

International Economic Institutions: Developing the Concept of Substantive Accountability

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Abstract

The need to hold International Institutions (IIs) accountable is well documented. In response to such clamours, there has been effort to implement some level of scrutiny of institutional actions either through an internal process or through some form of external review. It is contended that efforts so far made are inadequate as; first, the present level of scrutiny is often focused on institutional forms and procedures with scant or no visible scrutiny of the substantive actions of IIs. Secondly, even if substantive actions were to be scrutinised, many IIs (particularly international economic institutions) would escape scrutiny because of the somewhat blanket assumption that their acts are not authoritative. This paper seeks to establish the need to hold international institutions accountable for their substantive actions and in particular to broaden the scope of scrutiny to include seemingly innocuous "soft" measures through the adoption of "effect-perspective" in characterising an institution's modus operandi.

Keywords: International institutions; Substantive accountability; Blanket assumption

Introduction

The unique nature of governance at the international stage springs up numerous debates. Whilst there are often divergent opinions on many of the issues raised, one of the few issues for which there appears to be some form of consensus is regarding the dire need to subject public authority to scrutiny even at the international level. The bane of this paper will hence centre on the need for more effective accountability especially in International Economic Institutions (IEIs).

For the purpose of this paper, IEIs are inter-governmental organisation (and service providers) dedicated to or engaged in the prescription, assessment, operationalization, and enforcement of policies and decisions pertaining to economic, trade, and/or financial issues. International regimes are indeed distinctly different from national regimes especially in terms of robustness of institutional authority and constitutional scrutiny. The weakness of the oversight mechanism in the former relative to the latter is one of the reasons warranting the need to pay special attention to the accountability of IEIs. More specifically, the need for a thorough review of IEIs' accountability is further accentuated by the fact that most of the present efforts to scrutinise International Institutions (IIs) have been done from narrow prisms and through limited benchmarks.

A noteworthy effort to hold IIs accountability is the meticulous scrutiny of the One World Trust, an NGO which produces the Global Accountability Report (GAR). Their efforts have indeed been rightly commended. The timeliness and value of this effort is aptly expressed in the statement of one observer who stated thus:

"Impunity thrives on ignorance. We have entered an age when specialists manage the truth in function of organisational interests. This authoritative report's findings on the transparency of NGOs, corporations and inter-governmental organisations are disturbing. Rating powerful organisations against four 'accountability capabilities' is a courageous undertaking."

However, though such bold and useful effort is a right step in the right direction, it is also a candid reflection of the dire state of governance at the international level. The fact that the GAR is considered commendable despite the fact that only 30 organisations

are reviewed on a rolling basis is of concern. Moreover, the scrutiny is limited to three sectors. Indeed, the limited scope of the activities of the GAR and the relative lack of accountability of IIs is much regretted. This shortcoming has been recognised by one commentator who asserted that "[t]ax-payers, consumers and victims of poverty and abuse the world-over have a right to such high-quality information on the myriad organisations affecting their daily lives." An even more deflating observation is that it appears that the drive towards producing the GAR has stalled as the last assessable report was published in 2008.

Indeed, the GCR is commendable. The assessment through benchmarks such as transparency, participation, and evaluative capacity is ideal and the results generated from such exercise can give a good indication of the scrutinised institutions or even an entire sector. Its value notwithstanding, the fact remains that the nature of (in) action requiring scrutiny extends beyond those covered by these indicators. First, assessment of IIs activities via the benchmarks of transparency and participation can constrict the scope of scrutiny to procedural issues at the expense of equally important substantive issues. For example, in the GAR 2008, the European Bank for Reconstruction and Development (EBRD) was recognised as the highest scoring intergovernmental organisation after assessing its public information policy, external stakeholder engagement, membership control amongst others. Though these indicators provide quality information on the value of EBRD's governance, they do not give full indication of the true value and impact of their policies and operations. The potential problem with the ranking therefore is that it obscures concerns that might exist in the substantive side of EBRD's governance.

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Scholars have attempted in some way to bring attention to the prevailing accountability issues in IIs through academic evaluations. For example, efforts have been made to assess the effect of IMF programmes [1]. Nevertheless, scholarly efforts in assessing the substance of IIs' activities remain inadequate for a number of reasons. First, scholarly evaluations, though valuable in their own right are by no means substitute for an effective and robust transnational accountability framework.

Secondly, scholars have been complacent in their treatment of IEs especially those ones that appear not to engage in obvious governance activities. When they provide some level of evaluation, they tend to focus on institutions such as the World Trade Organisation (WTO), EU and so on because of their more visible exercise of authority. Some level of attention is also paid to institutions such as the IMF and the World Bank because of the obvious direct impact they could have. However much less attention is paid to institutions that appear to merely churn out standards or provide information based on the mistaken premise that they do not exercise cohesive authority. As though it is not bad enough that there does not exist firm accountability framework at the international arena, the misconception of great many scholars further insulates such overlooked institutions from being subjected to substantive scrutiny [2].

The aim of this paper is to postulate an accountability mechanism that would broaden the scope of scrutiny of IIs beyond the procedural issues. The mechanism should recognise and provide the means for scrutinising the substantive actions of these IIs. To ensure robustness of such mechanism, there need to be a reassessment of the indicators that signal the need for scrutiny.

This paper will be divided into four parts. Part I gives a holistic analysis of the imperativeness of IIs accountability. Part II provides a re-orientation of the public law perspective to institutional governance. This part clarifies the dimension of accountability which this paper seeks to strengthen. Part III elaborates in greater detail on the concept of substantive accountability which this paper seeks to promote. Part IV contains the conclusion.

Accountability of International Institutions

It is essential to hold IIs accountable in order to ascertain their credibility and to secure control over public power [3]. As such, to assert that an institution has put in place adequate accountability mechanism implies that there exists some standard through which the conducts of actors are assessed. It also implies that such system provides for sanctions [4].

