Introduction—International Regulatory Harmonization

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Because we live in a world of national laws and international business activity, the regulation of a single transaction can be affected by several different legal regimes. Within domestic systems, even if sub-units such as the states of the United States exist, there is a central government authority that can regulate such transactions.[1] In the international arena, the problems are more difficult. There is no supranational authority able to impose international standards; attempts at harmonization must overcome greater differences in culture and legal tradition; and national lawmakers are often resistant to any form of international rulemaking. How, then, should international cooperation proceed? There is no simple answer to this question. Different legal issues require different solutions, and even within a single issue there is often strong disagreement about how to proceed.

Nevertheless, the business of international cooperation must proceed. Business activity crosses national borders, and the law has no choice but to deal with that activity. Even if there is no international cooperation or coordination, domestic laws will interact with international activity affecting business decisions and human welfare. Under this laissez-faire system, each jurisdiction proceeds as it wishes, without concern for the policies of other jurisdictions. Without some coordination on choice of law rules, however, a system of this sort will almost always lead to overlapping jurisdictions, conflicting legal regimes, and over-regulation. The existing antitrust law regime fits this description. International transactions are subject to the simultaneous regulation of domestic regulators in many countries,[2] and each national

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1. For example, the US federal government stepped in to provide uniform legal regimes in many areas, including antitrust, bankruptcy, and securities. In other areas, different solutions have been found. The Uniform Commercial Code, for example, represents a successful harmonization of state laws, and the corporate governance regime avoids conflict by allowing firms to select a legal regime by choosing their state of incorporation.

2. See, for example, Stefan Schmitz, *How Dare They? European Merger Control and the European Commission's Blocking of the General Electric/Honeywell Merger*, 23 U Pa J Intl Econ L 325, 364–81 (2002).

regulator operates independently. States could avoid the problem of over-regulation by limiting their jurisdiction to a narrow territorial basis, but this would instead lead to the under-regulation of many activities.[3]

The best way to overcome the problems with these non-cooperative outcomes, however, is difficult to identify—in part because cooperation is difficult to achieve, difficult to enforce and sustain, and at times generates an additional layer of bureaucracy between citizens and decisionmakers.[4] My own view, then, is that we should seek strategies that require as little cooperation as possible while still achieving a reasonably efficient regulatory outcome. In any given area, increasing the degree of cooperation can only be justified on the grounds that it will yield a better outcome.

Starting with a low level of cooperation, note that effective international regulation can at times be achieved through unilateral choice of law rules. The appeal of this approach is that it does not require any explicit cooperation. To work, it must be the case that each state has an incentive to adopt a choice of law rule that is globally desirable.[5] I have argued elsewhere that this is the case in the international bankruptcy context.[6]

If unilateral choice of law rules do not yield an efficient international regulatory regime, states may be able to agree on a better choice of law system through negotiation. The advantage of addressing a problem through a choice of law rule, rather than through a substantive legal rule, is that each state remains free to adopt its preferred substantive law, reducing the conflict among legal systems and, hopefully, making agreement easier to achieve.

If choice of law rules prove insufficient to achieve a desirable international regulatory regime, the next level of cooperation is harmonization. This approach has many challenges to overcome, one of the greatest being the difficulty of reaching an agreement to begin with. Nevertheless, harmonization has promise when applied in a limited way. For example, harmonization seems like a sensible approach (for at least

3. There is under-regulation because territorial jurisdiction imposes the full cost of regulation on local firms, while the beneficiaries of the regulation include not only locals (for example, local consumers in the case of antitrust law), but also foreigners. For a detailed discussion of the impact of choice of law regimes on international regulatory issues, see Andrew T. Guzman, *Choice of Law: New Foundations*, 90 Georgetown L J 883 (2002).

4. See Paul B. Stephan, *The Political Economy of Choice of Law*, 90 Georgetown L J 957 (2002); Paul B. Stephan, *Regulatory Cooperation and Competition: The Search for Virtue*, in George A. Bermann, Matthias Herdegen, and Peter L. Lindseth, eds, *Transatlantic Regulatory Co-Operation: Legal Problems and Political Prospects* 167 (Oxford 2000).

5. It is enough if each state bears the full cost of its deviation from the globally preferred policy. Though public choice issues may nevertheless prevent the state from governing optimally, it is appropriate to leave that problem to domestic policies and politics.

