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Mechanisms of Transnational Accountability

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Mechanisms of Transnational Accountability

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The absence of world government means there are no central world courts or regulatory agencies where persons or firms causing harm to others can be brought to account. However, there are ways that people in one country suffering harm from actions undertaken by individuals, business firms, or organizations from another can hold the causers of likely or actual harm accountable for their actions. This involves taking advantage of the various regulatory and standards systems that exist around the world. "Regulations" is typically used to describe government-developed rules implemented and enforced through official agencies. "Standards" is typically used to describe privately-developed rules adopted, implemented, and enforced either spontaneously (because it is in the interest of addressees to follow them) or through third-party certification (that is, some entity other than the company making a product or the purchaser buying it monitors production and indicates when production meets the standards).

Using National Legal Systems

The most common form of transnational holding harm causers to account involves use of national legal systems to press criminal charges or secure civil law remedies against someone whose actions caused harm. There are two ways of using national legal systems: resorting to the national law and courts in the country where the harm occurred, and resorting to the national law and courts of the home country of the person or entity that caused the harm. In international law, the term "territorial jurisdiction" is used to denote resort to the law and courts of the country where the harm occurred, and the term "nationality jurisdiction" used to denote resort to the law and courts of the home country of the harm causer. In discussions of multinational corporations or foreign investors, "host state law" refers to the legal system of the country where the business activity is undertaken and "home state law" refers to the legal system of the country where the multinational corporation has its headquarters or the investor is a national. Suing a harm-causer in its home state courts is most obviously a "transnational" remedy since it goes outside the borders of the state where the harm happened, but even local lawsuits have a transnational aspect if the harm causer is from a different country.

Criminal charges are possible only when the action that caused the harm directly violates a law that defines the activity as a crime and imposes criminal penalties. Criminal law differs from one country to another, so an action that is legal in country A may be a crime in country B. For instance, printing or broadcasting

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pictures of people wearing scanty swimwear is legal in France, but not in Saudi Arabia. Even when an act is clearly illegal and defined as a crime, prosecutors may not seek punishment of the person who did it: some crimes are not detected, some are detected but there is insufficient evidence to convict any particular person of the crime, limits on time and resources sometimes lead prosecutors to ignore a lesser crime for which they do have enough evidence to convict someone because they have more important cases to handle, and well-connected people often wiggle out of charges by using their influence. Most countries do not prosecute their own nationals for acts that are legal where done even if they are illegal at home. However, most have laws that permit the government to prosecute nationals for all or some illegal actions they do abroad, and something causing sufficient public scandal at home might induce prosecutors to press charges. Even if an act is illegal both at home and where done, governments prefer that criminal trials be handled in the state where the crime occurred, mainly because local prosecutors can get hold of the relevant evidence more easily.

Civil law, the body of law that allows private persons or entities to sue other private persons or entities that caused them harm, can be applied whether the action producing the harm was legal or not; the focus in civil law is on compensation for the harm. Civil law also differs from country to country; sometimes in the definition of "harm," sometimes in the type or extent of compensation available, and sometimes in the standard of liability to pay compensation. The standard of liability can be the most important difference: the usual standard is negligence – the victim needs to show that the causer of harm was being careless when the harm was caused – but sometimes a law imposes strict liability – meaning the victim of harm needs to show only that the other person caused harm.

Governments generally prefer that private persons take their civil law disputes to the courts of the state where the problem occurred. However, the choice of where to go rests with the private individuals involved. Individuals or firms involved in cross-border business activity often specify in their contracts which country's courts will be used in the event of a dispute. However, those "choice of law" clauses are binding only on those who signed the contract; they do not affect the right of anyone else harmed by the activity to sue where they prefer. This can lead to some maneuvering on both sides. Harm causers sometimes prefer being sued in the courts where the harm occurred; this is particularly likely if the standard of liability is less strict or the standard of compensation is less generous than at home. Harm sufferers may like the standard of liability or the standard of compensation in the harm-causer's home state better, and sometimes succeed in persuading its courts to take the case despite government's preference for using the courts of the country where the harm occurred.

Using National Regulatory Agencies

In some countries regulatory agencies can impose penalties for causing harm without having to take the matter to a court. Such agencies must follow certain procedures, and in almost all countries anyone believing that a regulatory agency acted unfairly can have the agency's action reviewed by a court or a special administrative council.

