

GLOBALIZATION AND LOCAL ADAPTATION IN INTERNATIONAL TRADE LAW

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The Asia Pacific Legal Culture and Globalization series explores intersecting themes that revolve around the impact of globalization in countries on the Asia Pacific Rim and examines the significance of legal culture as a mediator of that impact. The emphasis is on a broad understanding of legal culture that extends beyond traditional legal institutions and actors to normative frameworks and the legal consciousness of ordinary people. Books in the series reflect international scholarship from a wide variety of disciplines, including law, political science, economics, sociology, and history.

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Preface

This volume offers a range of essays exploring the interplay between international trade standards and local practices. The volume is organized to highlight normative and organizational dimensions of the relationship between global regulatory standards and local performance. We begin with a selection of essays on concepts and methods (Part 1). Pitman Potter's introductory essay on selective adaptation and institutional capacity suggests that these particular paradigms offer useful approaches for understanding normative and organizational aspects of local implementation of international trade standards. The research presented here and the underlying project from which it is derived give significant attention to these normative and organizational perspectives in examining the conditions that affect local implementation of international trade standards. Ljiljana Biukovic's examination of global competition governance illustrates the effects of normative conflict in the implementation of international standards, while Emma E. Buchtel's methodological essay examines the role of normative discourse in cross-cultural conflict resolution. These essays are aimed at sharpening appreciation for the theoretical implications of local knowledge as an essential dimension of the processes of assimilation and transplantation that are so often assumed to accompany processes of globalization. As each of these authors suggests, expectations about globalization and convergence of regulatory norms are likely to go unfulfilled unless the resiliency of local legal and political culture is factored into the analysis of treaty compliance.

Informed by these conceptual and methodological perspectives, Part 2 of this volume then presents a range of case study examples of normative and institutional dynamics in the local implementation of international regulatory standards. International trade standards are explored more specifically in successive chapters addressing the role of local conditions in international contracting (Yoshitaka Wada), labour mobility within the North American Free Trade Agreement (NAFTA) (Kathrine Richardson), new developments in intellectual property law in China (Liao Zhigang), competition policy (Richard Schwindt and Devin McDaniels), and local implementation of World Trade Organization (WTO) transparency standards (Pitman Potter). Each of these essays addresses a salient issue in the international trade regime and examines the dynamics of local application. In these case studies, we discover the complexity of processes and outcomes by which international trade standards are localized. Normative and organizational dimensions addressed in these essays reveal that local compliance with international trade standards is not simply a matter of political will, but neither can it be attributed to singular factors of normative affinity or organizational performance. Rather, elements of selective adaptation and institutional capacity can be seen to operate in tandem to influence the reception and implementation of international rule regimes.

In light of the importance of dispute resolution both as a litmus test for the universality of rule regimes and underlying norms and as a context within which rules and norms are contested, Part 3 addresses local adaptation of international standards in relation to dispute resolution. The essays cover topics ranging from corporate dispute resolution in Japan (Maomi Iwase), international dispute resolution practice in China (Wang Shuliang), education on alternative dispute resolution (ADR) in Japan (Mayumi Saegusa and Julian Dierkes), and a comparative review of the performance of China and Canada under the WTO's TRIPS Agreement (Wenwei Guan). Each essay focuses on the resiliency of local norms and practices, which are an essential component of the dynamics of selective adaptation and institutional capacity. In the context of selective adaptation, it is precisely such resiliency, and the durability of community norms that it represents, that drives local interpretive communities to rely on local norms in the interpretation and implementation of international standards. And in the context of institutional capacity, it is precisely the influence of local conditions on organizational performance that affects local efforts to implement international trade standards in the absence of normative conflicts.

We hope that this collection of essays offers a range of useful case studies on the normative and organizational dimensions of local implementation of international trade standards. This research was made possible through the Major Collaborative Research Initiatives (MCRI) program of the Social Sciences and Humanities Research Council (SSHRC) of Canada, for which the editors are deeply grateful. We are indebted to each of the contributors to this volume for their commitment of time, energy, and ideas to this project. We would also like to thank the Institute of Asian Research and the Faculty of Law at the University of British Columbia for steadfast support and encouragement in connection with this project. Many student research assistants (including those whose essays in this volume formed part of their doctoral research) contributed to this project, including Harry Chao Wang, Matthew Levine, Stephen Rukavina, Ajinkya Tulpule, Karen Slaughter, Frank Huang, Anna Turinov, Nao Kashiwagi, Hayane Dahmen, and Wendy Zhu. We would like especially to thank Megan Coyle, Assistant at the UBC Law Faculty's Centre for Asian Legal Studies, and Rozalia Mate, Project Manager at the Institute of Asian Research, for their ongoing administrative assistance in support of this volume. Thanks also to Dr. Richard Schwindt for assistance in designing the formulae discussed in the Introduction to this volume.

Abbreviations

ACCJ	American Chamber of Commerce in Japan
ADR	alternative dispute resolution
AML	<i>Antimonopoly Law</i>
APDR	Asia Pacific Dispute Resolution project
APEC	Asia-Pacific Economic Cooperation
CBPS	Customs and Border Protection Service (US)
CBSA	Canadian Border Services Agency
CCP	<i>Code of Civil Procedure</i> (Japan)
CCPIT	China Council for the Promotion of International Trade
CIC	Citizenship and Immigration Canada
CIETAC	China International Economic and Trade Arbitration Commission
CIPE	Center for International Private Enterprise (US)
CLRC	Central Labour Relations Commission (Japan)
CMAC	China Maritime Arbitration Commission
COC	Chinese Olympic Committee
CPC	Chinese Communist Party
DFAIT	Department of Foreign Affairs and International Trade (Canada)
DHS	Department of Homeland Security (US)
ECJ	European Court of Justice
FTC	Free Trade Commission (US)
GATS	<i>General Agreement on Trade in Services</i>

GATT	<i>General Agreement on Tariffs and Trade</i>
GSP	Generalized System of Preferences
IIRIRA	<i>Illegal Immigration Reform and Immigrant Responsibility Act (US)</i>
IOC	International Olympic Committee
IP	intellectual property
IPR	intellectual property rights
JAA	Japan Association of Arbitrators
JCAA	Japan Commercial Arbitration Association
JCCA	Japan Credit Counseling Association
JCSTAD	Japan Center for Settlement of Traffic Accident Disputes
JFBA	Japan Federation of Bar Associations
JFTC	Japan Fair Trade Commission
JIC	Japan Investment Council
JIPAC	Japan Intellectual Property Arbitration Center
JSE	Japan Shipping Exchange, Inc.
LCCA	<i>Law for Conciliation of Civil Affairs (Japan)</i>
MITI	Ministry of International Trade and Industry
NAFTA	<i>North American Free Trade Agreement</i>
NCAC	National Consumer Affairs Center of Japan
OECD	Organisation for Economic Co-operation and Development
PCT	<i>Patent Cooperation Treaty</i>
SCAP	Supreme Command of Allied Powers
SSC	Special Survey Committee (Japan)
SSI	Structural Impediments Initiative (Japan)
TEC	<i>Treaty Establishing the European Community</i>
TEWG	Temporary Entry Working Group (NAFTA)
TN	Treaty NAFTA
TOMAC	Tokyo Maritime Arbitration Commission
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNIDROIT	International Institute for the Unification of Private Law
USAID	US Agency for International Development
USOC	United States Olympic Committee
VANOC	Vancouver Organizing Committee
WIPO	World Intellectual Property Organization
WTO	World Trade Organization



PART 1

CONCEPTS AND METHODS

Introduction

Selective Adaptation, Institutional Capacity, and the Reception of International Law under Conditions of Globalization

PITMAN B. POTTER

Legal behaviour is strongly influenced by norms of legal and political culture¹ and by the institutional context within which these norms are operationalized.² Cultural norms are reflected in rules, including formal laws and regulations and informal procedures and practices. The distinction between rules and the cultural norms they represent becomes especially important when rules particular to one cultural group are used by another without a corresponding assimilation of underlying norms. Local implementation of non-local rules is also affected by the institutional context. Under current conditions of globalization, normative tensions are present as liberal rules of governance generally associated with Europe and North America are disseminated to other areas characterized by local norms that are often in conflict with norms of liberalism. International trade regulation is of special importance, where concerns over compliance with international standards often reflect misplaced expectations about the enforceability of rules without agreement on underlying norms. In the context of globalization, economic and political power has allowed trade standards associated with liberal democratic capitalism to be imposed on societies outside the European tradition, but has had less effect in displacing local cultural norms. Better understanding of local implementation of international trade standards requires a deeper appreciation of the normative and structural contexts for legal performance. This introductory essay presents an approach to understanding trade compliance in light of normative factors of selective

adaptation and the structural dynamics of institutional capacity, drawing on conceptual and methodological perspectives developed through the course of the Asia Pacific Dispute Resolution (APDR) project of the Institute of Asian Research at the University of British Columbia.

