

**GLOBAL BUSINESS REGULATION
AND THE SOVEREIGNTY
OF CITIZENS**

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Business Regulation Goes Global

For quite a long time now in countries like my own, Australia, national sovereignty has been a thing of the past when it comes to many areas of business regulation. In the world system, most nations are substantially law takers rather than law makers. This process of globalisation of regulatory law has been accelerated by the GATT. Thanks to the GATT, Chinese food standards will soon, effectively, be set in Rome rather than Beijing. But this impact of the GATT is no more than an acceleration of what has been going on for a long time.

For years, some of Australia's air safety standards have been written by the Boeing Corporation in Seattle, or if not by them, by the US Federal Aviation Administration in Washington. Our ship safety standards have been written by the International Maritime Organisation in London. Our motor vehicle safety standards have been written by Working Party 29

¹ This paper draws on research I am conducting with Mr. Peter Drahos of the ANU Law School. A number of the ideas in the paper have developed out of our collaborative fieldwork and shared discussions. This project, particularly the interviews with key players in the global regulatory system, has been funded by the US National Science Foundation, the American Bar Foundation, the OECD and the Australian Research Council.

of the Economic Commission for Europe. Our telecommunications standards have been substantially set in Geneva by the International Telecommunications Union. Both the Chair and Vice-Chair of most of the expert committees that effectively set those standards in Geneva are Americans. The Motorola Corporation has been particularly effective in setting telecommunications standards through its chairmanship of those committees. As a consequence, Motorola patents have been written into many of the International Telecommunications Union standards that we must all follow.

This global privatization of public law seems benign to some, though not to the person who asked how many Microsoft engineers it took to change a lightbulb. None, was the answer. Bill Gates simply declared darkness the industry standard.

The plan of this paper is to show first that this globalisation matters. I will illustrate why it matters with the Trade Related Intellectual Property agreement (TRIPS) of the Uruguay Round of the GATT. Second, I seek to say something about how globalisation happens. What are the key mechanisms that bring about globalisation? Third, I will say a little about whether there is anything we can or should do about it.

Globalisation Matters - The Sad Story of TRIPS

My colleague Peter Drahos and I believe that the nature of power in the world system has changed away from the control over labour and capital towards control over abstract objects such as intellectual property rights. Imagine a company acquires a patent in a genetically

engineered cow that produces twice as much milk as today's cows. What does that company own? It owns an asset equal to all the dairy herds of all the farmers of the world, though only if all nations recognise the patent. What's more the company has a more liquid asset than the owners of all that milk and all those cows!

TRIPS was an agreement at the GATT that harmonised upwards the breadth of intellectual property regulation through patents, trademarks and copyright. For example, patents will be harmonised upwards to 20 years, up from 16 years in some cases, up from five years or zero in some countries. The effect of extending patent terms from 16 to 20 years is that consumers will pay monopoly profits to patent holders for an extra four years. That is what patents are - legal monopolies. I notice pursuant to the TRIPS agreement that the Peoples Republic of China has introduced a new intellectual property law, which has been translated in the Australian press, in what seems like a last gasp of socialist realism, as the *Anti Undue Competition law*.

Most owners of Hong Kong patents are US and European transnational corporations (TNCs). As net importers of intellectual property rights, Hong Kong and China will be big losers from the TRIPS agreement of the GATT. The effect of the TRIPS agreement on the poor of the Third World will be catastrophic. The prices for some essential drugs in the Third World will increase by as much as 400 per cent. Even fewer of the world's poor than at present will be able to afford necessary drugs. Impoverished farmers who presently put aside seed from this year's crop to plant next year's will find in future that this will be a crime if the seeds they have traditionally used are patented by a Northern agribusiness firm; they will be forced to buy the seeds from the TNC.

The TRIPS agreement was an implausible accomplishment. It put into a trade liberalisation forum an agreement to restrict trade, to expand monopoly rights, to reduce competition. That is what the TRIPS agreement is. Over 90 per cent of the countries who signed the TRIPS agreement would lose on their balance of trade by doing so, because they were net importers of intellectual property rights. Most of them had no idea of the implications of what they were signing.

