1997

International Economic Organization

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imported rules of physics as to the momentum force of international organization.

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International law has developed to serve the needs of the governments of "states" -- territorially-based collections of populations, united in subjection to their "sovereign" rulers. Other international organizations have long existed - the Virginia Company, the East India Company, and the Royal African Company provide early and influential examples - but without much formal recognition in developing international legal structures. Now their day has come, and eager academics seek to apply the insights of institutional economics, law and economics and industrial organization to international law, to demarcate new lines of competence between states and other international organizations.

The basic premise of most such studies has been the so-called "Coase theorem", which concentrates on "transaction costs" to explain (and evaluate) most structures in society. Everything should be organized to minimize transaction costs. That Coase never said or wrote any such thing does not diminish the influence of this norm, particularly among lawyers. Applied to international law by Joel Trachtman, this becomes an assertion that international institutions exist to maximize net gains "from engaging in the transaction in power" minus transaction costs. Any constraint imposed on a state, according to this definition, is a "transaction in power", which states undertake to make gains in other areas.

Transactions in Power

States have power. A government's power or control over people and territory is what makes states states. States relinquish this grudgingly, and if they relinquish too much, cease to be "states" in the international sense, becoming mere administrative units of larger federations, like the states of the American union. Power can be spent to buy cooperation from other states, or retained to force cooperation by threats or coercion. When states retain power, a "state of nature" can be said to exist. When they trade power, new law will be created.

Thus the market in power sets the frontiers of municipal law, diminishing states to empower other organizations. States allow this for the "gains" such trades bring in wealth or happiness, but always at the cost of power, which must be displaced, by definition, for a "transaction in power" to have taken place. When States cede jurisdiction to gain peace or profit, they exit the "market" of autonomous individual powers, and enter the "firm" of international organization.

Coase-based theories ascribe the choice between "market" and "firm"-like organization to their relative transaction costs. States will simply trade directly for what they want when it is easy to do so. When it is not, they often prefer to create non-state organizations to coordinate their transactions. The "best" arrangement, in the eyes of "economically"-minded lawyers such as Joel Trachtman, will be the method that allows people to obtain the maximum of what they want, with the minimum transaction costs. Large gains may justify large transaction costs. Small gains may be acceptable if transaction costs are negligible. But power will only be sold for some valuable benefit, or to cheapen transaction costs.

The Purpose of Government

Applying the "Coase" theorem to states in this way reveals the enormous difference between governments and most firms. Markets in goods exchanged for profit may realize absolute gains by minimizing transaction costs. "Markets" in power trade sovereignty for peace or protection as often as for commerce or wealth. Some states exist to maximize the wealth of their rulers, but others seek the common good of their citizens, or of a faction, or world justice, or some religious mandate. "Transaction costs" is a very awkward description of what matters in most international transactions.

All states claim to serve the common good of their citizens. Some claim to serve "justice" or the common good of humanity. In neither case does "gain" provide a very helpful description of what is sought, or "transaction costs" accurately capture the difficulties of getting it. In a "republic", for example, (a state actually committed to pursuing of the common good), the primary constitutional

question in both external and internal affairs will be how best to identify the common good. The constitution or "firm" established by such states will seek to minimize mistakes. To call these mistakes "transaction costs" would be misleading.

Perhaps one might understand corruption as the "transaction costs" of republican governments. Self-dealing (on this theory) will be present in any structure that seeks justice, and should be minimized. But speaking of "firms" and "transaction costs" in such situations only confuses the discussion. This will be true of most "transactions in power". States relinquish power to serve determinate ends, and the main question to be asked when states cede power to international organizations should be whether these ends will be served by the transaction. Does this international organization serve justice better than the state can?

Justice

"Justice" and "the common good" have a resonance in relations between states that the vocabulary of economic theory entirely fails to capture. The comparative-transaction-cost methodology facilitates innovation by viewing institutions as contingent. But this benefit palls when it sacrifices the vocabulary of liberty and justice, which delegitimize bad structures of government much better, with more fidelity to ordinary usage and what issues are really at stake. Economically-minded lawyers tend to speak and write of "satisfying" the preferences of all countries (or their citizens), rather than shaping or judging these preferences - the primary purpose of "law" of any kind.

The "Coase" theorem applied to law implies a faulty theory of human values and motivation that vitiates its usefulness as a heuristic device. All law claims to be just. Systems of power that do not claim to seek justice are not law. Human nature tends to self-justification, and even repressive systems justify themselves to themselves as serving the common good. This makes interest-based conceptions of law inaccurate, unless one defines justice as an "interest" like any other. But in legal systems justice is not an interest like any other. To describe or explain it in this way (even if possible) would be confusing and misleading.

