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When Corporations Translate Treaties

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Caroline Bradley

The transnational transmission of risk is increasingly visible as a subject of policy debate, from transnational terrorism to global warming, from food safety to the financial crisis. These risk transmissions involve more fundamental security risks: for example, the global financial crisis has led to violent protests; low-lying states are threatened by rising water levels; populations facing issues of food security also have implications for security and stability more generally. As these risks become increasingly recognized, international and transnational law, and also international standards, are increasingly relevant to US-based businesses. Private firms are affected when states enact and propose rules to address risks to global security, such as the SEC's recent proposals for disclosures about the use of conflict minerals.

Our standard model of the impact of treaties (and agreements setting non-binding standards such as those developed by the Basel Committee) on non-state actors involves implementation through domestic legislation. However, in this article Natasha Affolder argues that corporations engage with environmental treaty norms in ways that this standard model fails to reflect. Instead, corporations interact with treaty norms directly and via the transnational standard-setting process. Thus, she challenges the traditional model of treaty implementation and the usual separation between public international lawyers and scholars of private governance. At the same time her article has implications for those of us who study the legal environment within which businesses operate, and illustrates a complex set of interactions between governmental and non-governmental bodies around environmental regulation and practices.

Affolder suggests corporations' interactions with and translations of treaty norms may in fact produce changes in the underlying treaty obligations. In some cases corporate action may undermine treaty commitments:

In translating treaty norms for corporate use, companies cherry-pick among treaty provisions, interpret treaty commitments in their least onerous forms, and obscure the ways in which corporate activities impede treaty implementation by selectively reporting on instances where corporate policies and actions advance treaty norms.

But in some contexts, Affolder recognizes that corporate action may “lead to stronger and deeper implementation of treaty norms.”

The article focuses on environmental treaties, although Affolder suggests that the implications of “corporate channeling of treaty meanings” are broader. She would extend the implications to human rights and labor, and I think that her work is also relevant to financial regulation. The global financial crisis led to new efforts to reform financial regulation among domestic, regional and international policy-makers. The Basel Committee

has developed Basel III, the EU is reforming its structures for financial regulation, and the US enacted the Dodd-Frank Act. But financial firms and the trade associations which represent their interests are also involved in developing the new rules, through efforts to lobby across borders, arguing that rules applied in one jurisdiction should not be more onerous than those in others, and through the development of private standards. In October, staff of the IMF wrote that “private sector ownership of the financial reforms will be key to the successful implementation of the new rules”.

Affolder’s article is important, and nuanced. Corporate action in translating and implementing treaty provisions is neither entirely positive, nor entirely negative. Affolder does not offer a new theory — but this is the point: she pushes us to face the complex and multivalent facts about the interactions between business and law in a world of multi-level rules.

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