

What are Private International Regimes and What are Their Global Governance Functions?

Written by anon

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Identifying and analysing private international regimes requires first accepting the reality that authority exists outside public actors in the international system. Dissolving the private/public distinction that has dominated international relations is a necessary precondition for understanding the sources of authority and the ways in which actors acquire governance functions. Private international regimes are not concrete objects that can be defined and identified easily since their authority is more subjective and their power derives almost always from intersubjective understandings or contracts. Cutler (2002) argues there is no single authoritative criterion or threshold to prove the existence of an international private regime. She instead defines a private international regime as an integrated complex of formal and informal institution that is a source for governance in an economic issue area as a whole. In this essay, I will first flesh out Cutler's definition of private international regimes and then argue the governance functions they create for themselves revolve around regulation and the provision of public goods.

I. Defining Governance and Getting Specific about Private International Regimes

As it became an academic buzzword, multiple definitions of governance have been coined and many different types of global governance 'functions' put forward, making the term increasingly woolly and less meaningful. At its conceptual core, governance concerns how groups manage their common affairs, and usually entails an authority relationship between those who govern and those who are subject to that governance (Cutler, Porter, Haufler, Kahler, and Lake). Waves of research on governance have focused on different authority relationships: first on private actors as intermediaries between states and policy outcomes, then on public-private partnerships, and most recently on private rules and norms (Pattberg 2006). Each wave of research expanded the concepts of global governance by applying them to new areas, but the downsides of this conceptual stretching was occasional misapplication and a less rigorous analytical framework. In this essay, global governance functions will be specifically defined and applied exclusively to the services and leadership provided by private international regimes. Even in the context of international regimes, governance as both an idea and in practice is politically contested, and non-state actors are thought to 'govern' only when they act in an issue area that many people believe is the responsibility of the state (Haufler 2003). For the governance provided by private international regimes to be 'effective' requires legitimacy, accountability, capacity, and enforcement (Detomasi 2007). As later sections in this essay will illustrate, private international regimes often come up short on at least one of these criteria of effective governance.

The governance provided by private international regimes is different from mere cooperation between private actors because a private international regime by definition requires recognition of the long term legitimacy of the governance system. Private international regimes are differentiated from other forms of private governance by their capacity to authoritatively create and provide guidance and governance in a way that is stable over time and place. There are three basic constitutive elements of private governance: it centers on rules and regulation, it contains processes of institutionalization beyond cooperation, and it potentially organizes political spaces equivalent to public steering mechanisms (Pattberg 2003). Private international regimes contain all these elements and are the most institutionally developed form of private international authority (Cutler 2002). Private international regimes also fulfil Krasner's foundational definition for regime theory and are sets of implicit or explicit principles, norms, rules, and

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decision-making procedures around which actor's expectations converge in a given issue area. In practice, a private international regime is a complex, highly-institutionalized form of interfirm cooperation that is usually well-coordinated with the relevant state or states. Private international regimes exist where public international regimes do not because the states or public organizations lack adequate expertise, technical capacity, economic resources, or internal control for good governance. For example, private international regimes have been successful in internet regulation and the insurance industry; two issue areas where public governments are unable to provide meaningful and beneficial governance. Although they can be effective, private governance organizations usually lack legitimacy, experience or knowledge in governance, compelling collective action mechanisms, and the motivation for broad governance. For instance, the power of international debt ratings agencies like Moody's or Standard and Poor's is increasingly questioned and will potentially be curtailed in the future by a major national government or a global public organization. In general, private international regimes are highly institutionalized, sophisticated, and capable of providing governance but are also limited in their power and legitimacy.

II. Functions of Private International Regimes

Just as public international regimes create a framework for acceptable behavior and provide public goods, private international regimes fulfil those functions in the absence of government and in the case of failed intergovernmental institutions. Specifically, Börzel and Risse (2005) separated transnational regime governance into three functions: setting standards, enforcing rules, and providing services. The first two functions are designed to provide regulation and the third is designed to ensure the provision of public goods.