Many regulatory agencies perform periodic inspections of factories, laboratories, and other workplaces to check for compliance with national regulations. If an inspection detects deficiencies, the owner or manager is expected to correct the deficiencies within a specified period of time. Owners and/or managers may also be fined immediately if the deficiency is serious, or later if they fail to correct the deficiency within the allowed timeframe. In countries with well-staffed regulatory agencies, the inspectors then return to confirm

that the corrections have been made. In countries with small regulatory agencies, inspectors may not come very often and may not follow up effectively. Inspection systems are intended to identify unsafe conditions before harm is caused, but even the world's best-staffed and equipped regulatory agencies cannot prevent all harm. Inspections may not identify every problem, and new problems can arise after an inspection.

Regulatory agencies are even more territorially-oriented than courts; they carry out inspections only in their own country. However, they pay attention to news about major industrial incidents in other countries and may undertake special inspections of the type of workplace involved, particularly if it is owned by the same company or uses similar equipment. Regulatory agencies also learn from one another, and agencies in industrial countries often assist their counterparts in developing countries with training or lending of personnel for short periods.

Using Inter-Government Bodies

Inter-government bodies, whether international organizations or networks of government regulatory agencies, are often used to develop common standards, encourage governments to implement them, and SS governments and developing the administrative capacity needed to implement a war and forced them. Most inter-government bodies are not involved in holding particular individuals to account for their violations of regulations, that is typically left to the regulatory agencies of each member state. In the area of human rights, procedures allowing individuals to complain to an inter-government body about their own government's violations of human rights have emerged in parts of the world. Similar processes do not exist in other areas; the traditional assumption that the government where activity occurs has primary regulatory control over it still prevails.¹ Governments whose nationals are involved in an activity may also extend their regulations to those nationals even when the activity is abroad, but the basic principle of international law on jurisdiction is that jurisdiction asserted on the basis of territory prevails over jurisdiction asserted on the basis of nationality.

Governments are most likely to establish intergovernmental organizations when they face a recurring problem that they cannot solve through unilateral or bilateral action, but need cooperation from a larger number of governments.² Establishing an intergovernmental organization facilitates cooperation among large numbers of governments by establishing common rules for decision-making, common procedures for dealing with misunderstandings or disputes, and a central staff to take care of routine clerical functions plus whatever substantial tasks the member governments decide to delegate. In deciding whether to establish a new intergovernmental organization or to join an existing one, governments consider whether the gains from cooperating with the group will outweigh the costs; these costs take the form of loss of choice as any particular government may find itself outvoted in the organization, and commitments of resources required to maintain the organization as well as to pursue the cooperation. Thus, the gains from cooperation must be significant for a government to join enthusiastically. In certain circumstances, however, a government will join an organization despite lack of enthusiasm because it realizes that the cooperative project is going

¹ Even in the European Union, where individuals can complain to the European Court of Justice about their country's lack of enforcement of an EU rule, the system leaves enforcement to the individual countries rather than to the EU bureaucracy.

² Kenneth Abbott and Duncan Snidal, "Why states act through formal international organizations," *Journal of Conflict Resolution* 42/1: 3-32 (Feb. 1998).

to go ahead and that it will be worse off outside, where it cannot influence the direction of the project, then inside.³ Intergovernmental organizations engage in a variety of activities relevant to transnational accountability.

First, their decision-making bodies provide forums in which member governments can raise issues, express concerns, and engage in "naming and shaming" of those members they regard as particularly laggard in the cooperative effort.

Second, either the Secretariat or a special committee reporting to the primary decision-making body can be charged with receiving reports on activity from member states, reviewing the reports, engaging in dialogue about performance with the member government involved, and, in some organizations, report the matter to the primary decision-making body if dialogue fails to inspire increased effort by the member involved. Such mechanisms are particularly common in intergovernmental organizations addressing environmental problems, but also exist in intergovernmental organizations dealing with other issues.

