

ROLES OF IOS AND NGOS IN INTERNATIONAL LAW

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Introduction

In a continuing series of articles, the author has been working around the central theme of the recent rapid development of a new set of international laws applicable to the emerging unified global business system. The old independent and sovereign national law systems that we have had with us for several centuries now are failing to deal effectively with the growing volume of international private legal disputes. Trying to reconcile the disparate legal viewpoints of two or more nations to the facts of a single case through the complicated system of "conflict of laws" doctrines is no longer adequate. The added liability exposure of being subjected to costly, cumbersome litigation in a likely unfriendly foreign court, where you can't know what law will apply, would surely make the total risk exposure of a contemplated business deal too great and, hence, better avoided. To facilitate the growing volume of international trade, the new multinational enterprises need to be able to rely on known legal principles in order to properly evaluate their risk in any given business transaction. These legal principles must provide businessmen with ascertainable and certain legal rights and responsibilities, which are best guaranteed by the new regime of concrete uniform international (business) laws that have universal application.

Looking then to the development processes of these new uniform international laws, it should prove profitable to become aware of the roles played by international organizations and non-government organization in their development. It will be found that the greater portion of the written and published laws and rules governing international trade today come from these sources. International businessmen are exerting their influence through this very effective medium of development perhaps more effectively than through direct, private means such as their membership in the International Chamber of Commerce. The organizations described below are more indirect in that they are subject to the control and directions of national governments, yet the businessmen of the world strongly influence their respective governments in regard to the selection of and the instructions to their nations' representatives in those organizations.

Differentiating IOs from NGOs

At the outset, it is necessary to understand clearly what kind of organizations are to be included for purposes of the discussion that will follow. There are literally thousands of organization already in existence around the world today which have a membership and agenda devoted to solving one or more of the world's woes. The origin, structure, claimed jurisdiction and operations of each will greatly vary among that mass grouping, and the number is growing all the time. While it may be argued that all have some influence, it will be necessary to limit our scope of coverage to those that are truly international in nature and which are dedicated to the development of and enactment of international business or trade laws. We need to begin by looking at the difference between an "international organization" and a "non-government organization". The traditional distinction between them was that the former was established by inter-governmental agreements and the latter by way of association of individuals (Charnovitz at page 348), but there is a bit more to it than that.

International Organizations (IO):

It seems best to adopt the definition given by Jose E. Alvarez, who cites the name "international organization" as a word of art to including those "intergovernmental entities established by treaty, usually composed of permanent secretariats, plenary assemblies involving all member states, and executive organs with more limited participation." (Alvarez at pg 324) That is to say these are universally recognized organizations that have been given a formal existence (as a legal entity), endowed with a structure (for operational and administrative purposes), and given a mandate by authority of an international treaty (empowered with legislative ability). A key feature of this type of organization is the ability to promulgate laws, rules or regulations that can be enforced internationally according to the provisions of the enabling treaty. In this respect an IO has quasi-governmental powers. While all IOs trace their roots of their powers and jurisdiction to a treaty, some are directly created by such treaty, but many others get such powers and jurisdiction from treaty indirectly in that they are derivatively created by a superior IO which was granted such creative power by the treaty.

The prime example of an IO directly formed by treaty would be the United Nations, which was formed and empowered by treaty of the member nations in San Francisco in 1945 and propagated and expanded to the present. Others recognizable examples of IOs established directly by treaty would be the International Labor Organization (ILO), the International Monetary Fund, the World Bank, and the World Trade Organization (WTO)

to name just a few. The founding treaties typically establish an organizational structure, give the limits of its jurisdiction, and grant it the powers necessary to carry out its mandate, all of which are specifically itemized in the treaty document. Among the powers granted may be authorization to create other and further subsidiary organizations that are necessary to administer operations within more limited mandates.

These subsidiary organizations may become IOs in their own right (and within the above definition) if they are granted the requisite structure and powers. Again we turn to the United Nations for prime examples, for there are a profusion of UN organs and agencies, such as UNESCO, WHO, UNCTAD, and UNICTRAL, which are now independent IOs in their own right. Each has been granted powers, jurisdiction and prerogatives within a specialized area of the UN's over-all mandate, which it performs on behalf of (and reports to) the UN General Assembly. It has been reported that of the "nearly 300 IOs, a substantial proportion of new IOs today are created not by governments but by other IOs." (Alvarez at pg 325, footnote 9)

Non-Governmental Organization (NGO):

While the scope and jurisdiction of this classification will vary greatly, generally we are looking at "groups of persons or of societies, freely created by private initiative, that pursue an interest in matters that cross or transcend national borders and are not profit seeking." (Charnovitz at page 350) "Groups" in this definition are spontaneous, free associations (perhaps starting in the simple character of clubs) of persons sharing a special interest who have banded together to fight a common problem or pursue a common social goal. Until recently, this type of organization would not have legal status and simply remain an unincorporated association for the benefit of its members unless it chose to take on legal entity status as a charitable foundation or non-profit corporation where national law allowed. The trend recently is to provide for special incorporated status as an NGO under new national and local laws which many countries have adopted to encourage this type of activity. However, it still remains the key features of this type of organization are that its mandate comes from its own membership and that it has no quasi-governmental powers. These last features are what distinguish the NGOs from the IOs.