Globalization and the Unification of Trade Standards

Treaty compliance is an important example of the reception of international law. Treaty compliance involves dynamics of interpretation and implementation of international legal standards. In cases where treaties involve rules grounded in non-local norms, interpretation involves a dynamic of selective adaptation by which non-local rules are interpreted according to local norms of legal and political culture. As well, to the extent that reception includes performance, dynamics of structural relationships are also important and are revealed through the paradigm of institutional capacity.

Current conditions of globalization have supported the steady entrenchment of principles of trade liberalization associated with the *General Agreement on Tariffs and Trade* (GATT) and the World Trade Organization (WTO). Of particular importance is the influence of principles of market liberalization, privatization, and fiscal austerity associated with the so-called Washington Consensus. Seen initially as a remedy for economic problems in Latin America,³ the principles of the Washington Consensus have been expanded to Asia as well, as an antidote to “crony capitalism” and other perceived ills in the economies of the developing world.⁴ Although associated most immediately with neoclassical economics, the principles of the Washington Consensus drew more fundamentally on norms of liberalism that call for the diminished presence of government in market regulation. Although this perspective is undergoing active reconsideration,⁵ the ideological dimensions of globalization contribute to its capacity to bring about historically unprecedented cultural and institutional change.⁶

Power imbalances between developed and developing economies in particular have strengthened the dissemination and imposition of norms of governance and regulation associated with liberal industrial states in the West, particularly the United States. China’s accession to the WTO, the Asia-Pacific Economic Cooperation (APEC) trade liberalization process, the annual process of G8 summitry, and annual reporting on human rights conditions in developing economies by the United States all suggest the intention and capacity of liberal industrial states to disseminate their preferred norms of governance around the world. International regulatory systems associated with the GATT and the WTO also serve as vehicles for

global economic integration.⁷ Based on regulatory norms of transparency and the rule of law that are considered requirements for economic growth,⁸ principles of government restraint are entrenched in regulatory regimes for international trade and investment associated with the WTO.⁹

Ideological features of globalization and their expression through institutional regimes of governance have particular consequences. Although liberal norms of global business regulation may well be aimed generally at broad goals of economic growth and development, they also support the economic and political interests of the post-industrial states. For just as states deploy and manipulate international economic organizations to suit their own policy imperatives,¹⁰ so also do both states and private actors strive to build political and popular support for particular institutional and normative regimes through the deployment and manipulation of ideas. Antonio Gramsci's ideas about "cultural hegemony" raise important questions about the interests being served by the rhetoric of globalization.¹¹ Thus, trade liberalization, market reform, and market access agreements entrench regulatory principles that are presented as universal but that also support particular political and commercial interests.¹²

In a very important sense, globalization embodies an expansion of geographical imagination,¹³ reflecting a process by which the socioeconomic and political preferences that inform certain law and governance rules in a particular region are exported and imposed across the globe.¹⁴ This is made possible by the political, economic, and ideological dominance of the post-industrial capitalist states. Political dominance is achieved through international organizations such as the WTO, where disparities of bargaining capital entrench the interests of post-industrial capitalism.¹⁵ Economic dominance is supported by nearly overwhelming bargaining power, based on territorial control over consumer markets in Europe and North America preserved through tariff measures and anti-dumping provisions.¹⁶ Ideological dominance is achieved through education and training systems based largely at European and North American universities that disseminate norms and values of liberalism. Legal training programs supported by the United Nations Development Programme, the Canadian International Development Agency, the European Union, and the Ford Foundation, for example, suggest continued linkages between the education of elites from developing economies and the dissemination of liberal values.¹⁷

The development of international commercial law augments these initiatives, such that the cross-border transit of goods is now governed largely by the WTO's multilateral trade liberalization rules. Contemporary

international commercial law imposes the particular historical experiences and material preferences of a few powerful trading economies upon the global community, often to the disadvantage of developing economies.¹⁸ As a result, market liberalization principles imposed on the global political economy remain partial and distorted in favour of the governance principles of the post-industrial states, with little attention paid to local perspectives and conditions in developing economies.¹⁹ Halting and incomplete efforts to provide support for developing economies through, for example, the Generalized System of Preferences, have largely given way to the resilient power of “voluntary export restraints” and anti-dumping regimes enforced by fully industrialized economies to inhibit market access.²⁰

Challenges for institutional response in the area of global financial flows are also evident, such that territorial and jurisdictional limitations present historically unprecedented challenges to the regulation of transnational capital. The historical relationship between private banking and state expenditures, expressed, for example, in the expansion of the Rothschild financial empire through support for the French king’s apparently insatiable appetite for military adventure, was restricted largely to national territory – not least because this imposed a limit on the lender’s access to security.²¹ Today, by contrast, international lending and investment are facilitated by organizations, processes, and norms tailored to the needs of global capital.²² Banking and investment firms have the financial and technological capacity to establish themselves around the world and to direct capital flows without regard to national boundaries, supported by WTO-affiliated agreements on trade-related investment and trade in services that limit the capacity of states to restrict such activities.²³ Supporting the organizational and procedural dynamics of financial globalization is a framework of liberal norms and values extolling principles of market autonomy and the supremacy of private property. Bilateral and multilateral investment agreements that entrench principles of national treatment are aimed primarily at securing market access for a relatively narrow band of firms with global capabilities and interests.²⁴

Institutional responses to the transnational flow of information also reflect the impact of material and ideological features of globalization, and suggest significant departures from the past. International intellectual property (IP) regimes purport to protect private ownership of proprietary technologies for transmission of information, as well as the information itself, by imposing on member economies obligations to conform their national IP legislation to international standards.²⁵ Some argue that this privileges a narrow band of knowledge economies and information providers and works

to stifle innovation and growth in developing economies.²⁶ Moreover, although international regimes support unified standards of protection of private interests in knowledge, no parallel system exists to protect public interests, and so the regulation of electronic commerce (both means and content) remains largely dispersed among conflicting national systems.²⁷ As a result, purveyors of information internationally can be assured that their private interests in the content of expression and the means of transmission are well defended, while remaining relatively free of global regulatory oversight that might protect public interests in both content and means of expression. Thus, institutional responses to globalization of information permit largely unrestricted flows of entertainment and media products, with little accountability for content and responsible access.²⁸

Institutional responses to these newly emergent material and ideological dimensions of globalization reflect the extent to which state sovereignty is challenged.²⁹ By locating the subjects of exchange and the exchanges themselves outside particular jurisdictional boundaries, material features of globalization challenge the state's capacity to regulate these activities. For despite calls for multinational regulation, state governance remains subject to the limitations of jurisdictional boundaries – whether in the realm of exchanges of goods and services (e.g., customs and tariff administration), transactions in capital (e.g., financial disclosure and taxation rules), exchanges of information (e.g., media and Internet regulations), or travel by people (e.g., immigration regimes). To the extent that this challenges closely held beliefs about territorial integrity, the state's capacity and willingness to enforce its sovereign powers over global enterprises is further undermined. The state also faces direct opposition to its efforts to regulate the conduct of global business, where the mobility of capital operates as a disincentive to public interest regulation. Although there is debate over the possible correlations between lax regulation and international investment flows, the discourses of the “race to the bottom” and the concomitant call for renewed state activism³⁰ reflect concerns with diminishing state sovereignty in the face of material dimensions of globalization.