Addressed in light of global governance, issues of accountability have often been centred on concerns pertaining to institutional design, efficiency and effectiveness of the outcomes resulting from the institutions under scrutiny. Such accountability mechanism is generally less concerned about suitability of goals. Rather, it is more focused on how goals are achieved. This form of accountability, herein termed 'procedural accountability' is quite common and by all means relevant in addressing issues of rule of law and due process.

However, whilst it remains important to assess institutions in terms of their compliance with procedural rules, one should in no way consider such procedural scrutiny as representing the outer limit of an accountability framework. This point is worthy of emphasis as it is not uncommon in this increasingly globalised world to take for granted substantive convictions underlying institutional acts as being universally valid. In other words, because substantive actions of

institutions is an internal affair requiring specific level of expertise and awareness of contexts and circumstances [5], there is the tendency that one overlooks the power relations and conflicting values that underlie or are associated with them.

While it is acknowledged that general benchmarks for scrutinising the substantive convictions and actions of individual IIs would likely be undesirable and impractical, this cannot justify the failure to exercise a minimum level of scrutiny. In this regard, Venzke contends that there are political and normative implications not only to the manner in which IIs achieve their goals but also the goals which they choose to pursue. She thus suggests that "[i]n order to increase the legitimacy of international institutions, their conception cannot be confined to instruments for an effective implementation of agreed-upon goals but must equally encompass an arena for debating and contesting such goals and for channelling political conflict" [6]. This sentiment is shared in this paper and as such, in addition to pursuing procedural accountability, this paper will emphasise the need to pursue what is herein termed "substantive accountability". It should be noted that the concept of substantive accountability is not to be understood in terms of political accountability (i.e., democracy, legitimacy) but more in the public law sense.

Before a proper scrutiny of the substantive contents of institutional practices is undertaken, it is imperative that the role of IIs in global governance is first established. As it would be shown in greater detail, if we are to develop any meaningful account of substantive accountability, the role of IIs would have to be understood as distinct from other international actors. In other words, they would have to be seen as possessing inherent autonomy and authority [6]. Failure to properly delineate the characteristics of an authoritative action might result in some institutions being unwittingly taken out of the radar of the accountability mechanism.

One way to re-shape the perception of the role of IIs in order to enable a truly robust accountability framework is by assessing the capacity of any international actor to exercise public authority in the liberal sense. The liberal understanding of public authority as formulated by Bogdandy et al. is determined by assessing the constitutive and limiting functions of institution actions [3]. While the constitutive function assures that the act in question is truly public in nature, the limiting function "helps to translate concerns about legitimacy of governance into meaningful arguments of legality". From this perspective, though it is an undeniable reality that in comparison to domestic level, governance at the global level can generally be characterised as relatively less inherently cohesive, the consequential cohesiveness of IIs actions and decisions especially those that issue "soft laws" should not be ignored.

This liberal interpretation of what it means for an institution to exercise public authority has to contend with the prevailing understanding regarding the nature of public authority. It must however be stated that there has been a shift in perception primarily because of the surge of globalisation such that no serious minded stakeholder would totally discount the role of accountability at the international level. Improvements notwithstanding, the imperativeness of the scrutiny is not seen as absolute necessity because of the lingering perception that most IIs cannot be said to exercise public authority. This perhaps explains why more focus has been given to procedural accountability and not substantive accountability. From this classical perspective, an even deeper level of disregard is given to IIs are tend to govern indirectly. The foregoing consequences would easily follow from a tacit assertion that the absence of authority on the part of IIs renders

baseless any attempt to hold IIs accountability for their substantive actions. In essence, IIs would be seen as holding no institutional responsibility [7], and would at best be superficially considered to be individually accountable.

Before exploring further the liberal perspective on the exercise of public authority, it should be noted that there has indeed been efforts by some scholars to formulate frameworks that hold IIs responsible and accountable in their own right. The appeal of such accounts were however compromised by the fact that they were effectively subordinated to states responsibility. For example, D'Aspremont stated in this regard that the measure of accountability required of IIs in any given situation should be similar to the threshold to which a state would have been held if it was the latter that was implication in the given situation [8]. This in some sense makes it possible for IIs and states to sides-step legal responsibilities by taking advantage of the inflexibility of legal concepts through which responsibility and accountability are determined.

Conclusively, while the problem associated with the limited focus of the accountability frameworks for IIs has been established. The proposition for the establishment of substantive accountability mechanisms would be sustainable only after, first showcasing institutional actions as either inherently or consequentially cohesive, and secondly, imbuing authority into such cohesive actions. It is not until these conceptual issues are settled before an effort can be made to elucidate a concrete account of substantive accountability.

Re-orientating the Public Law Perspective to Institutional Governance

It is pertinent at this juncture to highlight the nature of substantive accountability which this paper seeks to stress. Addressed from a public law point of view, the issue of accountability is firmly related to the concept of rule of law [9] and it is built on the understanding that "any exercise of public power outside a limiting framework of public law is reason for concern [10]."

The concerns often raised in terms of accountability can be reduced to three broad questions; who is accountable, to whom one is accountable, and for what is one held accountable. In the context of international institutional law, the first two issues are largely procedural. As already noted, the need for procedural accountability cannot be overemphasised. Indeed, the importance of procedural accountability was stated by von Bernstorff who observed the "growing uneasiness about the way public power is exercised beyond the national realm." Due to the concerns echoed by stakeholders of different inclinations, efforts have been made by institutions to set up an acceptable procedural framework.