Typically a NGO will start within a country at a local level as a group of individuals seeking to influence local or national government to cure a domestic problem. The organization then will expand to affiliates into other countries to accomplish the same

purpose in those other countries. Then the next step will be to form international alliance to unify the movement for accomplishment of the common purpose world-wide. For purposes of discussion on international law in this paper, it is necessary to limit the class of these NGOs to those that have achieved this international character and are not confined to operations in one nation and are not an organ or agency of local or national government.

To get a better idea of what this definition means, perhaps a look at the development of the Sierra Club might be helpful. That group started in the late 1800s as group of private persons who were enraptured by the natural beauty of Yosemite Park and organized themselves as a club. Members of the club developed concern in the early 20th Century about the uncontrolled development that was devastating the wildlife and nature wilderness areas in the Sierra Mountain range in California, particularly concerned about the cutting of irreplaceable thousand-year-old native redwood trees. Although they chartered themselves as a non-profit corporation under California law for taxation avoidance purposes, this group was certainly not government sponsored. Another benefit of formal incorporation was to gain legal entity status, which allowed them to make contracts and file lawsuits in the corporate name. They were joined by other concerned groups around the state and eventually spread to a nation-wide network combating environmental pollution problems in all areas. Its success encouraged similarly concerned persons in other countries and the organization continued to grow into an international affiliated group which can challenge a broad range of environmental issues on a global scale.

Areas of Effective Operation

IOs:

In many ways the IOs have a premiere role to be creative in formulation of new international laws. These international organizations enjoy legal personality since they are chartered in nature, either by sovereign national governments by way of an international treaty or by a parent organization that has been vested with charter-granting powers (such as the United Nations). This legal status is founded in treaty which usually has a specific purpose of curing some international problem (such as the WTO). Such a treaty is contractual in nature and the signatory nations themselves become bound (as contracting parties) to honoring any statutory laws that grow out of actions of the created IO.

A significant result of this contractual relationship is that each party appoints its own representative to the IO's policy making assembly, its administrative board, and its functional committees. A nation's representatives are often from among the more experienced and better trained of its professionals and academicians, readily equipped to deal with the topics related to the problem to be solved. The result here is to generally have a higher quality of resources which tend to provide effective results from the IO's activities.

All of these the IOs are subject to the collective control of the contracting states of the treaty. It further defines the characteristics of IOs that they ultimately report to governments, and they must rely on national governments acting cooperatively to enforce the rules, regulations or laws that they produce. The representatives of the constituent members are appointed from each government and necessarily espouse the viewpoint of their home government. There is built-in conflict between the national interests of members from various national blocks and among non-friendly member states. Since most follow majority rule in decision-making, the resolutions that emerge often reflect the wishes of the stronger national members. This is not to say that such conflict is bad per se, because in a climate of conflict resolution requires compromise, and often such compromise will have to be made by better argued and reasoned deliberations, resulting in a solution of likely higher quality.

The international law-making ability of an IO will be determined by its treaty of creation. The terms of the treaty typically set the policy for the attack on and the direction of the cure of the problem which inspired the IO's founding. It will set up the framework of the organization that will have the task force to carry out the policy. This is essentially enabling legislation to set up an administrative framework under a secretariat for management. Subsequently the bureaucratic framework will be established to service the committees that will prepare drafts of legislation for each significant aspect of the cure envisioned. Each committee will then organize itself to gather the information and data on the problems, to conduct needed research into possible solutions, and to analyze and refined all the gathered data. From this it will make its proposals for remedies and report back up the line to the assembly for approval and formulation of the final form of legislation. Once the final versions are approved by the IO's constituent assembly, it may need to send it for further approval to a superior IO, depending on the treaty authorization.

Beyond promulgating new law, IOs also perform a significant function in monitoring compliance with the rules or laws once they are properly enacted and published. Usually the secretariat of the IO will staff inspectors to travel around and note the degrees of compliance and to pick up on any irregularities or violations. Also the IO will have regular data collection programs that will provide the tracking of trends and expose the irregularities more readily. Published reports help to keep the public aware of individual responsibilities and warnings for potential problems. The IO offices provide convenient places for lodging of complaints and requests for special help, all of which give vital feedback for needed changes in the system. As is discussed further below, NGOs provide the IOs with considerable input through these offices and are among the major supporters of IO activities.