Some suggest that these historical changes, and the apparent imbalances in purpose and effect associated with them, have generally deleterious effects on developing economies, whose comparative advantages and negotiating powers are weak.³¹ Certainly, governments for whom foreign investment is either a key element in local development or a key contributor to the co-optation of elite priorities face increasing challenges to the protection of public goods within their jurisdictions.³² And yet, it is public goods,

such as education and health care, that are essential to developing the human capital that enables developing economies to benefit from the global economy.³³ The emergence of local industries aimed at supplying goods to local consumers is hampered by investment liberalization policies that discourage, if not ban outright, policy efforts aimed at nurturing local industries, and by trade liberalization policies that require local market openings while permitting protectionist anti-dumping barriers in potentially lucrative markets elsewhere.³⁴ International mobility of capital inhibits local efforts aimed at protection of labour and environmental conditions, which are seen to justify capital flight.³⁵ The state's capacity to prevent the domination of foreign media and culture is undermined by the prospect of trade sanctions aimed at securing market access for information and entertainment industries,³⁶ while efforts to stimulate local technologies are constrained by international intellectual property regimes.³⁷ And finally, efforts to promote internationalization of local labour forces, with ancillary benefits of foreign exchange remittances, opportunities for technical training and education, and the potential for expanding commercial and social networks, face increasingly contested immigration policies.³⁸

Although the exegesis of and justifications for globalization reveal elements of material and ideological dynamics, the effects of globalization on local socioeconomic and political conditions remain obscure.³⁹ Certainly the expansion of market reach, growing diversity in goods and services, developing information infrastructure, expanded transboundary transportation, and accelerating privatization and deregulation programs can all be expected to affect local societies around the globe.⁴⁰ Although material effects may seem obvious at first, a closer look suggests significant local variation as well as significant regional contributions to the flows of goods, capital, information, and people. Thus, the penetration of foreign-branded goods has given rise to important elements of consumer differentiation locally as well as local imitation and variation in design, function, features, and appearance.⁴¹ Increased availability of international capital locally, despite encouraging institutions and processes for management and oversight that mirror those of capital-exporting economies, have also permitted local approaches commensurate with local conditions.⁴² Transnational information flows, whether through technology transfer, media publication, or entertainment, reveal a constant dynamic of local adaptation as well as regional competition.⁴³

The ideological effects of globalization on local cultures are even less clear. There is no shortage of liberal commentators who conclude that changes in ideological perspective are the basis for changes in material

conditions – in particular that adoption of liberal approaches to minimal governance and free market triumphalism are the basis for material prosperity.⁴⁴ Yet, the empirical evidence remains conflicted. Certainly, globalization has permitted broader exchanges of ideas about product competition and consumer selection, the character and purpose of financial and monetary practices, the content and uses of information, and the identity and worth of human beings. Causal linkages between the spread of liberalism associated with globalization and changes in local norms and values cannot be assumed, however, and we certainly cannot be confident that ideological perspectives associated with liberalism are, or can become, dominant in the local context.⁴⁵

Expectations that material features of globalization will drive changes in local value systems reflect questionable assumptions about the superiority of liberalism and the contingency and weakness of alternative cultural arrangements. Assumptions about the inherent superiority of liberalism are tied to natural law norms on the supremacy of the individual and resulting limits on the authority of state and community.⁴⁶ Much of this is expressed in discourses about “civil society,” whose beneficial conditions are seen to be the result of the withdrawal of the state.⁴⁷ Assumptions about the contingency and indeterminacy of local culture are evident in liberal responses to policy efforts to protect local culture through, for example, restrictions on foreign ownership of publishing media.⁴⁸ Assumptions about the power to change culture through material change are driven by enlightenment theories that inspired colonialism (and, incidentally, drove Marxist and Maoist ideas about social transformation).⁴⁹

An alternative approach would be to examine local conditions on their own terms and frame expectations accordingly. Roberto Unger has proposed that the influence of ideas on local communities depends on a dynamic of “reception,” which is grounded in the capacity of ideas to resonate with existing values.⁵⁰ This suggests that the influences of globalization locally will depend significantly on the possibilities for complementarity with local norms. This in turn would seem to require a more fundamental understanding of local conditions or, to use Geertz’s famous phrase, a mastery of “local knowledge.”⁵¹

Thus, understanding globalization raises questions about conceptualization, observation, and expectation. Conceptualizing globalization must take into account historical perspectives in order to account more fully for the particularities of current experience. Observing globalization requires examination of material and ideological dimensions and appreciation of the

institutional implications. Expectations about globalization should embrace a cautious skepticism about potential effects on local communities and should be accompanied by a patient sensitivity to the myriad of possible outcomes. One solution to the dilemma lies in research on local cultures and their responses to conditions of globalization. This is the approach taken in this volume, with specific attention to questions of treaty compliance.

Local Reception: The Influence of Selective Adaptation and Institutional Capacity

In contrast to expectations about convergence that suggest development towards a globally unified system of institutional practices,⁵² local implementation may be seen as a product of normative and structural factors. Normative dynamics of *selective adaptation* explain variations in compliance with non-local standards by reference to different levels of normative consensus. Structural dynamics of *institutional capacity* depict the ways in which relational factors of institutional purpose, location, orientation, and cohesion affect local implementation of non-local rule regimes.

Selective Adaptation

Selective adaptation describes a range of localized responses to external regulatory standards. In the absence of absolute normative consensus, selective adaptation suggests a spectrum of possibilities for implementation of non-local standards, based on varying degrees of conformity among local and non-local norms. Our research suggests that selective adaptation informs the processes by which implementation of non-local rule regimes is mediated by the influence of local norms.⁵³ Selective adaptation is made possible by the role of “interpretive communities” in the reception of international rule regimes.⁵⁴ Thus, government officials, socioeconomic and professional elites, and other privileged groups all exercise the authority of political position, specialized knowledge, and/or socioeconomic status to interpret non-local standards for application locally. In the course of this process, these interpretive communities express their own normative preferences, and in so doing selectively adapt non-local standards to local conditions. This process of interpretation reflects dynamics of perception, complementarity, and legitimacy.⁵⁵ We may conceive of selective adaptation by reference to the following formula:

$$SA = \frac{\textit{Rule Regime}}{(N = Nf \textit{var} N1) \times [(P = Pf \textit{var} P1) + (C = Of \textit{var} O1) + Jn]}.$$

Thus, selective adaptation (*SA*) may be seen as a function of a particular rule regime in light of the relationship between local and non-local norms attached to particular rule regimes, as affected by factors of local perception (*P*) on interpretation of both the rule and the underlying norm; the extent of complementarity (*C*) between the adapted rule and underlying norms (*O*), and existing rules and norms in the local economy; and the broader question of legitimation (*J*). The rule/norm relationship (*N*) thus involves a rule regime disseminated through processes of globalization, as qualified by the possibility of normative difference between the global and the local, which in turn is affected by factors of perception, complementarity, and legitimacy.

Perception influences understanding about foreign rule regimes and local norms and practices, and the relationships among them.⁵⁶ Perceptions about purpose, content, and effect of foreign and local institutional arrangements affect the processes and results of selective adaptation. For example, even where local institutional arrangements for political, social, and economic relations appear to have followed international models and organizational forms, local interpretation of international perspectives on federalism and local governance, multiculturalism and local society, and development and local economic relations are likely to hinge on the content and accuracy of perceptions about non-local institutional rules and practices, and about the norms that inform local systems. The interpretation and application of non-local rules in light of local norms thus depends on perceptions about both. This means, for example, that perception of what is required by WTO regimes for transparency and rule of law may well vary across (and within) different societies, ranging from simple commitments to publish formal laws and regulations⁵⁷ to more expansive notions about participation in rule making and the need for appeals processes to restrain state regulatory oversight.

Drawn from principles of nuclear physics, *complementarity* describes a circumstance by which apparently contradictory phenomena can be combined in ways that preserve essential characteristics of each component and yet allow for them to operate together in a mutually reinforcing and effective manner.⁵⁸ Complementarity may influence the extent to which norms and practices of local cultural communities can engage in mutually effective ways with institutional rules and processes associated with outside systems. Complementarity may inform the relationship between local accommodation and resistance to international standards in light of local conditions and needs. Thus, the extent to which WTO processes for trade dispute resolution have tended to privilege consensual or compulsory mechanisms⁵⁹ may

be seen as either more or less complementary to local dispute resolution systems that reveal greater or lesser preferences for binding decision making. Local interpretation of international perspectives on federalism and local governance, multiculturalism and local society, and development and local economic relations may depend on complementarity between international and local forms and processes.⁶⁰ Factors of complementarity also arise around questions of compliance with international standards, informing the relationship between local accommodation and resistance to international standards in light of local conditions and needs.

Legitimacy concerns the extent to which members of local communities support the purposes and consequences of selective adaptation.⁶¹ Thus, local interpretation of international perspectives on federalism and local governance, multiculturalism and local society, and development and local economic relations will depend on the legitimacy accorded to the processes and outcomes of the perspectives themselves and the legitimacy of local approaches to interpretation and application. Although the forms and requirements of legitimacy may vary, it remains essential to the effectiveness of selectively adapted governance practices. Legitimacy may derive from any variety of factors, including patterns of sociocultural relations, ideology, or local socioeconomic or political interest. Legitimacy may play a significant role in local implementation of trade disciplines on national treatment or intellectual property, where external pressures for market access or protection of ideas may be seen locally as intrusions on sovereignty and local autonomy. Thus, perception, complementarity, and legitimacy all affect the potential for integrating trade standards at the local level.