The most popular governance function of most private international regimes is the setting of standards and rules. Many different types of private organizations are involved and standards governance has evolved in a three stage process from internationalization to privatization to joint standards governance. Over the last ten years, private standards development organizations (SDOs) have the dominant private forums for coordinating choice among firms (Mattli 2003). However, the structure of an international SDO can vary from rulemaking dominated by national representatives at international conferences to one where standards are developed by an international bureaucracy and then national and local bodies are given significant flexibility in implementation. The International Organization for Standardization or ISO is an example of the former and is a confederation of national standards associations with decisions dominated by industry representatives. The structure of the Forest Stewardship Council or FSC is much closer to the latter, and the organization provides governance almost exclusively through rule-setting by its international secretariat. Although its prime function is to develop and implement detailed rules for sustainable forest management, its local chapters have meaningful independence. FSC rule-setting takes the form of certification, suggesting standards to national or regional authorities, and producing chain-of-custody standards (Pattberg 2006). Since the FSC and most other private SDOs are responsive to their members, their rule-setting typically engenders less resentment than regulation by states because it is often adapted to the needs of members. Corporations also support voluntary limits or SDO-developed standards in order to benefit from collective goods and decrease the likelihood of national or international regulation and decrease the critical reaction from activists (Haufler 2003). However, private SDOs can generate a critical reaction of their own from activists since their rulemaking is designed to consider the interests of their members first, before considering the interest of the general public. This hierarchy of interests casts doubt on the governance provided by private organizations and can decrease the perceived legitimacy of private international regimes.

The second function of private international regimes, implementing and enforcing rules, also varies widely from organization to organization and can engender legitimacy and motivation concerns. Private international regimes occasionally use national laws or punishment mechanisms, but more often implement and enforce voluntary standards with their own non-coercive mechanisms. For example, companies adopt the ISO 14000 voluntarily and then outside auditors review and certify companies (Haufler 2003). If a company fails to comply, there is no negative consequence that signifies enforcement of the rules, just a lack of certification or public positive reinforcement for compliance. The lack of meaningful punishment mechanisms is a key reason why most private international regimes are perceived to lack legitimacy or real 'teeth' in the eyes of activists; members generally lack the motivation to design mechanisms that can really sanction other members or themselves in the future. Members are, however, motivated to avoid more serious regulation from public authorities or serious damage to their reputation from

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transnational activists; the pressure from activists, concerned shareholders, and host governments all helped corporate self-regulatory strategies evolve during the last ten years. Self-regulatory strategies make sense since corporations are eager to fend off regulatory and reputation threats, but the extent to which corporate self-interest can create meaningful regulation and good governance is still deemed questionable by many analysts and activists. Self-regulation, although an important component of many private international regimes, encompasses so many different strategies that it cannot be endorsed or criticized as a single concept. Self-regulatory strategies include single-firm corporate governance, industry self-regulation, multi-stakeholder partnerships to address NGO concerns, and co-regulation with government input. All of these strategies generate different collective action or motivation problems and each leads to a different type of implementation and level of enforcement. The implementation and enforcement of rules is a crucial global governance function of any private international regime, and as Reinicke (1998) suggests, deserves more monitoring and coordination with public regulation. Mugge (2006) argues that whether regulation is located in the public or private sphere depends on the nature of the competition in the industry; when there is uncertainty about regulation, corporate actors are able to shape the situation to their advantage. Only when markets are unstable and companies engaged in serious struggle with one another will public transnational regulatory regimes dominate. Rule setting and rule enforcement are important global governance functions of private international regimes but the motivation of each actor and the effectiveness of each action should be critically examined because the governance provided cannot be presumed to be legitimate.

Service provision is another global governance function of private international regimes that requires coordination with public authorities. Service provision can be considered delegated responsibility from states, either because states don't have the capacity to deliver the goods or services or because private actors are considered more efficient at delivering them. Private organizations can often emerge in a given issue area before states are knowledgeable enough to take action in a given field. This pattern of early private international regime emergence has been particularly pronounced in areas that require high technical capabilities, like internet regulation. Other areas of service provision where private governance has become dominant are in fields where the state does not want to suffer bad publicity or could not engage without controversy. These regimes can take the form of private-public partnerships or private regimes under the aegis of an international organization, since areas like weapons production or limitation or responding to humanitarian emergencies often require some input from states or public bodies. Depending on the timing and degree of state involvement in the service provision regime, the governance structure may not be defined as private international regime Börzel and Risse (2005) challenge the common conceptualization of public-private partnerships as a sophisticated form of private governance and highlight the difference between public-private partnerships and 'private self-regulation in the shadow of hierarchy' as the strictly ex post involvement of public actors in private international regimes. The involvement of public actors can increase the legitimacy of a governance regime and potentially capacity of a regime but public involvement in service provision or regulation makes the regime into a global public policy network, not a private international regime (Detomasi 2007).

International private regimes have developed into global authorities in a wide variety of issue areas, and are entering into non-hierarchical partnerships with states. Although private governance is a contested concept, it is widely recognized as an important way to manage globalized and transnational operations. Even before widespread public or theoretical recognition, private international regimes proved they had the capacity to make rules, enforce rules, and provide services. The ability and authority of private networks to create and enforce a framework of acceptable behavior for members is the key to the definition and also to the global governance functions of international private regimes. However, in order for private international regimes to continue to grow and fulfil their growing global governance obligations, they must be recognized as legitimate actors in governance, which requires critical scrutiny and more democratic oversight.

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