6. See Lucian Arye Bebchuk and Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J L & Econ 775 (1999); Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 Mich L Rev 2177 (2000).

some groups of countries) to problems such as environmental issues and health and safety matters.[7]

If all else fails, supranational regulation represents the most intense and difficult form of cooperation. One example of this form of cooperation is the Agreement on Trade-Related Aspects of Intellectual Property ("TRIPS"), within the WTO, which establishes minimum standards for intellectual property protection. I have argued that this form of regulation is also needed for global competition policy.[8]

As we move to higher levels of cooperation, we gain the ability to solve more difficult problems, much like moving from the state to the federal level within the United States provides for more effective regulation in many areas. As cooperation increases, however, so do the problems of agency, accountability, and transparency. So, as cooperation is increased we must consider whether the benefits from that cooperation are worth the costs. For example, WTO obligations constrain the way in which member states impose health and safety requirements on imported foods.[9] In exchange for a limited surrender of national control over health and safety measures, member states reduce the risk of those measures being used for protectionist purposes. There may be debate on the question of whether this particular trade-off was wise, but it is clear that the potential for similar trade-offs arises constantly as international cooperation proceeds. Each must be evaluated carefully if the legal system is to adapt itself to the international reality that is already here.

The *Chicago Journal of International Law* has chosen to dedicate this symposium to the difficult question of how to manage international cooperation and harmonization. The papers presented address a broad range of issues and demonstrate the variety of questions and challenges facing the international legal system.

Frederick Tung offers a look at the regulatory competition and cooperation literature from a public choice perspective.[10] Even a regime of pure regulatory competition requires some cooperation among participating states in the form of a choice of law clause to allocate jurisdiction in a sensible manner. Noting this requirement, Tung compares regimes based on regulatory competition, in which firms are free to choose the regime that applies to them, with a second system—termed "passport" arrangements, in which a firm's home country regime applies, and is

7. Harmonization has already been adopted in several areas, including, for example, the Harmonized System of Tariff Nomenclature developed by the World Customs Organization, the practice of driving on the right side of the road, and the common use of symbols to represent traffic information, poison, and radiation.

8. See Andrew T. Guzman, *Is International Antitrust Possible?*, 73 NYU L Rev 1501 (1998).

9. See Agreement on the Application of Sanitary and Phytosanitary Measures, WTO Doc No LT/UR/A-1A/12 (1994).

10. Frederick Tung, *Passports, Private Choice, and Private Interests: Regulatory Competition and Cooperation in Corporate, Securities, and Bankruptcy Law*, 3 Chi J Intl L 369 (2002).

recognized as sufficient for activity in other states. Tung is sympathetic to the normative claims made in favor of choice regimes,[11] but believes the realities of the international political economy prevent true choice regimes from flourishing. Regulators find passport regimes more palatable, he argues, explaining both why these systems are more common and why the growth in their popularity is likely to continue.

Daniel Shaviro writes on cross-border tax arbitrage.[12] Though taxation is one of the more successful international attempts at cooperation in the private law sphere, it is often omitted from general debates on harmonization. Whether this is because the technical nature of the field discourages non-experts from commenting or for some other reason, it is an unfortunate reality. There are few enough examples of deep international cooperation and coordination that we should strive to learn all that we can from each of them, including tax. Presented in the context of firm efforts to take advantage of inconsistencies between domestic tax rules,[13] Shaviro's piece points out that normative discussions of harmonization and cooperation must focus on both national and worldwide welfare considerations. In the context of cross-border tax arbitrage, Shaviro shows that unilateral action by the United States, though not the best possible outcome, will in some instances be preferable to no action. Though the likely response of other states must be considered, there are instances in which both national and international welfare can be increased through unilateral policy changes.[14] As with all international regulatory concerns, if national welfare maximization coincides with international welfare maximization, there is great potential for progress.

Paul B. Stephan adds a pessimistic note to the collection of papers in this symposium.[15] His specific focus is the adjudicative process necessary for any unification project. This list of potential adjudicative bodies includes national courts, private arbitrators, and arbitration through an international organization. Stephan

11. See id at 388 ("direct competition may be a more effective way to spur competition among regulators"). For a sample of choice proposals, see Stephen J. Choi and Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 Nw J Intl L & Bus 207, 231–33 (1996) (introducing the idea of portable reciprocity); Stephen J. Choi and Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S Cal L Rev 903 (1998) (developing the case for portable reciprocity); Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 Yale L J 2359 (1998) (advancing a choice-based proposal focusing on US states); Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 Mich J Intl L 1 (1997) (proposing a choice regime for international bankruptcy).