Institutional Capacity

Institutional capacity refers to the ability of institutions to perform their assigned tasks. Institutional capacity has been examined from relational perspectives that focus on issues of responsibility between organizations and their constituencies, efficiency in performance and the use of resources, and accountability to varying sources of authority.⁶² Functional perspectives have also been applied to the question of institutional capacity, in such areas as access to information, effectiveness and methods of communication, organizational symmetry, and ability to enforce rules and directives.⁶³ No matter how useful these approaches may be in the abstract, however, actual institutional performance remains contingent on domestic political and socioeconomic conditions.⁶⁴ Local conditions of rapid socioeconomic and political transformation in Asia pose particular challenges for institutional

capacity, inviting attention to structural relationship questions of institutional purpose, location, orientation, and cohesion.

Examined by reference to factor analysis, institutional capacity can be expressed through the following formula:

$$IC = \frac{\textit{Institutional Goal}}{\left(U = \frac{1}{1-u} \right) (S = Sn) (A = Ar \text{ var } As) \left(D = \frac{1}{1-d} \right)}.$$

Thus, institutional capacity (*IC*) may be seen as a function of a particular institutional goal being affected by factors of institutional purpose (*U*) concerning the institutional goal; the effects of location (*S*) on understanding of the institutional goal; the effects of institutional orientation (*A*) as to how the goal is to be pursued; and the extent of institutional cohesion (*D*) in organizational structure and behaviour.

Institutional purpose may be seen as a factor of uniformity and diversity, and reveals the ways in which the goals of institutions vary with local material and ideological contexts, the availability and nature of financial, human, and other resources, and the various limitations that attend institutional performance. Institutional purpose plays a significant role in determining the capacity of institutions to respond to socioeconomic change. Institutional purpose concerns the goals of institutional behaviour, and the way these reflect consensus and conflict among communities in which institutions operate. Thus, the capacity of local governance institutions to integrate international standards on trade regulation depends on the degree of clarity and consensus regarding policy objectives. For example, in the intellectual property area, differences among policy actors regarding the purpose of intellectual property rights (IPR) measures (for example, encouraging local innovation versus simply complying with externally imposed rules) have a significant effect on institutional behaviour.⁶⁵

Institutional location is a product of varying degrees of distance from centres of governmental power and conformity, and reflects in particular the question of balancing central authority with decentralization of social and economic development initiatives.⁶⁶ Economies in Asia have long traditions of tension between local and central authorities. Although scholarly discourses have come increasingly to accept the application of federalist principles to local circumstances in many Asian economies, this discussion has often been marginalized in established policy discourse. In the process

of bargaining that accompanies the allocation of resources and the distribution of costs and benefits of policy initiatives, rigid adherence to contested ideals of unitary authority limits the ability of regulatory arrangements at both local and national levels to provide even limited autonomy in support of predictability and stability in socioeconomic and political relations. Institutional location affects trade regulation; for example, questions about agricultural subsidies may differ significantly when implemented in globalized urban areas as opposed to rural areas.

Institutional orientation may be seen as a factor of the difference between the orientation of regulatory institutions and the behavioural orientation of the societies in which the institutions operate. Orientation refers to the priorities and habitual practices that inform institutional performance. For governance institutions in Asia, orientation involves particularly the tension between formal and informal modes of operation. This is especially sensitive under conditions where local social norms may privilege informal mechanisms for decision making, dispute resolution, and resource allocation. The resiliency of informal relational networks has called attention to the potential re-emergence of civil society dynamics in many economies across Asia, but the potential role of informal institutions is challenged by the continued insistence on the part of modernizing governments on maintaining formal organizational systems to defend ideological orthodoxy and enforce political loyalty. The tension between statist ethics of formal institutionalism and the pervasive local informal arrangements that it strives to control tends to divert resources from institutional performance and undermines institutional capacity. This is particularly important where the informal orientation of local social and economic practices differs significantly from the formalism associated with the regulatory culture of the central government.⁶⁷ Contested approaches to recognition and enforcement of international trade standards are important examples of institutional orientation.⁶⁸

Institutional cohesion involves the willingness of individuals within institutions to comply with edicts from organizational and extra-organizational leaders, and to enforce institutional goals. Institutional cohesion may be seen as a product of the relationship between an ideal of cohesive performance and empirical indicators of behaviour by officials within organizations that departs from the organizational norm. Compliance concerns the recognition and enforcement of norms.⁶⁹ Conflicts arise when the norms of particular organizations differ from those of the individuals within these organizations – such as where norms of public policy that drive organizational priorities require subordination of the parochial interests of

individual officials within the organization. The dilemma of corruption is but one example of the challenge to discipline and subordinate the individual norms of officials to the organizational norms of institutions. Ongoing efforts at bureaucratic reform face difficulties in subordinating the individual interests of officials to organizational norms. In the context of implementation of international trade standards at the local level, institutional cohesion often reflects issues of human resource management and administrative discipline.

Thus, selective adaptation addresses the relationship between rule regimes and underlying norms, whereas institutional capacity addresses the functioning of regulatory institutions and hence raises the issue of structural relationships that may affect performance even without tension between imported rule regimes and underlying norms. Institutional capacity helps build understanding of local and structural relationships among regulatory institutions, as an indicator of performance of non-local rule regimes. Institutional capacity helps build understanding of local compliance with international standards, even where acceptance of international standards and assimilation of underlying norms is relatively coterminous. It helps build understanding that compliance with international standards is more than simply a matter of political will, but rather a matter of structural relationships among regulatory institutions. In the cross-cultural context of globalization, institutional capacity helps meet the need for cross-cultural understanding of relationships between institutional constraints and rule compliance.

Conclusion

Local interpretation and implementation of international trade standards is an issue of significant importance and discord. Conflicting perspectives about the reasons for compliance with international trade rules, ranging from a focus on political will to questions about resistance to neocolonial domination, often tend to obscure understanding. The alternatives presented by normative and institutional analyses are compelling, not only because of their potential to build understanding but also because of their potential to manage and reduce the incidence of disputes. The paradigms of selective adaptation and institutional capacity explain much about the normative and institutional dimensions of local compliance with international trade standards. The particularities of local norms and local institutional conditions may tend to support conditions of “legitimate non-uniform compliance,” which are distinct from “willful noncompliance.” Such an approach

may augment the academic and policy research discourse associated with cultural essentialism, institutional determinism, and behavioural law and economics that is currently used to explain international treaty compliance in a cross-cultural context. The paradigms of selective adaptation and institutional capacity offer exciting prospects for understanding the critical issue of local compliance with international trade standards. It is hoped that future research results will further scholarly discovery, support informed policy making, and strengthen international understanding about trade compliance, and thereby reduce and prevent disputes and facilitate more effective international cooperation.

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Global Competition Governance

A Step towards Constitutionalization of the WTO

LJILJANA BIUKOVIC

Since the establishment of the World Trade Organization (WTO), there has been considerable discussion among scholars as to whether the trade regime can, or inevitably will, become a new framework for universalizing substantive international law.¹ The *General Agreement on Tariffs and Trade* (GATT)² system of international trade law advanced the core principle of wealth maximization through trade liberalization and nondiscrimination by trade actors. Its successor, the WTO system,³ has moved into the area of linkage between systems of substantive law, such as environmental, labour, intellectual property, investment, and competition law, and the trade regime.