Lawyers apply the theory of the firm to international institutions to promote cooperative solutions to inter-state coordination problems. Creating an international regime that minimizes the friction involved in necessary international transactions would be a valuable achievement. But any such arrangement not founded on justice will be unstable, or undesirable, or both. Some lawyers may feel, with John Rawls, that justice is found best by avoiding substantive morality, which fosters the transaction cost of self-righteousness. But "efficiency" is not a standard to rally around either. Laws in general and international law in particular depend on justice for their binding force. Economic tactics will never produce agreement about the issues that really matter in international law.

International Organization

Perhaps this is all really just an argument about how best to constitute the international system to serve the purposes of international cooperation - whatever they are. For those who like justice, a lawyer-economist might say, we can talk about how best to find justice. For those who like trade, we can talk about maximizing trade. Those who like their own private unfettered world dominion can evaluate international organizations according to how these serve that end. All governments (or the individuals who control them) have interests, and international organizations serve those interests, or they would not exist.

Legal theorists, in such a scheme, write either to describe this situation, or at best to point out how it could run more smoothly. The theory of the firm might be useful here to show how two states could coordinate their disparate interests to achieve mutually satisfactory results, with a minimum of transaction costs. The trouble is that states do not necessarily aim at such cooperation, nor should they. States often prefer to impose their will on others. States do not only trade power for interest. They also use power for domination. Force is just or unjust, lawful or unlawful, according to the ends it serves. International organizations do and should exist, not simply to facilitate the interests of states, but also to promote certain ends over others. Efficiency is usually a secondary interest.

Some states originated as profit-seeking shareholding corporations. Virginia and Massachusetts still retain traces of their earliest corporate charters in institutions that provided a model for many Western democracies. The analogy between states and corporations is not absurd. States that choose to cooperate through the mediation of

international organizations may look a bit like corporations that merge into a single holding company. But this does not mean that international institutions should exist only when their agency costs are smaller than the alternative transaction costs of the same allocation through the market, as Coase might have it. International organizations exist to prevent power transactions, and to impose goals that frustrate normal "markets" - not make them more efficient.

The Market for Power

International organizations supersede states, in pursuit of certain goals. They emerge not from a "market for power" but from a desire for justice. States control each other's excesses by deferring to international institutions. Some international relationships could be described in Coasian vocabulary. War incurs high transaction costs. A just world order would be a valuable transaction gain, possibly outweighed by the transaction costs of imposing or achieving justice. Simply to speak or to write in these terms illustrates the vacuity of doing so.

International organizations concerned with commerce may fit the "Coasian" model better, because they really are economic, and concerned with self-interest in the narrowest, monetarily quantifiable sense that most economic models necessarily assume. International economic integration may follow the theory of the firm in ways that would permit the application (in some narrow circumstances) of economic formulas computing the net gains from transactions, after subtracting the transaction costs.

The market for power is not a market in goods or interests, but a market in moral perceptions, where states must justify their use of power to themselves, and sometimes to others. Governments that relinquish power, do so either because they are forced to (in which case they never fully enjoyed power at all) or because they are convinced that some interest outside the state justifies weakening the state to serve a greater good. Speaking in terms of the market undermines the moral constraints that sometimes lead to the (rare) abdications of power that make international institutions possible at all.

Conclusion

Joel Trachtman rightly observes that the best laboratories for analyzing legal institutions will always be comparative and historical. Everything else is pure speculation. Those who propose change must look to what has worked before, in comparable situations. The greatest difficulty lies in identifying what is "comparable", and the proper standards of evaluation. The theory of the firm and other "Coasian" constructs mislead as a basis for comparison, because their circumstances are so different from those of states. They also fail as standards of evaluation, because they rest on economic premises that contravene the basic purposes of law.

Law schools have seen a great vogue for importing techniques from other social science disciplines. This reflects a widespread loss of faith in the integrity of law as its own discipline, the study of justice. Unfortunately, techniques from other disciplines usually, carry their own ethos with them. The values of the business world are overwhelmingly self-interested and generally mercenary. These may be appropriate in the economic sphere, but they are highly pernicious to community and justice. The vocabulary lawyers use colors the results that they can and will achieve. "Coasian" terms are not appropriate to principled legal discourse.

International law, more than most law, depends on moral weight for compliance, particularly when powerful interests are at stake. The language of institutional economics, law and economics and industrial organization, which carry no such weight, provide a feeble basis for demarcating new lines of competence between states and other international organizations. Their use puts off the day when better institutions will facilitate transactions among well-intentioned states.

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