shift campaigning resources onto those plans as soon as the opportunity happens.

The second implication for NGO effectiveness in bringing about change is that international framework agreements matter. Our research shows that nearly all global business regulatory agreements start out as deep disappointments to the NGOs that lobbied for them. Over time, however, the disaster dynamic infuses real content and clout into what start out as vague and platitudinous principles. Figure 1 shows the change process we describe in *Global Business Regulation*.

There are many actors in global webs of regulatory controls: states, insurers, international organizations, professions, industry self-regulation schemes, global law firms, credit ratings agencies and NGOs, among others. The NGO that wants to ratchet up regulation cannot accomplish that acting alone. It needs to learn how to work the web of controls. We find that weak actors in the world system (e.g. NGOs) can often enrol strong players (e.g. the medical profession, reforming states) by appealing to a shared identity of responsible citizenship. However, they can also enrol powerful organizations to their campaigns, as we will see in the next section, by appealing to their economic interests.

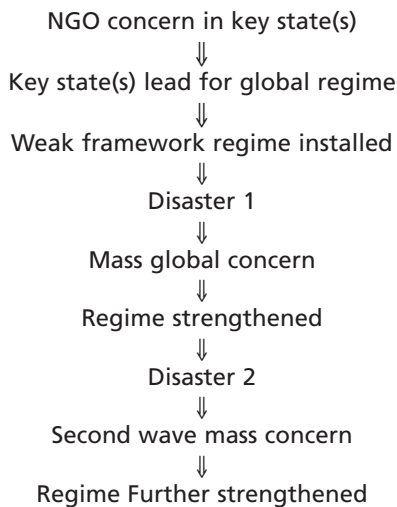


Figure 1. Model of a globalization dynamic for regulatory regimes

Exploiting strategic trade thinking to divide and conquer business

The social movement against the slave trade was an instance of the success of this strategy (see Chapter 11 of *Global Business Regulation*). Once the social movement had succeeded in getting Britain out of the slave trade, the British state prosecuted a strategic trade interest in coercing other states from supplying slave labour to compete with the Empire's plantation economy. Our most instructive case study was ozone diplomacy. The strategic trade game involved getting the US state to pass legislation that favoured US manufacturers of CFC substitutes. The key victory of the environment movement was in 1977 when an ozone Amendment was passed to the US Clean Air Act. The reason the US moved on CFCs so many years before the rest of the world was that business opposition was divided. The biggest player, DuPont, was ready to make large profits out of cornering the market for CFC substitutes. Once the Reagan administration got over its early hangups about environmental deregulation, green NGOs globally had the US state and US business as allies in a campaign to convert the European Community and then the rest of the world to what became in 1987 the Montreal Protocol.

As a more general claim about the way we have found the world system to work, a coalition of NGOs can almost never defeat a coalition of the US, the EC and US and European business. But a coalition of NGOs strong enough to capture the world's media, supported by US business and the US President, can roll European business and the EC. Given that a consensus of North America and the EC on business regulation almost always leads to global implementation of the consensus, the key move is to float reform models on whichever side of the Atlantic is likely to grasp the strategic trade advantage. Just as an alliance of a unified social movement and American business can defeat European business, so our research shows an alliance of a social movement and European business can defeat American business.

Harnessing the management philosophy of continuous improvement

A standard view among health, consumer and environmental activists is that voluntary standards are toothless and therefore unimportant. First, they are not toothless because they are taken up from time to time in tort cases against business (and business worries more about tort litigation than criminal prosecutions). Second, toothlessness misses the point that compliance globalizes more through webs of dialogue than through webs of coercion, more through modelling than by legal enforcement. Third, we found it is more common for globalization of law (with teeth) to follow globalization of a new standard of business practice than for globalization of a new standard of business practice to follow after a new law demands it. The lead firm that pulls standards up is the more important upward dynamic than the (largely unenforceable) minimum standard to push up the laggards.

Hence, the premise of this NGO strategy is that working directly with business to change their practices matters. It can matter enormously if we can not only persuade an innovator to lead the pack but also persuade the pack that continuous improvement is a good thing (so they need to catch up with the leader).

US business certainly thinks it matters when we note the gigantic effort it mobilized (with partial success) to oppose translation into the ISO 14000 standards the continuous improvement philosophy of the European ECO Management Standard (EMAS). Voluntary standards in the ISO 9000 tradition institutionalize the managerial principle of continuous improvement, the idea that product quality, workplace safety, or privacy should have superior measurable outcomes this year than last year and better outcomes again next year and every subsequent year. Much of the extraordinary power of ISO 9000 in global business arose from the fact that it gave some assurance to large purchasers (like major corporations or defence departments) to instruct their purchasing divisions only to buy from firms who could guarantee quality through an independent ISO 9000 certification. To the extent

that management practice, global voluntary standards, governmental standards and intergovernmental agreements explicitly incorporate the principle of continuous improvement, the global system structurally induces upward rather than downward movement in the global norm.