Brian Fitzgerald states that the universalizing process is already occurring in international trade law because the trade regime universalizes the norms attached to the core principle, which starts from the premise that every state in the world wants to maximize wealth and build outward through substantive extensions.⁴ Some scholars claim that it is occurring because “the relevant markets” and business practices that influence competition spill across national boundaries.⁵ Finally, others suggest that the universalizing process is occurring at the regional level, where numerous regional trade agreements, such as the North American Free Trade Agreement (NAFTA),⁶ the *Treaty Establishing the European Community* (TEC),⁷ and MERCOSUR,⁸ include competition principles and rules in addition to the rules on cross-border trade.⁹

This essay argues that the process of universalizing competition law depends on local identification, interpretation, and application of the norms of international trade and competition. It starts with an analysis of the problem related to identification of norms of international trade and definition of a system of international trade law as a coherent system. It then proceeds to scrutinize the normative underpinnings of global competition law as formulated by various international organizations, including the WTO. Finally, it analyzes the objectives of national competition law or drafts of such law in both China and Japan. This is done by utilizing the concept of selective adaptation. Selective adaptation argues that the level of compliance with foreign rules and norms in a specific jurisdiction depends on three factors: (1) an understanding of the jurisdiction's rules, local norms, and practices; (2) the extent to which members of the local community support reception of foreign norms; and (3) the level at which the international norm and a local norm are complementary or capable of coexisting and operating together in a non-conflicting way despite their potential for substantively contradicting each other (factors of perception, legitimacy, and complementarity).¹⁰

Trade and Competition in the Context of Global Governance

Despite the connection between trade and competition, it is obvious that trade policy and competition policy seek to facilitate economic development in different ways. Although both attempt to promote competition by removing its impediments, trade policy focuses on removing government-created barriers to competition, whereas competition policy focuses on removing barriers created by private parties.¹¹ In addition, says Hudec, trade policy focuses exclusively on competition in international markets whereas competition policy focuses primarily on competition in domestic markets.¹²

There have been a number of failed attempts to achieve internationally harmonized competition laws. Waller argues that competition represents a very important set of public values embodied in the concepts of national sovereignty, governmental systems, ideologies, and the economic philosophies of every country.¹³ He recounts several unsuccessful attempts to create harmonized international competition laws. He notes the attempt by the League of Nations to explore the system of controlling cartels; the International Trade Organization's set of rules on the substance and enforcement of competition law included in the *Havana Charter*; the Organisation for Economic Co-operation and Development's *Recommendation of the Council Concerning Co-operation between Member Countries on Anticompetitive*

*Practices Affecting International Trade*¹⁴ and *Recommendation of the Council Concerning Effective Action against Hard Core Cartels*;¹⁵ the United Nations Conference on Trade and Development's *Set of Multilaterally Agreed Equitable Principles and Rules for Control of Restrictive Business Practices*;¹⁶ and, finally, the Doha Round negotiations of the WTO as ill-fated attempts to create an internationalized system that would be highly inconsistent with the concept of national sovereignty and the rights of individual states to enforce and carry out their national competition rules.

The 1999 Working Group on the Interaction between Trade and Competition Policy emphasized that the basic principles relevant to competition policy are also the basic principles of international trade – the principles of national treatment (or treating foreigners and locals equally), most-favoured nation treatment (treating any nation as a “most favoured” nation), and transparency.¹⁷ All of these were incorporated in the 1947 GATT founding document and the subsequent WTO agreements (the *General Agreement on Trade in Services*, hereinafter GATS,¹⁸ and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (hereinafter TRIPS Agreement)¹⁹).²⁰ For example, Article IX of GATS acknowledges that anti-competitive business practices may restrain and restrict trade.²¹ Article 8(2) of the TRIPS Agreement recognizes that some measures may be needed to prevent the abuse of intellectual property rights by rights holders and to prevent practices that may unreasonably restrain trade or adversely affect the international transfer of technology.²² Moreover, Article 40 deals with the control of anti-competitive practices in contractual licences.

In contrast to Waller, other authors, such as Antonio Perez²³ and Eleanor Fox,²⁴ feel that the recent Doha Declaration²⁵ has made it possible to include competition issues in the current negotiations. An excerpt from the Declaration reads:

Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at the Session on modalities of negotiation.²⁶

The 1997 annual report of the WTO secretariat seems to confirm the predictions of Perez and Fox by stating that “the issue is not whether competition policy questions will be dealt with in the WTO context, but how and, in

particular, in how coherent a framework this will be done.”²⁷ Thus, the interesting questions are: (1) To what extent is substantive competition law capable of achieving full universality? and (2) To what extent is cultural diversity capable of impeding the transfer of global substantive law?

A Global Market Regulated by National Laws: What Difference Does It Make?

It has been increasingly emphasized that although the marketplace has become global, the laws regulating it remain national.²⁸ In addition, it has been said that to maximize market efficiency at the global level, it appears necessary to harmonize (or perhaps globalize) competition laws. Efficient, transparent, and harmonized competition laws could enhance foreign direct investment, reduce government intervention, and potentially even block corruption.²⁹

It has been estimated that by 2002 more than ninety countries had adopted competition laws.³⁰ Sixty percent of the world’s competition laws were adopted by developing countries during the 1990s.³¹ This was often due to these countries’ accession to trade agreements (regional or bilateral) with other, usually developed, countries. Or it was due to the need to respond to requirements for regulatory reform imposed by international financial institutions, such as the World Bank. Adoption of competition laws was sometimes also due to the development of pro-competition consciousness and attempts of national governments to start fundamental economic reforms.³² According to data from the Organisation for Economic Co-operation and Development (OECD), at least sixty developing countries are still struggling with the adoption of competition laws.³³

Despite the fact that harmonization of competition laws is desirable, there are at least ninety countries with different competition or antitrust laws.³⁴ These laws deal with a range of anti-competitive practices, including price fixing and other cartel arrangements, abuse of a dominant position (or monopolization), mergers that limit competition, and agreements between suppliers and distributors (“vertical agreements”). This means, for example, that there are differences in substantive law and also divergent procedural requirements for the multiplicity of merger reporting regimes, and this presents a significant challenge for lawyers and businesspeople around the world working on merger and acquisition deals. Thus, it is possible that an international merger may have to be reviewed in more than ninety jurisdictions by at least ninety different competition authorities.³⁵

The high costs incurred by businesses due to duplicative or conflicting enforcement policies is only one of the problems resulting from the existence

of numerous different national competition laws. Other problems include the limited ability of national competition authorities to fully protect their citizens from transnational anti-competitive conduct, the possibility of disagreements or conflicts between states arising from antitrust enforcement, and the variety and seriousness of restrictive market access practices.³⁶

Further harmonization of competition rules has been delayed because of the lack of consensus between the most active partners in the global market – the European Union (EU) and the United States – regarding the matrix of harmonization. This has ultimately resulted in a lack of global integration.

The European Commission (EC) has proposed that member states of the WTO negotiate a binding competition code. In brief, the Commission's proposal is that a WTO treaty would:

- oblige member states to enact or maintain domestic competition legislation that would include at least core rules such as those prohibiting the abuse of dominant position or cartels
- require the enforcement of the WTO competition legislation based on the principles of nondiscrimination and transparency
- provide for cooperation between competition authorities
- aim for the gradual convergence of national practice.³⁷

Notwithstanding the efforts of the EU and some other WTO members from the developed world, the General Council of the WTO decided in July 2004 that competition would not be discussed any further during the Doha Round.³⁸ The decision to take competition issues off the WTO negotiating table was partly due to constant protests from developing countries. These countries felt that an international treaty on competition would not be beneficial for their economies. The most vocal opponents were Malaysia, India, China, and Hong Kong. First, they argued that the creation of some sort of central competition law-making authority would erode their state sovereignty. Second, it would unnecessarily open their markets to stronger and much more experienced foreign competitors, yet it would not facilitate easier access to foreign markets for them. Third, it would reverse the regulatory priority list in developing economies. Finally, the developing countries rejected international attempts to create a widely accepted global competition law ("one size fits all"), arguing rightly that each country needs to tailor its competition laws to its own specific set of circumstances.

At present, countries drafting competition laws or reforming their existing competition laws are relying on two models – the EU and the US.

Since the WTO multilateral competition framework has not been accepted, most of the developing countries are now even discussing competition policy under the umbrella of regional initiatives such as the Asia-Pacific Economic Cooperation (APEC)³⁹ or international organizations such as the UN Conference on Trade and Development (UNCTAD)⁴⁰ or the OECD.⁴¹

The possibility of the export of the EU competition model and the extra-territorial application of EU competition laws worries the United States as much as the export of the US competition model and the extraterritorial application of US legislation worries the EU.⁴² Until the *Woodpulp* case in the 1980s, the EC had not been interested in the policy of extraterritoriality of its competition law.⁴³ It had been more concerned with establishing the internal common market and protecting its four freedoms (free movement of people, goods, services/establishment, and capital) from obstacles imposed by its member states. Since *Woodpulp*, however, the EC has adopted American-style extraterritorial enforcement of its own competition rules.