The accountability mechanisms built into these systems have been designated to different levels. The first level, it has been said, encompasses a range of possibly non-judicial procedures aimed at scrutinising IIs' behaviour. Such broad mechanism can take retroactive or prospective forms [4]. However, the response to these arcane procedural concerns is often dependent on the institutional design and structure at the international level. The reality of international relations reveals the strong role of politics in this area [11] and therefore calls to question the value of any juridical attempt to build a principled framework of procedural scrutiny [12]. This means that the issue of accountability as an integral component of international rule of law would hardly be taken seriously.

As would be detailed below, one of the reasons behind the failure to recognise the implicit authority in certain actions of IIs stems from oversights that occur when International Relations (IR) interacts with the law. As a result of this interaction, rule of law and accountability discourse in the public law sense have thus stagnated and continue to be treated as broad issues of principle. This stems from the inability of legal scholars to reconcile the multidimensional character of IIs "with the largely 'one-dimensional' areas of international law" [13]. Another factor is that the relative supremacy of domestic law has led many scholars to characterise and review international activities through the well establish rule of law paradigm at the domestic level.

There is little doubt that international law has benefitted immensely from IR ideologies. The latter have helped to infuse "reality" into the doctrinal nature of law. However, somewhere along the line of this valued interdisciplinary interaction, the direction of legal analysis of IIs was gradually subsumed into IR's sphere of inquiry. A clear manifestation of this altered direction is that even legal discourse at the international sphere tends to be centred on issues pertaining to influence (for instance the role of network governance and power relations) as against the more legal task such as the theory and practice of international legal authority and the constraining of such authority. Moreover, even where pure legal questions pertaining to authority and accountability are addressed, as shown with the GAR example, they are likely to be addressed within the narrow prism of procedural accountability. In such instance, the perception of accountability may be far from its reality as there is the tendency that the actual scrutiny might be merely formalistic with representative of IIs merely rubber-stamping the acts of its departments and technical committees [10].

In order to refocus legal discourse on IIs, it has become imperative to give a reasoned legal response to the rule of law inquiry regarding the characteristics of actions requiring accountability.

If we are to stand any chance of responding appropriately to the query concerning actions requiring scrutiny, one must be ready to think differently about IIs' autonomy and the way they exercise authority. Indeed, as it will be shown below, it is the failure to firmly decipher IIs autonomy and the nature and scope of their authority that weakened the impetus of international law scholars to conceive of genuine accountability structure for international institutional governance in the public law sense.

Thus, in turn, the concepts of autonomy and authority will be addressed in detail. The aim is to distil the IR influence on the terms and how it has impacted upon legal scholars' perception of the true nature of institutional actions and the public law function.

Autonomy

The proposed accountability mechanism would have the potential to tackle much of the overlooked activities of IIs only if we reassess what makes an institution autonomous. The impetus to hold IIs accountable is likely to be greatly diminished where IIs are seen as mere subordinates – tools in the hands of state actors. A typical position about the subordinated role of IIs within a larger social order is expressed by Chimni [14]. Though the agential role of IIs in many instances cannot be denied, such perspective only partly explains the nature of global governance. Moreover, failure to note IIs autonomy at both policy and decision-making level would unwittingly condition us to pay scant attention to aspects that already appear insignificant. Such oversight could indeed lead to the exclusion of far-reaching institutional decisions from legal scrutiny [15].

Some scholars have asserted the autonomous role of IIs especially as against the perception that they are subordinated to states [6]. It has thus been contended that even though international institutions may be a product of states, they do act autonomously. This observation has warranted the need to “divert attention away from the rear-view mirror directed at (International Institution’s) embryonic stages under the tutelage of (dominant) constituent members [as International Institutions] have grown up.” In other words, “apart from (being) instruments in the hands of one or a number of powerful actors or arenas for decision-making, (institutions) can also be autonomous actors exercising public authority in a broader governance process.” It has thus been noted that rather than focusing strictly on a state-centric approach to analysing global governance concerns, we should also pay attention to the perimeter of these institutions’ “actions, the sources of their autonomy and to *how* they act.”

Question on autonomy of IIs has been motivated by different ends, the most notable of them being the conception of autonomy as political independence. This concept has been considered an integral issue in substantiating the legal personality of IIs [13]. Some of the notable debates in this regard have been between the neo-sovereignism and the legal cosmopolitanism schools of thought [16]. Legal cosmopolitanism scholars argue in favour of the idea of institutional autonomy as it is believed that this conception helps to give a more robust picture of international law in that it, amongst other things, would help to foster corporation and remove global power asymmetry. There is indeed some level of coherence between the idea of legal cosmopolitanism and the underlying ethos of this paper. Nevertheless, it should be noted that the claim of autonomy herein proposed is motivated by a much narrower goal – to enhance the accountability of IIs in the public law sense. In essence therefore, it is expected that at the very least, credible analysis of institutional autonomy will strengthen the case for holding IIs legally responsible [17].

It is essential to avoid misconstruing the idea of autonomy herein sought with an idea of autonomy that practically justifies the independence and total non-interference with the activities of IIs. As such, even where the idea of autonomy does not relate directly to accountability, it should set the stage for a worthy discussion of an II’s responsibility. For example, even where autonomy is addressed chiefly to situate the legal personality of an institution, the finding in this regard will go a long way in fashioning the appropriate way of scrutinising the institution in question. In essence therefore, no reasonable discourse on accountability can take place outside an appropriate conception of IIs’ autonomy.

The view of IIs both as independent actors and as agents has meant that the issue of their autonomy has been interpreted differently depending on the end pursued. In both real terms and conceptually, some aspects of IIs are less amenable to the concept of autonomy than others. This has made it difficult to develop a constructive legal case for public law scrutiny at the international stage even though the value of public law analysis (at domestic level) has long been established. However, the failure to develop an adequate legal norm in this regard cannot be blamed on lack of effort. Attempts have been made to develop a respectable conceptual foundation for the idea of autonomy that will be adaptable to the pursuit of critical public law discourse. A notable attempt is that of D’Aspremont who sought to isolate the idea of autonomy necessary to support legal analysis. In this regard, he sought to differentiate between autonomy as political independence and autonomy as institutional independence [18]. However, despite his best effort, he conceded that the divide between the two subgroups might be artificial [13].