In any event, recognition and compliance in the global business community are mainly encouraged by courtesy and convenience, since the IO has no police power (nor is there any such international police power) to compel compliance. Police type enforcement must come from the national government that has jurisdiction over the violator. Likewise there are no international courts that have jurisdiction over affairs of private persons (either criminal or civil), and if resort to litigation might avail some allowable remedy, that must be pursued in a court that will recognize jurisdiction over the issue and can apply the legal issued derived from the IO's legislation.

NGOs:

Possessing no quasi-governmental powers, NGOs have no direct role in the legislation of international law. They have no international legal personality because the laws that grant them any status as a legal entity are national in nature, even those of the new NGO laws. Since the name "non-governmental" indicates that they have no part of government, NGOs have to rely on their membership for support and direction. In this respect they are the closest thing to "grassroots" that we can get in international organizations. But this is a vital source of strength for NGOs that provides them with their greatest asset-influence. NGOs may not be able to directly formulate the new laws, but that have no match or equal in the pressures that they can assert on the way those new laws will be developed. NGOs educate their members and the public on issues, masses of people influence governments, governments give instructions to their representatives, and those representatives sit as members in the assemblies and committees of the IOs. This is the chain of influence that NGOs effectively use to get the new international laws headed in the direction that they want.

The IOs are well aware of the symbiotic relationship that NGOs can play in their own operations and to help meet their agenda. The NGO's role is not to be disparage nor is it unwelcome. The NGO itself provides a very valuable source of data and information that the IO cannot otherwise get to. Again the grassroots contacts provide hands-on experiential reports, identification of problem areas, suggestions for remedies and a wealth of other information that makes the work of the IO much easier (and certainly less costly). NGOs often provide well researched and argued briefs on significant issues being dealt with by the legislative organs of an IO. While these documents may be biased to the NGO's perspective, they provide invaluable references and guidance to the often understaffed research personnel of the IO.

Nowhere is the symbiotic relationship between IOs and NGOs more evident or more thoroughly used than at the United Nations, our prime IO. Indeed the UN Charter states, "The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence." (UN Charter at Article 71). The UN Economic and Social Council (ESOSOC) has promulgated rules for the recognition and registration of NGOs who have consultative status before it. These rules do not grant any legal status, but acceptance for registration certainly gives a position of prestige and access that is the NGO's stock in trade. It should be also noted here that Article 71 only refers to the ESOSOC, but in fact NGOs are recognized and utilized throughout the network of UN organizations. Consultative status is the entrée to the activities of committees and access to UN officials. NGOs often provide *amicus curiae* to international courts which contain pertinent legal arguments to the complicated cases that come before them.

Future prospects

It would seem then that what we started as being differences between IOs and NGOs are in reality not so much differences as places along a continuum of relationships with common people on one end and the international governmental (diplomatic) structure on the other. If, as was posited in earlier articles, the new international law regime is moving back toward the *Lex Mercatoria* condition of the law being responsive to real, on-the-ground problems of the working people in international trade, then this recognizable symbiotic relationship is encouraging support for such thesis. While the organizational structure of the IOs, who we attribute to be the writers of the new international law legislation, is bureaucratic and cumbersome (as are most governmental agencies), the

democratic and progressive actions of members of NGOs around the world are able to capitalize on such and use it for their own means by the influence that they can bring to bear:

The relationship between IOs and NGOs may be considered quite matured at the present. Indeed news of the success of this relationship has spread world-wide such that there has been a clamor in recent years in many countries to provide legal recognition to NGOs and many laws have been enacted to accommodate this. It would seem that while the number of IOs has about reached its saturation point, the number of NGOs continues to rise. It is recognized that the nearly 300 IOs and about 40 institutionalized international dispute settlers now address virtually every field of human endeavor. (Alvarez at page 325). It seems that there are no statistics on the number of NGOs today, but it is evident that the numbers are in the thousands and still growing. This trend may well slow down at the NGOs find their saturation point, but the interplay of the IOs and NGOs will certainly continue.

For the private law legal practitioner who is interested in influencing the development of international private law, it would seem that the NGO will provide the most effective point of contact. Indeed encouraging the development of NGOs related to international trade law issues is probably the fastest way to get legislation of truly uniform international business law. By promoting programs of awareness among the legal profession and encouraging active participation, the necessary connections to the organs of legislation (mostly the IOs) can be established. It is influence that the grassroots people possess, and they can most effectively assert that by cooperative actions afforded through the NGO.

References

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