Needless to say, the United States is trying to play a leading role by exporting its competition law through a number of government and non-governmental agencies, such as the Center for International Private Enterprise (CIPE), which is affiliated with the US Chamber of Commerce, and the US Agency for International Development (USAID), which provides financial and technical assistance to countries in transition. For example, in the past ten years, the US antitrust agencies funded by USAID developed a program of international technical assistance that involved sending resident advisors on short-term missions to transition countries (not only in Central and Eastern Europe but also in Asia), and organizing regional conferences and internships in the US for personnel from transition countries.⁴⁴

The utilization of extraterritoriality by both the EU and the US leads to a type of convergence between the two actors on the general principles of extraterritoriality.⁴⁵ In other words, extraterritoriality has worked as an option of soft convergence of competition laws, reducing the importance of international comity concerns.⁴⁶ This process of convergence and extraterritoriality of EU and US antitrust laws may be the most effective means of harmonizing competition law and/or creating a global competition law. The problem with a convergence approach through soft harmonization, however, is that it appears to be too slow. In addition, the final result of convergence is not easy to predict. Finally, the extraterritorial application of EU or US domestic competition law to the jurisdiction of other states violates the concept of state sovereignty.⁴⁷

"Competition Culture"

David Gerber states that competition is an abstract concept, a cultural construct where "one can 'see' something called competition only where one's language, training and experience give that concept meaning."⁴⁸ Hiroshi Iyori argues that competition laws operate in the context of different social or cultural values.⁴⁹

In 1999, Dr. Wolfgang Pape, at the time with the European Commission, predicted that the sociocultural divergence among WTO contracting parties, including both members and non-member potential candidates, would be a serious impediment to the establishment of common competition rules within the WTO.⁵⁰ He suggested that differences between cultures underlie differences in attitude and differences in the structure of ownership and capitalism. These differences ultimately inform the development of different competition policies. Despite the fact that globalization has partially reduced these differences, they should still not be ignored.⁵¹

In February 2004, the OECD Global Forum on Competition identified the lack of a "competition culture" as one of the major obstacles faced by competition authorities in promoting competition and in achieving greater economic development.⁵² The OECD report defined "competition culture" narrowly as the particular political process or the political support necessary to enhance economic development by the use of competition in markets. It thus focused on competition and government authorities and their respective actions, such as the allocation of financial resources, the training of personnel, and the building of an adequate institutional structure for investigating and enforcing competition policy and laws. It also referred to the adequacy (or inadequacy) of powers conferred on competition authorities, powers that allow them to take action independent of government. In the broader context, however, "competition culture" refers to more than just political and financial support for competition. It also refers to awareness among economic actors and the general public of the rules of competition.⁵³

These narrow and broad definitions of competition culture are interdependent. Public awareness of the rules of competition greatly depends on adequate advocacy by competition and government authorities. At the same time, public consciousness about competition could inform further government regulatory actions. Thus, the successful creation of a competition culture depends on the existence of financial, political, and human resources, all of which are necessary to facilitate the adaptation of institutions, training of individuals, and establishment of an appropriate legal framework. The

lack of these resources is the major impediment to the growth of a competition culture in developing countries.⁵⁴

Pape suggests that EU law can be considered a successful example of how cultural differences in the perception of competition can be coordinated within a workable framework built around a common belief in principles of competition (as presented in the TEC) and respect for competition authorities (primarily the EC but also national competition authorities).⁵⁵ EU competition policy has been developed from the basic provisions of the TEC (Articles 81-89⁵⁶) into a complex body of secondary legislation (regulations, directives, and decisions) and European Court of Justice (ECJ) cases on anti-trust activities, state aid, and mergers. One of the major objectives of the European Union, as specified in Article 3(g) of the TEC, is to establish a system that would ensure that competition within the internal market has not been distorted.⁵⁷ Achieving this objective requires not only a simple regulatory convergence but also a process of building national competition authorities that are coordinated (by the EC and the ECJ) in interpretation and application of the common rules. In addition, the EU provides significant financial and technical resources to support member states in creating the appropriate competition framework.

The recent attempts to decentralize EU competition law, by decentralizing enforcement powers and placing them under the jurisdiction of national courts and competition authorities, illustrate the difficulties of harmonization or convergence of competition policies. Even in the case of a relatively highly harmonized and integrated single market, with a long tradition of balancing diversity of national and community competition rules and cultures, the problem of subsidiarity, or cooperation between different competition authorities and clarification of those authorities' substantive competencies, is still a challenge for the EU. The EU is constantly searching for methods to respond to this challenge, however.

Normative Underpinnings of a Global Competition Law: A Case of Selective Adaptation

What could constitute the normative underpinnings of a global competition law formulated under the umbrella of the WTO agreements? Certainly, such normative underpinnings would derive from trade policy norms. Arguably, the dominant idea behind WTO-led trade liberalization is market access – that is, the idea of promoting open markets by ensuring that restrictive business practices and national competition laws do not impede free trade.

It is commonly accepted that the purpose of competition law is to facilitate the functioning of an efficient and fair market. Perception of the norms of efficiency and fairness is therefore crucial. The paradigm of selective adaptation suggests, however, that the internationally conceptualized norms of efficiency and fairness would be unavoidably contextualized to local legal and political culture. In other words, local conditions determine national priorities regarding competition policy. National competition policy then informs competition laws, which in turn determine the rules and disciplines imposed by government on private actors to ensure that the market is competitive.⁵⁸ Competition policy, however, usually includes a broader set of measures and instruments, and their underlying objectives and values could (and should) differ and include more than just economic efficiency and fair competition.

Economic efficiency is the paramount norm of both international trade and competition law. Efficiency can be perceived differently at domestic and international levels, however. Domestic competition laws usually define economic efficiency in the context of efficient resource allocation within the national market and the maximization of national welfare,⁵⁹ whereas at the international level, efficiency is perceived in the context of export efficiency or market access possibilities for foreign companies.

Economic efficiency is articulated as an important (if not the most important) objective in a number of international templates and national competition laws. In other words, countries rarely differ in what they articulate as the most important competition law objectives and how they define efficiency. For example, the Pacific Economic Cooperation Council determined in its Principles that “the ultimate goal of this competition framework is to promote the process of competition ... in order to achieve greater overall economic efficiency and an increased average standard of living in domestic economies and the APEC region as a whole.”⁶⁰

The *Treaty of Rome* states that establishing a common market and an economic and monetary union is the primary objective of the Union,⁶¹ and that ensuring that competition is not distorted⁶² is one of the most important conditions for the functioning of a common market. In other words, besides economic efficiency and fairness, the central objectives of EC competition law are the establishment and maintenance of the single internal market, economic growth, and social cohesion.⁶³ In contrast, Gerber argues that since the late 1970s and the rise of the law and economics movement, economic efficiency has become the only legitimate objective of competition law in the United States.⁶⁴

Iyori suggests that besides economic efficiency and fairness in competition and consumer welfare, other values and objectives should be included in the competition normative framework. He gives an example of the Japanese statute that considers the protection of business opportunities of small enterprises and reduction of government controls as central objectives of competition law.⁶⁵ It is noteworthy that the Japanese *Anti-Monopoly Act* of 1947 was modelled on the US antitrust legislation, but it has not been successful in advancing the Japanese economy from a *zaibatsu*-dominated system towards a demonopolized system of fair competition. On the other hand, the normative framework of the Japanese act is consistent with the norms of “communitarian capitalism,” which has been pursued by the Japanese government for decades and which informs Japanese competition policy in general. According to those norms, the state performs a very important role in economic and social redistribution of wealth, and the objective of redistribution comes before the objective of economic efficiency.⁶⁶

The latest draft of the Chinese *Anti-Monopoly Law*, often referred to as the “economic constitution” of China, primarily emphasizes the objective of safeguarding fair competition, but it omits direct reference to economic efficiency.⁶⁷ It also includes the objectives of protecting the public interest and consumer rights, and ensuring the healthy development of a socialist market economy. No other competition law in the world is committed to the creation and maintenance of a socialist market economy. Most countries provide for the protection of the legitimate rights of consumers in their consumer protection legislation. The creation and maintenance of a socialist market economy has been the official commitment of the Chinese government since late 1992, however, and it is consistent with the Chinese belief in the evolution of state economic management and competition policy.⁶⁸

Whereas efficiency is a core economic concept, with a relatively clear objective to minimize waste or to get the most out of resources,⁶⁹ the concept of fairness appears to be much more dependent on local culture. In the context of the US anti-dumping law, which prompted the enactment of competition laws in most countries, including members of the EU, fairness means equality of entry into a business endeavour.⁷⁰ It may, however, mean something else in other countries or in another context. For example, in the context of a developing country concerned that an agreement on competition would mean giving multinational firms greater access to its national market with no reciprocal access for its own firms to the markets of developed countries, fairness could mean the opportunity for all countries to share in economic wealth.⁷¹

In other words, there are significant sociocultural differences between countries that are relevant to how those countries perceive competition policy and competition law.