Issues concerning legal responsibility of IIs have often been nested on the conception of autonomy in the political sense. According to different strands of IR theories, IIs gain their autonomy either as a result of state’s inability to agree, or due to the professionalism and technical competence of the actors within those institutions. For instance, it is argued that even where the source of authority of IIs originate from their principal which are often state actors [19], IIs can nevertheless be said to be autonomous where their actions cannot be reduced to the interests of their so-called principal [6].

A principal could delegate legislative, implementation and enforcement functions to IIs. Where these three functions are delegated, there is little doubt that the institution in question is likely to act autonomously which would strengthen the case to hold them specifically accountable by characterising their actions and inactions as constituting acts of public authority. If the legislative authority is delegated without an overriding competence by the principal, the level of autonomy is limited but still likely to be strong enough to amount to an exercise of public authority.

However, where the competence transferred to the international institution merely enables the institution to administer norms fully negotiated between members, one would have to assess the level of autonomy afforded by such delegation before a firm statement can be made as to whether the institution’s actions falls within the scope of public authority. This ultimately will be determined by the amount of discretion which the norm allows.

One way in which autonomy of institutions has been conceived from the political science perspective is by conceptualising IIs as “international bureaucracies” [6]. Though this idea is attractive in that it reinforces IIs autonomy to develop strategies of their own. Nevertheless, its potential elitist implication would also weaken the claim for substantive accountability at best; this ideology would support the establishment of due process as it might be perceived that appropriate substantive scrutiny cannot be done on technical issues from the outside. The relative absence of substantive scrutiny in institutions such as the World Bank and IMF reflect these concerns [20].

The appropriate idea of autonomy has to fit into the concept of rule of law. Though the importance of the rule of law and accountability at international level has been recognised, the concept is yet to gain much traction in comparison to the domestic setting. The effect is that since IIs are autonomous and at the same time not autonomous, they should be able to act without constraints and independently. However, they must also be subject to the checks of those from whom they derived their authority. At the same time, those exercising the checks should not as much as confine the activities of IIs. Thus, when it comes to the overall accountability of IIs mechanisms, one should probably hold member states responsible for the actions of IIs because the former are the source of the latter’s authority [21] but at the same time, the bureaucratic nature of IIs mean that they should be held accountable in their own right. The characterisation of IIs’ autonomy in this regard therefore creates a complex cyclical web indeed. Little wonder therefore that there has been not much success in substantiating the appropriate scope and content of accountability for IIs.

The idea of autonomy that would be suitable for this paper is such that would enable scrutiny of the substantive acts and inactions of IIs in a rule of law context. The true implication of this apparently terse statement would become visible after a thorough analysis of IIs authority is addressed.

Authority

Indeed, holding an institution accountable for its substantive actions cannot be a limitless exercise. The scope of such institution's responsibility should ordinarily align with the authority it exercises. Even where an institution is found to be autonomous, it does not automatically mean that all of its actions constitute an exercise of authority. It is thus evident that to decipher the substantive actions for which IIs should be held accountable and how they should be held accountable, one must first concretely address the institution's exercise of authority.

Questions on IIs' authority are topical. Increasingly, scholars are asking what it means for IIs to have authority [22]. Reasons for this query are divergent most of which will not be explored further in this paper. The term authority has no fixed definition. However, the term elicits discourse that draws on its relationship with other terms such as power and persuasion. What makes this discourse unavoidably topical is that authority seems to imply a degree of cohesion and persuasion by the institution as well as consent and voluntary recognition by subjects. At the same time, none of these attributes will suffice to establish authority in their own right. In this regard therefore, Hannah Arendt rightly noted that authority must be understood "in contradistinction to both coercion by force and persuasion through arguments [23]." Venzke also notes that "[w]hat arguably characterizes authority in contrast to power is a moment of consent, or a certain degree of voluntary recognition. At the same time, authority implies influence also in the absence of agreement by the addressee. If tested, authority needs to withstand disagreement and is thus different from persuasion [22]." The seeming puzzle emanating from this discourse therefore provokes questions as to how it is possible that authority rests on voluntary recognition and still constrains.

It appears to be taken for granted that aspect of an II's activity which constitutes an exercise of authority can be deciphered by simply looking at the form in which the action is expressed. This could take place in the context of law making, interpretation or implementation. Where the form of expression is conveyed through so-called hard laws such as treaties or if their implementation is undertaken through a global authority with relatively functional administrative capacity such as the WTO, it is taken for granted that such institution in such instances can be said to exercise authority which has been ceded to them by states [24]. However, where the actions of IIs are conveyed through so-called soft laws such as guidelines and recommendations, there has been less enthusiasm as to their impact. This boils down from the understanding that soft law are "rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects [25]." In this regard therefore, some have for instance contended that "[s]tatements of general aim and broad declarations of principle are [examples of which are soft laws]... too indefinite to create enforceable obligations and therefore agreements which do not go beyond that should be presumed to be non-binding". The impression this creates therefore is that the seemingly "soft" law preserves state sovereignty than hard law [26]. While such distinction might prove to be correct in some cases, it appears rather too simplistic and unprincipled and as such could give a false interpretation of an international institution's action. This could consequently impact on the scope of the public law scrutiny.

Some transnational legal scholars dare to think differently. According to Cotterrell, this group of scholars understand that there is a space between that domestic governance and international governance that requires some form of regulation [27]. More importantly,

transnational legal reasoning can help to disabuse the regimented approach to ascertaining authority such that one looks less at the form and more at the effect of the institution's actions. This however does not mean that transnational legal reasoning can disregard the dividing line between acts that amount to authority as against actions that are a manifestation of power as well as persuasive actions. Rather, the flexibility afforded by this line of reasoning renders the need to firmly establish the dividing line.

