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Domestic regulation in a multilateral context: A right, an obligation, a necessity?

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DOMESTIC REGULATION IN A MULTILATERAL CONTEXT: A RIGHT, AN OBLIGATION, A NECESSITY?

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1. Rules in the marketplace can originate in a wide variety of ways: regulation by public authorities, contracts between private parties, generally accepted practice, or public/private cooperation involving regulators, market participants and public interest organizations are some of the mechanisms that have been widely utilized. In all instances, the central challenge is to achieve a proper balance between private rights and public goods in a manner that is widely recognized as being legitimate.

2. The issue of domestic regulation is particularly acute in relation to international activities that establish a domestic presence, trade in services and foreign direct investment in particular. All significant activities of this nature are subject to domestic regulation, in some instances involving highly complex rules that require a careful balancing of private rights and public goods. The multilateral interest is primarily the development of effective regulatory institutions rather than an attempt to replace domestic regulation by international rules.

3. The institutional capabilities of most international regime are currently inadequate to the task of achieving a balanced outcome that is transparent, accountable and legitimate. In other words the fundamental principles of legitimacy that apply to domestic regulation must also apply to any multilateral system of rules that entails the risk of preempting domestic action.

4. There appears to be a hierarchy of complexity when it comes to domestic regulation.
   - Regulatory practices in relation to trade in goods appear to be adequately addressed by the TBT and SPS Agreement, which establish general criteria for the regulation of products.
   - Trade in services is subject to a significantly more complex and dynamic regulatory structure, and it is currently not clear whether it will be possible to develop multilateral disciplines that adequately respect the autonomy of domestic actors at all levels.
   - Investment can be subject to extraordinarily complex regulatory systems, involving not only a multitude of individual regulations but also all institutions of government, ranging from local authorities to the highest courts of the land.

5. Any attempt to second-guess domestic regulatory actions at the international level is fraught with dangers. International rules must be rigorously circumscribed to focus on the interest that can only be adequately addressed at the international level, for example a range of environmental concerns as expressed through the system of multilateral and other international environmental agreements.
6. From the perspective of sustainable development the operative principle governing relations between multilateral and domestic action is the principle of subsidiarity. Subsidiarity recognizes that action will occur at different levels of jurisdiction, depending on the nature of issues. It assigns priority to the lowest jurisdictional level of action consistent with effectiveness. International policies should be adopted only when this is more effective than policy action by individual countries or jurisdictions within countries.

7. The most important challenge facing the international community in this area is how to promote the development of effective domestic regulatory institutions where these are lacking. This is a task that requires the active participation of civil society since it is not just a technical exercise but represents a fundamental commitment to certain principles of governance. In some respects, international environmental regimes have been remarkably successful in achieving such an outcome so there may be valuable lessons for international economic negotiations to be derived from environmental experience in this area.

8. As markets become more international it is inevitable that the disciplines on market actors—whether these concern environmental performance, respect for social norms, or maintenance of competition—also acquire an international dimension. To this extent the increase in international regulation is to be expected. Any such increase must, however, be accompanied by the necessary institutional development to ensure that international decisions meet the fundamental standards of legitimacy, transparency and accountability that characterize such actions in open societies. There is little evidence that countries currently negotiating within the WTO are prepared to meet this challenge.