Conclusion: On Possibilities for the Development of Global Competition Rules

As previously mentioned, many authors argue that there are overwhelming obstacles to the realization of a global competition law system.⁷² Some argue that countries should opt for convergence through regulatory interaction supplemented by extraterritorial competition law enforcement by using either the US or the EC approach.⁷³ In addition, it appears evident that any form of regulatory convergence mandates the development of a specific competition culture in some countries that already have a very different competition culture or no competition culture at all. The importance of a culture of competition for successful convergence of competition policies has been emphasized not only by the OECD but also by the WTO Working Group on the Interaction between Trade and Competition Policy.⁷⁴ These organizations believe that the existence and development of a culture of competition depends on the existence of appropriate independent institutions that can promote a competition culture among economic actors and the public at large.

The theory of selective adaptation suggests that even when norms associated with global competition law have been incorporated locally, those norms will not necessarily be received or interpreted in a harmonious way. Norms of economic efficiency and fairness (founded on the liberal norm of a market economy) have been considered in different contexts in societies such as China and Japan. The interpretation and enforcement of the norms of efficiency and fairness have been deeply affected by local competition policy and, in particular, local political, economic, legal, and social culture. The international norms have been selectively adapted to fit local institutions, traditions, and policy goals. As a result, the central problem related to adoption of global competition policy remains how to identify norms of international trade and competition that will enable harmonious interaction between the globalized system of liberal norms on competition and local norms and values.

NOTES

- 1 See, e.g., Brian F. Fitzgerald, "Trade-Based Constitutionalism: The Framework for Universalizing Substantive International Law?" (1996/97) 5 University of Miami

- Yearbook of International Law 111, or Richard Steinberg, "Judicial Lawmaking at the WTO: Discursive, Constitutional and Political Constraints" (2004) 98 *American Journal of International Law* 247.
- 2 *General Agreement on Tariffs and Trade*, 30 October 1947, 55 U.N.T.S. 187, Can. T.S. 1947 No. 27 (entered into force 1 January 1948) [GATT].
 - 3 The World Trade Organization was established on 1 January 1995 in Geneva as the successor to the GATT. See *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 3, 33 I.L.M. 1144.
 - 4 Fitzgerald, *supra* note 1 at 129.
 - 5 Edward M. Graham, "Internationalizing Competition Policy: An Assessment of the Two Main Alternatives" (Winter 2003) *The Antitrust Bulletin* 947.
 - 6 *North American Free Trade Agreement between the Government of Canada, the Government of Mexico, and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994) [NAFTA]. Chapter 15 of NAFTA contains obligations requiring the Parties to adopt or maintain competition laws and cooperate in their enforcement. See, in particular, Article 1501.
 - 7 "Consolidated Version of the *Treaty Establishing the European Community*" (24 December 2002) C 325 *Official Journal of the European Communities* 33 [TEC]. Commonly called the *Treaty of Rome*, it was signed in Rome in 1957 and came into force in 1958.
 - 8 MERCOSUR, or the "Common Market of the Southern Cone," formed in 1991 by Argentina, Brazil, Paraguay, and Uruguay, with Chile and Bolivia as associate members (*Treaty of Asuncion*, 26 March 1991, 30 I.L.M. 1041), approved its *Protocol on the Protection of Competition in MERCOSUR* (the *Fortaleza Protocol*) on 17 December 1996. The *Fortaleza Protocol* prohibits all concerted agreements that impede, restrict, or distort competition or free access to markets; or abuse a dominant position within MERCOSUR; and affect trade between the member states (c. II). It also establishes the Commission and the Technical Committee of the Defense of Competition as the enforcement institutions (c. IV). The text of the *Protocol* is available at <http://www.sice.oas.org/Trade/MRCSR/MRCSRTOC.ASP>.
 - 9 In addition, Damien Geradin, in his report to the World Bank, lists several Central African, Latin American, and Caribbean regional trade agreements, such as the 1964 *Brazzaville Treaty* and the 1973 *Treaty Establishing the Caribbean Community* (CARICOM), as examples of trade treaties comprising competition rules. See Damien Geradin, *Competition Law and Regional Economic Integration*, World Bank Working Paper No. 35 (Washington, DC: World Bank, 2004) at 34.
 - 10 Pitman Potter, "Legal Reform in China: Institutions, Culture, and Selective Adaptation" (2004) 29 *Law and Social Inquiry* 465.
 - 11 Robert Hudec, "Private Anticompetitive Behaviour in World Markets: A WTO Perspective" (Winter 2003) *The Antitrust Bulletin* 1045 at 1048.
 - 12 *Ibid.* at 1047.
 - 13 Spencer Weber Waller, "Neo-Realism and the International Harmonization of Law: Lessons from Antitrust" (1994) 42 *University of Kansas Law Review* 557.

- 14 OECD, *Recommendation of the Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade*, OECD Paris 856th Sess., C(95)130/final (27 July 1995).
- 15 OECD, *Recommendation of the Council Concerning Effective Action against Hard Core Cartels*, OECD Paris 921st Sess., C(95)130/final (25 March 1998).
- 16 UN Doc. TD/RBP/CONF/10/Rev.2 (1980), available in 19 I.L.M. 813 (1980).
- 17 WTO, Working Group on the Interaction between Trade and Competition Policy, *The Fundamental WTO Principles of National Treatment, Most-Favoured-Nation Treatment and Transparency*, WTO Doc. WT/WGTCP/W/114 (14 April 1999).
- 18 *General Agreement on Trade in Services*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1B, 1869 U.N.T.S. 183; 33 I.L.M. 1167 [GATS].
- 19 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [TRIPS Agreement].
- 20 The principle of national treatment is set out in GATT art. II, GATS art. XVII, and TRIPS Agreement art. 3. The principle of most-favoured-nation treatment is contained in GATT art. I, GATS art. II, and TRIPS Agreement art. 4. Finally, the principle of transparency is set out in GATT art. X, GATS art. III, and TRIPS Agreement art. 63.
- 21 GATS art. IX: Business Practices
 1. Members recognize that certain business practices of service suppliers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services.
 2. Each Member shall, at the request of any other Member, enter into consultations with a view to eliminating practices referred to in paragraph 1. The Member addressed shall accord full and sympathetic consideration to such a request and shall cooperate through the supply of publicly available non-confidential information of relevance to the matter in question. The Member addressed shall also provide other information available to the requesting Member, subject to its domestic law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Member.
- 22 TRIPS Agreement, *supra* note 19, art. 8(2).
- 23 Antonio F. Perez, "International Antitrust at the Crossroads: The End of Antitrust History or the Clash of Competition Policy Civilization" (2002) 33 *Law and Policy in International Business* 527.
- 24 Eleanor M. Fox, "Can We Solve the Antitrust Problems of Globalization by Extra-territoriality and Cooperation? Sufficiency and Legitimacy" (2003) 48 *The Antitrust Bulletin* 355.
- 25 WTO, *Ministerial Declaration, Fourth Ministerial Conference*, WTO Doc. WT/MIN(01)/DEC/1 (14 November 2001) [Doha Declaration].