That an institution's legislative actions are widely followed regardless of the form in which they are expressed does not mean that such actions reflect public authority. Indeed it will be improper to conceive authority in this way. If one follows an uncritical path in assessing the effect of an institution's legislative activities, we might fail to differentiate the effect nested on obedience and that based on substantive agreement. It means therefore that even though there is need to divert the focus from institutional actions to the effect of their action, it remains imperative that an act is only considered to constitute an exercise of authority where it commands obedience even in the absence of agreement in substance [22]. The dilemma here is summed up in the observation that "[c]onstraint in the absence of consent spells power instead of authority and at the same time there would be no authority if it not also persisted in the absence of agreement [28]."

However, when assessed through what is herein termed the "effect perspective", institutional actions expressed in seeming subtle form can possibly be incorporated within the category of activities capable of constituting an exercise of authority though it must be noted that adopting this perspective makes it ever more important and even more difficult to differentiate authority from persuasion. In this regard, it has been noted that "authority implies that the addressee acts as if she took the contents of the command as a maxim for action due to the relationship of authority and not because of her own assessment of the command as such [22]." It means therefore that in assessing the effect, focus need be placed on the intent of the party exercising authority not on compliance based on a subject's perception of the nature of the command. In other words "[a]uthority implies at least relative content-independence; that is, its demand for obedience cannot only turn on the persuasiveness of its content in the eyes of the addressee." Nevertheless, consent of the addressee is important as it helps to differentiate authority from mere exercise of power.

In the context of international economic law for example, many activities of IEs take the form of soft measures. This makes any attempt to decipher the intent of these institutions perilous at best – do they intend that their "proposed" measure be applied by subjects even where the latter disagrees or do they merely seek to make the measures as acceptable as possible in order to *persuade* subjects to comply? A curious example is the Financial Action Task Force (FATF), an inter-governmental body which makes 'recommendations' for combating money laundering and terrorism financing.

Effort has been made to solve this conundrum by substantiating a principled account of what it means to say that an institution has or exercises authority. For example, because of its reflexive nature, it has been suggested that authority should be seen as arising from a discursive practice forming just a part of a broader constellation [29]. Determining whether an act constitutes an exercise of authority by focusing on the expected consequence of such act rather than the nature of the act itself will help to solve the consent/restraint debacle [30].

Mere influence can transform to authority as a result of the political process or as a result of de facto legal state. With regards to the former, it can be said that by engendering a common belief of what is acceptable, it can be argued that norms serve as the basis of authority as their accustomed use and reiteration of particular behaviour create an expectation that actions based on these norms will be followed [31]. Thus according to international relations scholars, the persistence of such norms have the effect of conditioning compliance at the domestic level and in turn, these customs reinforce compliance.

As noted above, institutional actions can also transform into authority as a result of the de facto consequence of such action. To be able to perceive authority in this sense, it is imperative to focus on the actual consequence of the action as opposed to assessing the nature of the action (i.e., hard or soft) or considering the process of legalisation (i.e., norm creation). In essence, in line with this reasoning, there is a possibility that an action, regardless of its nature or the process of legalisation can be said to constitute an exercise of authority. It is however essential to recognise that it is by no means an 'ends justify the means' proposition as conditions would have to be established to streamline the boundaries of what we term to be an exercise of authority as against ends based on 'rough consensus', 'persuasive appeal', or 'mutual agreements'. Bogdandy et al. were at pains to stress the need to develop an appropriate concept of public authority since it is "[o]nly authoritative acts [that are required] to be constituted and limited by public law, and the limiting function of public law depends on identifiable actors on whom to impose limitations [32]." According to this school, the form which a measure takes could possibly be of no tangible consequence. It is thus noted by Erika de Wet who stated that "[d]ecisive is not whether the normative act is legally binding in the formal sense, but rather whether it has a de facto impact on the rights and interests of States and/or non-State actors" [4].

Once this assertion is established, it becomes elementary to say that the activities of such institutions could spring up legitimacy concerns. Their legitimacy can only be settled if there is appropriate mechanism that renders them accountable; the gap between their exercise of authority and the absence of appropriate scrutiny would need to be reined in through the formulation of appropriate legal question which would ultimately provide the foundation for the clamour of substantive accountability.

Moreover, the increasingly changing architecture of global governance has rendered rather mooted the viability of assessing the process through which institutions act. This is because, as noted by Calliess and Zumbansen, norms created by institutions in recent times seem to oscillate between "the so-called official, 'hard' law and unofficial, 'soft law'" [29]. This concern has thus set scholars on the task of aligning the new set of norms with the existing norms. In the traditional sense, hard law with firm enforcement mechanisms would except in exceptional cases allude to the presence of institutional authority. On the assumption that one can take for granted the authority embedded in hard law, and more importantly because most institutional designs concerning economic issues tend to operate through 'soft' measures, the remainder of this part will focus on soft law. The aim will be to ascertain how seemingly soft laws can be incorporated in the existing account of authority.

Substantive Accountability-its Contents

Substantive rules create social reality and IIs have a role to play in this process through the creation of "meanings, classification and norm-diffusion" [33]. Hence to ensure that such substantive rules

are well construed and implemented, there is a dire need to provide platforms for scrutinising them. However, traditionally, discussions about an organisation's accountability are often addressed through an assessment of its structure and procedural framework. In this sense therefore, any general assertion about accountability deficit in institutional practice would more likely be understood to mean that such institution does not have an appropriate democratic framework in place or that the institution fails to follow due process. Sometimes, questions might be raised about the veracity or appropriateness of applying certain norms that are generated by the institution in question. For example, a non-member might review the applicability of certain OECD guidelines within its jurisdiction. Review in this regard is rarely directed at the content of the guidelines. Rather, it is more common that approvals or discontentment's are expressed based on factors such as their perception of how representative such guidelines are.