Linking Porter's competitive advantage of nations analysis to BAT and BAP

Michael Porter's influential book, *The Competitive Advantage of Nations*, argues that it is not necessarily good business for firms to locate where regulatory costs are lowest. On the contrary, he concludes the following advice from a considerable amount of empirical analysis of what makes firms internationally competitive:

Establish norms exceeding the toughest regulatory hurdles or product standards. . . . Find the localities whose regulations foreshadow those elsewhere. Firms with the skills to produce such products will have an important lever to enter foreign markets, and can often accelerate the process by which foreign regulations are toughened.

Global Business Regulation summarizes the considerable evidence that location in states with tougher environmental standards does confer a long-run competitive advantage. Of greater interest to NGO activists is that firms that have upgraded their standards early because they are located in a state that is an early mover to higher standards have an interest in making Porter's prediction come true. They will not get the predicted early mover advantage unless other states follow the lead of their home state. So the NGO analysis is to model monger among nations that might be attracted to their reformist regulatory model until they find one so convinced of the attractions of the model that they and their firms believe they may get a strategic trade advantage through being first to require it. Then it is to work with those firms to help them reap that strategic trade advantage by lobbying together for a global standard.

The best way for a globalized NGO to reap a strategic trade advantage for the most innovative firms in a state that collaborates with a Porteresque competitiveness strategy would be to link the strategy to

a Best Available Technology or Best Available Practice form of standard in the German tradition. In Chapter 12 of *Global Business Regulation* we point out that the Germans have a very different way of thinking about BAT than the Americans (for whom BAT means forcing of a specific technology in a way that stultifies technological innovation). The German approach to BAT does the reverse by refusing to mandate any specific technology. It fosters innovation by using the BAT to set an outcome standard that the BAT, but not inferior technologies, can meet, and then challenging German industry to come up with a cheaper or better technology for achieving this outcome. When a better technology is invented in another country, German industry is given time to either come up with a more cost-effective technology for matching or beating the outcome it can deliver or to buy that technology. Usually, German innovation being what it is, they can manage the former rather than be foisted with someone else's technology. Moreover, German clout being what it is, it has been able to convince Europe and much of the rest of the world to adopt their approach to BAT in environmental regulation.

To the extent that other countries take this approach to BAT seriously, rather than just pay lip service to it, we have a powerful strategy for ratcheting standards up but never down. Whenever any one of the BAT countries invents a better way of achieving a regulatory outcome, a competition is triggered among the BAT countries to outperform this technology or buy it from the innovator. The same argument applies to Best Available Practice (BAP).

Note now the connections among our first three strategies. Strategic trade divides and conquers by enticing some global business actors into supporting hurdles that others will find difficult to jump. Continuous improvement is the business philosophy which can be used to persuade the rest of the pack to attempt the jump. The more strategic trade and continuous improvement are used, the more it makes sense for business actors to build competitive advantage (or regain competitive advantage lost to strategic trade manoeuvrings) by searching out higher standards of regulation. That is, more upward momentum means more incentive to race

ahead of the pack even faster. To the extent this happens, the more true Porter's predictions become and the more benefit a state like Germany can gain from a German-style approach to BAT or BAP. For some kinds of problems, ratcheting up standards achieves little without ratcheting up enforcement, which takes us to the next strategy.

Targeting enforcement on 'gatekeepers' within a web of controls – actors with limited self-interest in rule-breaking, but on whom rule-breakers are dependent

Our strategy was well illustrated here by Ronald Mitchell's (1994: 425–58) work on the prevention of oil spills at sea. Treaty obligations on states to prosecute ships that spilled oil were utterly ineffective. What worked was shifting the enforcement target from the ships which benefited from the pollution to builders, insurers and classification societies which did not. Insurers would not insure ships that were not classified, classification societies would not classify ships without segregated ballast tanks and crude oil washing to prevent oil spills, and builders would not be silly enough to build ships which could not be classified or insured. So 98 percent compliance globally was obtained with International Maritime Organization requirements to install technologies which dramatically reduced oil discharges at sea. The feature of interest in this success story is that enforcement targeting was shifted from ships which had an economic interest in cheating to builders, classification societies and insurers who, if they had any interest, it was in more expensive ships. So compliance was improved by shifting enforcement onto gatekeepers on whom principals were dependent but who had a limited interest in rule-breaking. Where mighty states could not succeed in reducing oil spills at sea, Lloyd's of London could.

Conclusion

Mostly, of course, the weak do not prevail over the strong in the world system. Profit prevails over health. Inequality widens. Yet we have attempted

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to show that there is no inevitability about this. We can come to an understanding of the ju-jitsu by which the weak use the strength of the strong against themselves.

Health NGOs can engage with webs of regu-

lation to ratchet up global standards. Each strand in global webs of regulation may be weak, but when NGOs learn to pull the right strand at the right moment they can tighten the knots that bind them into a wider fabric of social action.

References

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