Third, the organization can facilitate diffusion of best administrative practices and development of administrative capacity among the smaller and poorer members. Such programs might involve the organization's permanent staff, they might involve temporary employees seconded from government service or hired from the private sector, they might involve officials of one member state assisting or training officials from others. Immediately after World War II, UNESCO was central to the development of science policy agencies in member states where close connection between the government and the scientific community was not already an established tradition.⁴ Such efforts may also occur through the mechanism of special committees. The 1985 Vienna Convention for the Preservation of the Ozone Layer established scientific, technical and economic, and environmental impact assessment panels to assist decision-making with expert advice. Atmospheric scientists in the first provide assessments of the physical state of the ozone layer while engineers and others in the second provide a forum for disseminating ideas on decreasing use, substituting non-depleting substances, and other manufacturing and product related questions.⁵

While helpful, an intergovernmental organization is not necessary to transnational regulatory cooperation. Members of government regulatory agencies addressing the same problems or issues can cooperate with each other directly if their political superiors allow them to establish a trans-governmental network. Such networks involve peer-to-peer collaboration rather than formalized decision-making, but if each national agency adopts similar regulations a trans-governmental network can produce as much regulatory harmonization or standardization as decisions in an intergovernmental organization. There is considerable tacit regulatory harmonization and standardization around the world; regulatory agencies in smaller industrial countries or in developing countries, which lack the extensive resources for testing, monitoring field activity, or collating the results of multiple clinical trials, follow the activities of agencies in the major

³ Lloyd Gruber, *Ruling the World: Power Politics and the Rise of Supranational Institutions* (Princeton, NJ: Princeton University Press, 2000).

⁴ Martha Finnemore, "International organizations as teachers of norms: the United Nations Educational, Scientific, and Cultural Organization and science policy," *International Organization* 47/4: 565-597.

⁵ The Technology and Economic Assessment Panel (originally established as separate committees in the 1986 Montreal Protocol on, and merged in 1989) and 6 Technical Options Committees. See http://ozone.unep.org/Assessment_Panels.

industrial countries and often use those agencies' regulatory decisions as inspiration for their own regulations.

In some areas, use of intergovernmental organizations and trans-governmental networks for regulatory standardization and cooperation in enforcement is combined into a process in which the intergovernmental organization serves as a forum for basic decisions about regulations and establishes basic guidelines, while national governments retain certain areas of choice. These national choices, for instance decisions to ban the entry of toxic waste into a particular country⁶ or to ban imports of certain genetically modified plants,⁷ are then made known to all cooperating governments through a system of "national focal points" -- each governments designated agency -- reporting those decision to an organization maintained common website. Officials of national agencies in each member state, as well as affected private entities, can go to the common website for the information they need. In Europe and in East Asia, enforcement of maritime safety regulations is facilitated through regional memoranda of understanding among the port authorities of different countries. The MOUs include establishment of a secure website to which the port authorities in each state can post results of ship inspections. This permits the port authorities in other states to direct their enforcement efforts toward those ships that failed in earlier inspection or have not been inspected for a significant length of time.⁸

Using Private Business or Public Interest Organizations

The increasing volume and pace and variety of trans-border investment, trade, travel, research collaboration, and other contacts poses significant challenges for government regulators. However, particularly in the more politically and economically liberal states, where citizens are encouraged to form their own organizations and develop their own activities and where market participants are allowed to make their own decisions, governments do not seek to regulate every conceivable form of activity. They tend to focus on those activities that have particularly strong implications for the general public, such as air and water pollution, transportation safety, wholesomeness of food, and safety of pharmaceuticals. Yet, companies and researchers often find their activities more effective if they operate to a standard. For companies, the standard may address the size and design of machines. Having standard scanning on television sets allows consumers to choose from several makers with confidence that they will be able to receive available programming. Yet, companies may also want to standardize certain processes of operation. The ISO 9000 standards address internal activities, and help companies design processes that will manage and improve quality control, orders, payments, and deliveries more effectively. The ISO 14000 standards address environmental management, identifying and minimizing the negative impact of company

⁶ 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. Text available at www.basel.int/text/documents.html and information about the process at the secretariat's general website, www.basel.int. The later developing country shift of "default" from prior informed consent to ban was institutionalized globally in the Basel Ban Amendment that became effective in 2005, in Africa by the 2002 Bamako Convention, and EU regulations incorporating the Basel Ban Amendment.

⁷ 2000 Cartagena Protocol on Biosafety. Text available at www.cdb.int/biosafety/protocol.shtml and general information about the process from the Convention on Biological Diversity secretariat's website www.cbd.int/biosafety.