Limiting the accountability exercise to procedural issues might in many cases be truly sufficient. However, undue focus on procedural "rightness" or "wrongness" could be at the cost of thorough accountability. Failure to recognise the exercise of authority inherent in institutional acts would give the erroneous impression that it is unnecessary to conduct a public law review of institutional goals and the appropriateness of the medium employed to achieve such goal. Rather, it is contended that more attention should be placed on the political concerns associated with questions such as how the goal was reached or how the medium was decided.

Implicit in the expositions made thus far in this paper is the value of scrutinising the content of institutional measures. For substantive accountability, it is thus expected that in addition to reviewing the procedures through which an institution reaches decisions, it is equally important to review the philosophies, content, and implications of such decision. A good example is to assess the goals sought and the medium for achieving such goals. This form of scrutiny however raises two major concerns – through what yardstick should such act be measured? Is it appropriate to scrutinise the substantive contents of soft institutional measures? It is conceded that there is hardly a value-neutral metric for assessing the propriety or otherwise of institutional acts. Thus, one runs the risk of substituting the desired public law scrutiny with the idiosyncratic views of the assessors. In the same vein, the fact that recipients of the soft measures could in principle exercise discretion as to whether or not to adopt a soft measure brings to question the need for a firmer scrutiny. These two concerns will be treated in turn.

Substantive accountability of "hard" measures-deciphering the yardstick

This paper thus far has emphasised the dearth of accountability mechanisms for assessing the substantive content of institutional practices. This assertion at this juncture however requires some qualification. It would be incorrect to assert that IIs have been left to ride roughshod at the international stage. Indeed, such inference will be far from the truth as it has been consistently affirmed that IIs are often subjected to procedural scrutiny. Moreover, it would also be erroneous to suggest that transnational law is bereft of any form of mechanism to scrutinise the substantive contents of IIs' practices. Through common constitutional and public law mechanisms such as judicial review [34], efforts have been made to hold IIs accountable for their substantive actions. It has thus been rightly observed that IIs "are no longer regarded as merely convenient vehicles of inter-state cooperation. Rather, they are perceived as powerful actors whose actions/acts need to be restrained by the rule of law [35]."

While many would consider the direct review of institutional acts to be few and far between, it has been contended by some that the rate at which the acts of IIs are subjected to judicial review is more than it ordinarily appears especially if one pays attention to the various indirect forms of judicial review [36]. The present scope of substantive scrutiny should however not be overstated given that there is no established principled way of engaging in such exercise. Moreover, the identified instances where IIs activities were scrutinised through judicial review seem to be in those cases where the measures in question had some relatively obvious elements of coerciveness. Measures that are considered “soft” are however not scrutinised at the same level.

In order to substantiate a holistic and principled account of substantive accountability, it is necessary to gain an understanding of how judicial review can be deployed in holding IIs accountable.

In the transnational context, institutional acts that involve some degree of exercise of public authority may be subjected to judicial scrutiny at both the domestic and regional level [4]. This in some way could be viewed as one of the means through which national courts check the practices of IIs in a decentralised system of transnational governance [37]. Such judicial review may in fact be desirable as it may indeed be a viable route for holding IIs accountable for their substantive actions. This avenue remains suitable regardless of the concerns one might have as to the potential effect such decentralised scrutiny might have on the autonomy of IIs [38]. However, this is not to say that such concerns that have implication for the independence and autonomy of IIs are without base. Admittedly, this present line of reasoning may raise query as to why there appears to be a sudden change in position on the issue of IIs autonomy. In response to such query, it must be noted first of all that the idea of IIs autonomy is not an end in itself. The emphasis on IIs’ autonomy is not made to support the idea that they are severable or that such institution can be shielded from the remit of transnational governance through concepts such as immunity. Rather, the idea of IIs’ autonomy herein emphasised is a means for affirming the identity of the actor with whom responsibility lies.

Despite the desirability of a decentralised judicial review system, concerns arise regarding how the yardstick for measuring institutional acts should be determined. The danger here is that where national courts follow their own idiosyncratic idea of “the good” such promising public law platform may be reduced to IR squabbles between states and non-state actors. Moreover, where the yardsticks are subjective, the concerns regarding the effect of national judicial review on the autonomy of IIs may become potentially real.

The question as to the appropriate yardstick for questioning acts of IIs have been raised by Reinisch who wondered whether it should be based on domestic law in general or based on core national law protections (such as fundamental rights), or even international law [35]. In response, Reinisch, motivated by the urge to avoid undermining the autonomy of IIs, considers that such judicial review should be conducted through the yardstick of human rights nested on internationally accepted principles as opposed to those that are based purely on national legal concepts. Further, Benvenisti and Downs are of the opinion that coordination between national courts in this regard will have substantial global benefits [36].

The extent to which national courts are willing or able to hold IIs accountable is equally worthy of note. It is imperative to ascertain how courts react when asked to review acts of IIs – are they willing or reluctant to do so? When they show willingness, how do they justify the exercise of such judicial review? Should they be more willing or should they refrain from scrutinising IIs?

The *Solange I* case [39] could provide some insight in answering some of the questions raised above as this case seems to suggest that there could be a valid basis for adopting a decentralised judicial review mechanism in scrutinising the actions of IIs especially when fundamental values are at stake. In this case, the German Constitutional Court did not shy away from reviewing the actions of the European Economic Community (EEC). The Court applied its national laws which it justified on the grounds that the protection afforded by the EEC was inadequate. This case seems to serve as the template for other national courts whenever they are faced with the task of reviewing the activities of IIs [35]. However, another way to interpret the reasoning in this case is that courts would be more likely to exercise restraint if the institution in question has an alternative review mechanism vice versa.