12. Daniel Shaviro, *Money on the Table?: Responding to Cross-Border Tax Arbitrage*, 3 Chi J Intl L 317 (2002).

13. See id at 319–21.

14. "[O]pportunities to free-ride on other countries' willingness to offer deductions ... may often be worth exploiting, on the ground that they are likely to combine doing well with doing good." Id at 329.

15. Paul B. Stephan, *Courts, Tribunals, and Legal Unification—The Agency Problem*, 3 Chi J Intl L 333 (2002).

points out that every available adjudicatory strategy has drawbacks. National courts may have the advantage of being established, respected (at least in some countries), and well-organized, but they are poorly placed to provide uniform decisions and interpretations of international agreements. The same is true of private arbitrations, which are often secret and which rely on the consent of the parties to a contract, preventing them from serving as a unification mechanism for nonconsensual transactions. On the other hand, the use of a single adjudicatory body—as done, for example, at the WTO—creates an agency problem. To ensure the loyalty of adjudicators as agents, governments can monitor them closely and cabin their authority. This, however, undermines the flexibility of the relevant agreement. Alternatively, states can give adjudicators relatively wide discretion, but this involves a delegation of sovereignty that national governments consent to only if they can control the adjudicators through short tenures and control over reappointment. Ultimately, Stephan argues, the agency problem between nation states and adjudicators frustrates harmonization efforts. States will not consent to binding interpretations of international agreements without significant control over the adjudicators, yet this control undermines the cooperative outcome sought through harmonization.

Diane P. Wood takes a more optimistic tone than Stephan, but also calls for restraint in the pursuit of harmonization, at least with respect to antitrust laws.[16] She points out that although many countries have some sort of competition law, there is no consensus regarding the content or even the purpose of these laws. When we talk of competition law, then, we are really talking about quite a diverse set of legal regimes. These differences, argues Wood, generate costs that make it worth pursuing some form of harmonization. That said, she cautions that efforts toward harmonization must be tempered with the knowledge that different countries are differently situated and, therefore, have different needs. For these and other reasons, Wood suggests a form of "soft" harmonization, based on persuasion, discussion, and study. Ultimately, she believes the power of the economic model that underlies American and European competition law will capture the minds of decisionmakers in other countries, and a form of harmonization will take place as an increasing number of states use that model to create their own competition laws.

Stephen Choi and Kon Sik Kim present an application of some of the harmonization and cooperation problems that are discussed in this symposium—the question of how Korea can strengthen and promote its capital markets.[17] Their proposal is an example of how unilateral changes within a state can interact with international markets and foreign regulations. For Korea they propose two primary

16. Diane P. Wood, *International Harmonization of Antitrust Law: The Tortoise or the Hare?*, 3 Chi J Intl L 391 (2002).

17. Stephen J. Choi and Kon Sik Kim, *Establishing a New Stock Market for Shareholder Value Oriented Firms in Korea*, 3 Chi J Intl L 277 (2002).

reforms: (1) limiting the opportunity to opt into a new section of the Korean Stock Exchange to those firms that satisfy global corporate governance standards and (2) giving firms the opportunity to opt out of Korean regulation entirely and instead to meet the requirements of a foreign regime. The latter solution would give firms and shareholders the ability to choose the level of regulation that suits their firms' needs.

Erin Ann O'Hara's article looks at forum-selection clauses.[18] In recent years, the federal courts of the United States have dramatically increased the range of instances in which they will enforce forum-selection clauses, whether those clauses select arbitration or a foreign forum. O'Hara points out that this judicial liberalization may soon be reined in and reversed by Congress.[19] To explain the proposed legislation, she argues that some forum-selection clauses are what she terms "zero-sum provisions." By this she means that one forum is selected over another because one party has a bargaining advantage. Because the forum-selection clause distributes value but does not create it, she argues, a legislative prohibition on the selection of a foreign forum through such clauses forces the local forum to be chosen and ensures that the value at issue goes to the local party in the transaction.

The economic and business worlds embraced globalization some time ago, and the legal world is still playing catch-up. The papers in this symposium illustrate that there remain many important unanswered questions for legal scholars and policymakers to tackle. As we learn more about international regulatory cooperation and harmonization, we can improve the legal landscape against which international activity takes place, promoting human welfare both at home and abroad.

18. Erin Ann O'Hara, *The Jurisprudence and Politics of Forum-Selection Clauses*, 3 Chi J Intl L 301 (2002).

19. Id at 302.