- 26 *Ibid.* at para. 23.
- 27 World Trade Organization, "Special Topic: Trade and Competition" in *WTO Annual Report 1997*, vol. 1 (Geneva: WTO, 1997) 30 at 32.
- 28 An overview of national competition laws is available at <http://www.globalcompetitionforum.org/gcfover.htm>. Texts of all competition statutes are provided in English.
- 29 Mark Dutz, *Competition Policy Issues in Developing and Transition Markets*, OECD Global Forum on Competition, Paris, 14-15 February 2002.
- 30 Yves Devellennes and Georgios Kiriazis, "The Creation of an International Competition Network" (2002) 1 EU Competition Policy Newsletter 25.
- 31 International Competition Policy Advisory Committee, *Final Report to the Attorney General and Assistant Attorney General for Antitrust* (Washington, DC: US Department of Justice, 2000) at 51 and 181.
- 32 Geradin, *supra* note 9 at 13.
- 33 *Ibid.*
- 34 J. William Rowley, Q.C., "IBA Facilitates Global Competition Law Convergence," online: Global Competition Forum <<http://www.globalcompetitionforum.org/draft%20IBA%20Facilitates%20Convergence%20article.pdf>>.
- 35 The Global Competition Forum website covers competition laws and procedures from 126 countries, indicating those with already enacted laws and those in the process of adoption of competition laws. For example, by 22 July 2004, only fourteen countries in Africa had adopted national competition laws, while ten countries were in the process of adoption. See "Africa" at <http://www.globalcompetitionforum.org/africa.htm#top>.
- 36 Daniel Tarullo, "Norms and Institutions in Global Competition Policy" (2000) 94 *American Journal of International Law* 478. But see Frank M.K. Wijckmans, "Internationalization of Competition Policy: Observations from a European Practitioner's Perspective" (Winter 2003) *The Antitrust Bulletin* 1037. Wijckmans argues that the consequences of the lack of substantive harmonization should not be dramatized and that from the practitioner's perspective, it is more important to harmonize certain procedural aspects of competition laws, particularly the one dealing with aspects of merger review. *Ibid.* at 1042.
- 37 *Communication from the European Community and Its Member States, to Members of the World Trade Organization*, WTO Doc. WT/WGTCP/W/115 (25 May 1999).
- 38 WTO, *Decision Adopted by the General Council on 1 August 2004*, WTO Doha Work Programme, WTO Doc. WT/L/579 (2 August 2004) at 3: "Relationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement: the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round." The decision is available at http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm.
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- 41 OECD–World Bank, “A Framework for the Design and Implementation of Competition Law and Policy,” online: OECD <http://www.oecd.org/document/24/0,2340,en_2649_37463_1916760_1_1_1_37463,00.html>.
- 42 See, e.g., Sharon E. Foster, “While America Slept: The Harmonization of Competition Laws Based upon the European Union Model” (2001) 15 *Emory International Law Review* 46.
- 43 A number of Finnish, Swedish, American, and Canadian wood pulp producers established outside the EC created a price cartel. Their restrictive practices affected about two-thirds of the total shipments and 60 percent of the consumption of wood pulp in the EC. In December 1984, the Commission issued a decision finding several infringements of former art. 85 (now art. 81) of the *Treaty of Rome* by the said agreements and concerted practices, and imposed fines. The Commission held that the EC had jurisdiction to apply its competition rules to an undertaking outside the Community because the producers involved were exporting and selling directly to customers in the EC or were doing business within the Community through branches, subsidiaries, or other agents. Several companies appealed the Commission’s decision. The European Court of Justice (ECJ) confirmed the Commission’s decision. It held that in order to establish the application of the EC competition rules (former art. 85, now art. 81), the crucial factor is the place where the agreement, decision, or concerted practice is implemented, not the place where it is concluded. An agreement, decision, or concerted practice is implemented where it has effect on the competitive behaviour of the undertakings party to it. See ECJ Joined Cases 89, 104, 114, 116-17, and 125-29/85 *Ahlstrom (Woodpulp)*, [1988] ECR 5193.
- 44 See US Federal Trade Commission and US Department of Justice, Antitrust Division, *The United States Experience in Competition Law Technical Assistance: A Ten Year Perspective*, OECD Global Forum on Competition, CCNM/GF/COMP/WD 20 (6 February 2002), online: OECD <<http://www.oecd.org/dataoecd/37/61/1833990.pdf>>.
- 45 Charles W. Smitherman III, “The Future of Global Competition Governance: Lessons from the Transatlantic” (2004) 19 *American University International Law Review* 770 at 854-55.
- 46 William Sugden, “Global Antitrust and the Evolution of International Standard” (2002) 35 *Vanderbilt Journal of Transnational Law* 989 at 1013.
- 47 Ricky Rivers, “General Electric/Honeywell Merger: European Commission Antitrust Decision Strikes a Sour Note” (2003) 9 *ILSA Journal of International and Comparative Law* 525 at 530.
- 48 David G. Gerber, *Law and Competition in Twentieth Century Europe* (Oxford: Oxford University Press, 1998) at 10.
- 49 Hiroshi Iyori, *Competition Culture and the Aims of Competition Law*, in R. Zäch, ed., *Towards WTO Competition Rules: Key Issues and Comments on the WTO Report (1998) on Trade and Competition* (The Hague: Kluwer Law International, 1999) 127 at 132.

- 50 Wolfgang Pape, "Socio-Cultural Differences and International Competition Law" (1999) 5 *European Law Journal* 438.
- 51 *Ibid.* at 439.
- 52 Centre for Cooperation with Non Members, Directorate for Financial, Fiscal and Enterprise Affairs, *Session II of the Global Forum on Competition*, OECD doc. CCNM/GF/COMP(2003)6 (12-13 February 2004), online: OECD <[http://www.oalis.org/olis/2003doc.nsf/0/3ecf5129ef7ea69ac1256dcc0058fd90/\\$FILE/JT00152334.DOC](http://www.oalis.org/olis/2003doc.nsf/0/3ecf5129ef7ea69ac1256dcc0058fd90/$FILE/JT00152334.DOC)>.
- 53 Sally Southey, "Building a Competition Culture," online: Canadian Competition Bureau <<http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/en/ct02476e.html>>.
- 54 WTO, Working Group on the Interaction between Trade and Competition Policy, *WTO Regional Workshop on Competition Policy, Economic Development and the Multilateral Trading System: Overview of the Issues and Options for the Future, Cape Town, 22-24 February 2001*, WTO Doc. WTO/AIR/1564 (6 June 2001) at 12, 15, and 19 [*WTO Cape Town*].
- 55 Pape, *supra* note 50 at 441.
- 56 In brief, arts. 81-89 of the *Treaty of Rome* defined the major substantive competition law for the European Community. Article 81(1), formerly art. 85(1), prohibits certain agreements between the "undertakings," decisions by associations of undertakings, and concerted practices. Article (81)(2), formerly art. 85(2), states that all prohibited agreements or decisions are automatically void. Article 81(3), formerly art. 85(3), provides for exceptions from these prohibitions under certain conditions. Article 83, formerly art. 87, defines the jurisdiction of the EC institutions to regulate competition policy by adopting regulations and directives. Articles 86-89 (formerly arts. 90-94) cover the status of public undertakings and state aid.
- 57 *Treaty of Rome*, *supra* note 7.
- 58 Bernard Hoekman and Petros Mavroidis, *Economic Development, Competition Policy and WTO*, World Bank Working Paper No. 2917 (Washington, DC: World Bank, 2002) at 8.
- 59 *Ibid.* at 4.
- 60 Pacific Economic Cooperation Council, *supra* note 39 at 6.
- 61 Article 2 of the *Treaty of Rome*.
- 62 See art. 3(g) of the *Treaty of Rome*.
- 63 *Treaty of Rome*, art. 2: "The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States." See David Gerber, "Constructing Competition Law in China: The Potential Value of European and US Experience" (2004) 3 *Washington University Global Studies Law Review* 315.

- 64 *Ibid.* at 318 and 326.
- 65 Iyori, *supra* note 49 at 132; see also art. 1, Law No. 54 of 1947 (*Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade*).
- 66 Marie Anchordoguy, *Whatever Happened to the Japanese Miracle?* Working Paper No. 80 (San Francisco: Japan Policy Research Institute, 2001).
- 67 China does not have a comprehensive competition law but rather a patchwork of laws, regulations, and measures that have not been consistently enforced. In 1993, the *Anti-Unfair Competition Law* was enacted, followed by the 1998 *Price Law*, *Foreign Trade Law*, and various provincial and city regulations, such as the 1994 *Beijing's Anti-Unfair Competition Law*. See more on the Chinese competition regulation at <http://www.globalcompetitionforum.org/asia.htm#china>.
- 68 Edward E. Epstein, "China's New Competition Law" in *Law Lectures for Practitioners* (Hong Kong: Hong Kong Law Journal, 1994) 310; see also Nathan Bush, "Chinese Competition Policy: It Takes More Than a Law" (May 2005), online: *China Business Review* <<http://www.chinabusinessreview.com/public/0505/bush.html>>.
- 69 Edward M. Graham and J. David Richardson, eds., *Global Competition Policy* (Washington, DC: Institute for International Economics, 1997) at 8.
- 70 *Ibid.* at 9.
- 71 Joseph E. Stiglitz, *Globalization and Its Discontents* (New York: W.W. Norton, 2002) at 78.
- 72 See, e.g., Pape, *supra* note 50; Smitherman, *supra* note 45.
- 73 Smitherman, *supra* note 45 at 880; see also Gerber, *supra* note 48.
- 74 See *WTO Cape Town*, *supra* note 54.

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