The line of interpretation in *Solange I* however leaves open two legal quandaries as far as IIs’ scrutiny is concerned. First, the fact that the *Solange* approach “demonstrates that the need for the implicit decentralized judicial review by national courts may be most pertinent where the protection of core fundamental values is pursued” implicitly “introduces value judgments which may be difficult to make and accept.” Second, there is the danger that an II might altogether escape being held accountable for its substantive actions where the national courts readily refrain from conducting judicial review because such institution has an alternative judicial or quasi-judicial review mechanism. Here, the concern is that an institution might appear to have a review mechanism which might not be transparent or might even be ineffective.

One way of side-stepping the challenges associated with the review of IIs is for courts to undertake a “low intensity” review [40]. It has been noted that this approach makes judicial intrusion more acceptable as it “lies often in a reduced level of scrutiny, for example where courts check only whether the rights and values forming the standard of review are generally complied with and not whether this was the case in the specific situation [35].” The concern with this approach however is that the judicial review might turn into a toothless exercise as courts might in the exercise of excessive caution be inclined to interpreting such acts as conforming to human rights principles.

Substantive accountability in soft cases

As it has been continuously iterated throughout this paper, there is need to take seriously the soft law mechanism employed by IIEs. With regards to the task of developing a substantive accountability framework, it is thus necessary to expound on the possibility of extending the judicial review mechanism adopted in cases involving hard law to instances where IIs’ actions are under scrutiny. This transition is vital as governance has evolved. More and more, institutional actions take the shape of permissive rules [41] that allows for flexibility and discretion where necessary. Moreover, as already revealed through the “effect perspective” of the concept of public authority, seemingly permissive actions could in fact have authoritative force. Indeed, it could be as coercive as hard measures, thus warranting an appropriate level of scrutiny. It is because of such instances that it becomes imperative to extend the judicial scrutiny of IIs to instances where their practices are considered to be ‘soft’.

Nevertheless, one is not expected to take such quantum leap on the back of the conjecture that soft measures may also require deeper scrutiny. Its imperativeness has to be thoroughly established. In light of the IPA, it has been contended that soft measures may in fact have coercive effect through their constraint on individuals. According to

this account, the source of authority of such soft mechanism lies in the actual effect such measures have.

As a rule of thumb, it would appear that those to whom soft laws are directed often retain the discretion to follow or disregard such laws. If such assertion is shown to be true, it would put to question the supposed authoritative effect which one might have been inclined to attribute to soft measures. Take for example the OECD Guidelines for Multinational Enterprises (OECD MNE Guidelines) which despite its widespread appeal leaves states with the discretion of either adhering or not adhering with its contents without any direct institutionalised negative repercussion.

It is however contended that the fact that guidelines may not be adhered to does not make them any less law and as such does not necessarily rob off the cohesive elements in them. So long as there is a cost for non-compliance, the scope for viewing such seeming soft measure as constituting an authoritative act remains open. One can draw parallel to areas in which exercise of authority is beyond dispute. A local authority might designate an area as a 'no parking' zone with non-adherents liable to pay steep fine. Despite the clear authoritative character of such law, subjects might choose whether or not to abide by the law. Indeed, someone might continuously act against the stated law and quite happily pay the penalty. This functional law and economics reasoning has been used to explain international law, particularly the propensity for stakeholders to assess the compliance with international law in any particular instance would be efficient [42]. In such cases, even if issues might be raised as regards the effectiveness of the measure, this does not necessarily put in doubt the authoritative nature of such measure.

In the same vein therefore, we would be wrong to deem for example the OECD Guidelines as lacking in authority just because there are non-adherents. It must however be equally conceded that there is no telling signs of cohesiveness in the OECD Guidelines itself either. Moreover, the parking ticket analogy is not quite apt as the OECD does not even exert punishment for non-adherence. However, given that the authoritativeness of soft measures may only be ascertained at the instance of breach, there is no apparent reason why the signal of its authoritativeness should emanate from the institution itself so long as there is an identifiable source that can potentially threaten to punish non-adherents.

The task of proving the existence of such punitive mechanism (wherever it may arise from) is crucial for streamlining those soft laws that could be said to be authoritative and hence justify the extension of judicial review exercise. To achieve this, focus will be placed on the OECD MNE Guidelines.

OECD MNE guidelines

The popularity of the OECD MNE Guidelines as a business code of global appeal is reflected in the assertion that it is "the only multilaterally endorsed and comprehensive code that governments are committed to promoting [43]." Some have even gone as far as describing them as "the principal intergovernmentally agreed 'soft law' tool of corporate accountability [44]." It has been noted that the appeal of the guidelines derives from the political commitment of OECD members and adherent non-members and not due to any form of legal force.

The guidelines serve as a mere proposition which may be applied or dispensed with. This is even more so for non-adhering members. OECD members are however expected to comply since the guidelines exist in the first place primarily due to the stakeholders' support. As

such, as far as compliance of OECD members are concerned, it is imperative to assess critically whether there could exist or does exist an element of coercion in its institutional framework. Part of the roles required of the National Contact Points (NCPs) is to contribute to the resolution of "issues that arise relating to implementation of the Guidelines in specific instances in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines [45]." The document contains necessary procedure to be followed by the NCPs. It also emphasises that the NCPs will serve as mediators or conciliators in order to resolve any impasse arising from the implementation or non-implementation of the Guidelines. Even where disputing parties fail to reach an agreement, the NCPs can make recommendations on the implementation of the Guidelines.

Notwithstanding the important role played by the NCPs in policing compliance with the Guidelines, it would be far-fetched to suggest that their activities amount to an enforcement mechanism.