⁸Mark Zacher with Brent A. Sutton, *Governing Global Networks: International Regimes for Transportation and Communications* (New York: Cambridge University Press, 1996).

activity on the natural environment.⁹ Though governments did not play a direct role in development of the ISO 9000 or 14000 standards, they have encouraged companies to meet those standards and be certified as meeting those standards by making certification a requirement for bidding on government contracts. Researchers also find standardization useful in certain areas. Chemists around the world can understand each other's research better if they all use the same system of chemical symbols to summarize the number of atoms of each element and the shape of the connection between atoms found in each compound. Similarly, genetic research requires common notations for gene sequences. Scientists thus use general or specific trans-national scientific organizations as platforms for developing standards.

The ISO is a private body that develops standards through technical committees composed of experts in the particular area named by participating national organizations. These are primarily industry associations but also include consumer and other groups.¹⁰ In some areas there are also industry-specific associations involved in developing common standards and monitoring enterprises' adherence to them. For instance, there is an International Organic Farming Council that develops standards defining practices qualifying a form as "organic" and maintains a monitoring system for certifying particular forms as meeting those standards. This has become increasingly important as consumer interest in organic foods has increased, inspiring greater efforts not only by true organic farmers but by others seeking to present themselves as organic even if their practices fail to be fully organic. The International Organic Farming Council and attempts to separate the two, by certifying the former and denying certification to the latter.

The fair trade and environmental movements have developed a slightly different form of trans-national private certification. Rather than rely on either industry associations or consumer groups, certain transnational nongovernmental organizations promoting fair trade and ecological sustainability have developed their own certification systems. These "third party" systems develop standards, and encourage their use by companies, monitor company's activities, and permit those companies whose activities meet the standards to display a special logo in their advertising and on their packaging. The logo is a message to consumers that the company meets high standards in the areas of working conditions, treatment of suppliers, and/or ecological sustainability of operations.¹¹

Since fewer people are affected by them, there is much less discussion of the possible roles of national or international scientific and engineering associations in enforcing standards. When those standards involve things like chemical notation systems, the standards are self-enforcing. Researchers who want to work understood while spontaneously adopt the standards (once they are aware of them, and awareness is the national or international association's job). For many researchers, ethical standards will be self-enforcing, but national and international associations may well have to deal with the exceptions. National scientific/engineering associations can apply their own ethical codes to the activities of their members in other countries, for the simple reason that going abroad does not cancel membership in the association. Transnational scientific or engineering associations have more obvious cross-border impact since their

⁹ ISO is the all-languages short name adopted by the International Organization for Standardization. See its website www.iso.org.

¹⁰ ISO provides a brief description at www.iso.org/iso/standards_development.

¹¹ In fair trade, Fairtrade Labelling Organizations International (www.fairtrade.net) coordinates activities of 23 member national-level certification organizations; in lumber and wood products the Forest Stewardship Council (www.fsc.org) is the global coordinator.

members live in many countries. Yet, even they can face a transnational ethical problem if a member who is a citizen of one country undertakes ethically undesirable activity in another. Though the typical association has a single code of ethics for all members, application of the code in a particular case may require sensitivity to the local culture and situation.

Common codes of ethics are less developed at the international level, although both international scientific unions and engineering organizations have addressed transnational controversies or conduct in one country regarded as unethical in many others. In the mid-1950s, the International Astronomical Union, the global association of astronomers issued statements criticizing the US government's planned Project Westford involving the launch of a large number of long, narrow metal rods ("space needles") into space to determine whether they could be used to relay radio signals to different places on earth where the curvature of Earth prevented direct transmission. Astronomers were concerned the needles would interfere with radio astronomy and the AIU's statements were helpful in triggering more public debate, though technological obsolescence was more important in the ending of the project.¹² Widespread media and other reports that the Soviet government was dealing with lesser known political dissidents by having them declared insane and confined to mental institutions led the Soviet All-Union Society of Psychiatrists and Narcologists to resign from the World Psychiatric Association rather than continue to face its criticisms. The All-Union Society sought readmission in 1989, but the WPA made readmission conditional on a visit and favorable report from a WPA monitoring team. The process had not been completed before the USSR dissolved in December 1991.¹³

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¹² See C. Wilfred Jenks, *Space Law* (London: Stevens and Sons, 1965) p35-36.

¹³ Felicity Barringer, "Soviet article says psychiatry was abused in 70s," *New York Times* 22 Nov. 1989, p. 9; F. Kondrat'ev, "Soviet psychiatry," *Russian Social Science Review* 36/6: 74-90 (Nov/Dec 1995); "News and Comment: Soviet Psychiatry," *The Lancet* 338 (no. 8767): 626-627 (9 July 1991).