The foregoing observation should however not be seen as sealing the possibility of construing the Guidelines as authoritative. In line with the effect-based reasoning of the IPA as explained in the preceding parts of this paper, whether or not the Guidelines is considered authoritative would depend largely on our assessment on the actual effect the Guidelines have on subjects. It must be reiterated that in assessing this effect, the restriction on unilateral freedom (which is an essential requirement for the exercise of authority) need not emanate from the institution itself. On this basis therefore, it becomes imperative to conduct a more detailed analysis of the Guidelines.

The MNE Guidelines can be broadly categorised into two aspects in terms of the agenda it pursues – the trade and investment liberalisation agenda and the Corporate Social Responsibility (CSR) agenda. This paper will focus on the latter as the authoritative status of the former is in doubt. CSR has no fixed definition but it can be said to focus on maximising the societal contributions of businesses such as maintenance of respect for human rights, environmental protection or the pursuit of social justice. The MNE Guidelines' pursuit of CSR goals is unequivocal. Paragraph 9 of the Preface to the Guidelines provides that "[t]he common aim of the governments adhering to the Guidelines is to encourage the positive contributions that multinational enterprises can make to economic, environmental and social progress and to minimise the difficulties to which their various operations may give rise."

The widespread acceptance of the CSR agenda has led some to suggest that it should serve as the basis upon which minimum globally applicable standards for business should be built [46]. In this regard, it was noted by Ward that the CSR agenda is a potential candidate for shaping "the content of ... a globally applicable minimum set of standards for business behaviour [46]." It has even been suggested that though the Guidelines are not legally binding, the fact that many countries have adopted them or modelled their contents give them moral force [47].

The foregoing shows the prime importance of the OECD MNE Guidelines in the global CSR architecture. However, given that the paper aims to justify the application of high threshold of scrutiny for such instruments, we cannot afford to proceed simply on the basis of The Guidelines' general appeal. In other words, the Guidelines must be shown as truly authoritative.

It is quite clear that the OECD does not adopt any measure that directly or indirectly gives the Guidelines any coercive force. Notwithstanding, it can be contended that external factors have aided

in giving instruments such as the OECD MNE Guidelines authoritative force. The paramount factor is the stakeholder expectations [48] which might for various reasons impact on management approach of multinationals [49]. This could result from the perceived need to avoid the backlash for non-compliance [50]. Its authoritative nature is further strengthened by the array of specific complementary principles that have been established over the years for example in the field of human rights [51].

Conclusively therefore, the OECD MNE can support the contention that soft measures can indeed have authoritative force hence, in such instances, they should be scrutinised in the same way as hard law.

Judicial review of soft cases

Given that it has been shown that seemingly soft measures can truly carry authoritative force and as such in some cases might be no less different from the institutional practices which have been shown to have been subjected to judicial review by national courts, there is no reason why its substantive content should not be subjected to judicial review in the same way in which hard institutional measures have been scrutinised.

Appropriate mode and degree of review

Up till this point, the paper has sought to establish the need to hold international institutions accountable for their substantive actions and in particular to broaden the scope of scrutiny to include seemingly innocuous “soft” measures through the adoption of “effect-perspective in defining the concept of public authority. In order to articulate the need for the herein proposed concept of substantive accountability, it was made a prerequisite that IIs are viewed as autonomous and authoritative actors. This remains so regardless of the form and mode of individual institutions [52]. De Wet noted in this regard that “it is the de facto impact of an international institution on the rights of States and/or non-State actors which triggers the accountability requirement, rather than the question whether the international institution constitutes a subject of international law in the formal sense [4].”

However, once we proceed beyond the question of whether IIs should be held accountable and we are faced with the question of degree of scrutiny, one is then expected to take into account the peculiarities of each institution, we are to take into account the institutional structure and their operations. The peculiar characteristics of an institution may not be unconnected to the way in which they are established which might in turn give us a clue as to how they are likely to behave. It is basic reality that international institutions behave differently as a result of the differences in their forms and design which could result in wide ranging and disparate consequences. It would as such be uncritical and unhelpful to suggest a one-size-fits-all concept of legal scrutiny for all IIs. Moreover, the peculiarity of individual institution also makes it difficult to give a specific categorisation or concrete guidance on the appropriate mode and degree of review. Further, the perversity of the effect of IIs practices means that “the constituency entitled to claim accountability from an international institution can consist of a variety of international actors (with or without international legal personality), provided their interests or rights are affected by the conduct of the international institution in question.”

This means therefore that the degree of review should be determined in individual cases and even if it is considered necessary to set out ex ante guidance documents, it should at best contain open-textured guidance based on broad categorisation of institutions.

Conclusion

This paper has sought to tease out and shed further light on the public law dimension of international institutions’ accountability deficit. In particular, the paper posits that the idea of substantive accountability is much less understood and pursued both within the institutions and by other stakeholders. Substantive accountability in this context is focused on the actual content of institutional acts as opposed to institutional forms and procedures.

As regards the scope of activities requiring scrutiny, arguments were made to extend scrutiny to seeking soft measures of IIs. Given that there exists an uncontroverted difference in the nature of public authority exercised at the national as opposed to the international level, the absence of any direct punitive measure against non-adherents or violators of such soft provisions should not be seen as diminishing the claim of their authoritativeness so long as there exists an identifiable source willing to exercise such “punishment”. For instance, a transnational corporation may choose to exit a state for the latter’s failure to adhere to guidelines provided by an International Institution. The fact that such institution by itself is incapable of punishing such state becomes irrelevant.

Conclusively therefore, it is suggested that we re-orientate ourselves to the issue of accountability of international institutions as these entities continue to play a more ingrained role in formulating and implementing policies that have direct impact of the social and economic welfare of global citizens.

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