Who was it who made the TRIPS agreement happen? First, it was Washington legal entrepreneurs who came up with the idea of linking intellectual property to trade policy. It was then the CEOs of two American companies in particular - Pfizer (the pharmaceutical company) and IBM - with the support of the CEOs of Bristol-Myers, Dupont, FMC Corporation, General Electric, General Motors, Hewlett-Packard, Johnson and Johnson, Merck, Monsanto, Rockwell International and Warner Communications. These men sold the idea direct to the President of the United States and the US Trade Representative. They sold it to key business contacts in Europe and Japan, who sold it to their governments. From then on American diplomats sold it, with Europe and Japan standing behind them, to the other leaders of the world.

Global Games Citizen Groups can Play

Social movements like the environment and the consumer movement can never play the international trade game with this devastating effectiveness. Yet a policy analysis of despair is no longer warranted on the part of citizen movements in the face of the globalisation of regulation. One reason is that there is a new view gaining momentum in

international business that pushing regulatory standards down at home in order to be competitive abroad no longer makes sense. This view is succinctly summarised in the advice of Harvard Business School guru Michael Porter in his paradigm-shattering book, *The Competitive Advantage of Nations*.²

“Establish norms exceeding the toughest regulatory hurdles or product standards. Some localities (or user industries) will lead in terms of the stringency of product standards, pollution limits, noise guidelines, and the like. Tough regulatory standards are not a hindrance but an opportunity to move early to upgrade products and processes”.

“Find the localities whose regulations foreshadow those elsewhere. Some regions and cities will typically lead others in terms of their concern with social problems such as safety, environmental quality, and the like. Instead of avoiding such areas, as some companies do, they should be sought out. A firm should define its internal goals as meeting, or exceeding, their standards. An advantage will result as other regions, and ultimately other nations, modify regulations to follow suit.”

“Firms, like governments, are often prone to see the short-term cost of dealing with tough standards and not their longer-term benefits in terms of innovation. Firms point to foreign rivals without such standards as having a cost advantage. Such thinking is based on an incomplete view of how competitive advantage is created and sustained. Selling poorly performing, unsafe, or

² Michael Porter (1990) *The Competitive Advantage of Nations* London: Macmillan.

environmentally damaging products is not a route to real competitive advantage in sophisticated industry and industry segments, especially in a world where environmental sensitivity and concern for social welfare are rising in all advanced nations. Sophisticated buyers will usually appreciate safer, cleaner, quieter products before governments do. Firms with the skills to produce such products will have an important lever to enter foreign markets, and can often accelerate the process by which foreign regulations are toughened.”

Here we have an intriguing emerging international dynamic. Firms that have upgraded their safety standards early because of their location in states that are early movers to higher standards have an interest in getting other states to follow the lead. There is thus a connected strategy for those of us who are active in the international environmental or consumer movements. It is to persuade targeted national governments to be first movers to upgrade regulatory standards through the argument that they can actually benefit their national economy by doing so. Porter supplies many examples of nations that constructed important competitive advantages by being first to establish tougher health and safety standards. Then home-base transnationals from those first nations can be recruited to support upgrading of standards in other nations, thus setting back their competitors from laggard nations.

Porter's way of thinking about the constitution of competitive advantage is gaining wider acceptance in business and regulatory communities. Pharmaceutical companies can see that it is actually a competitive disadvantage to have as a home base an eastern European country that

might have cheap labour costs and minimal regulatory standards. The absence of demanding regulators and demanding consumer groups gives companies from these countries totally inadequate preparation for competition in sophisticated markets.

What is it that is generating this shift among some industry strategists from an interest in seeking the lowest possible standards to finding the highest standards? It is "sophisticated buyers....[who].....appreciate safer....products before governments do".

To this I would add sophisticated buyers combined with a sophisticated consumer movement. Let me illustrate with the scenario of how a sophisticated international consumer movement might have responded when Ralph Nader's campaign for compulsory airbags in cars faltered with the election of Ronald Reagan in 1980. Consumers International might have convened a meeting to consider which would be the country in the world best able to marshal political and business support for a compulsory airbags law. International lobbying resources would be put into that country. Imagine that country was Australia. The job of the Australian consumer movement would then have been to go to the manufacturer which had been globally targeted as likely to be sympathetic to their approach. Their job would be to persuade them that following Porter's logic they were going to help make money for them by campaigning in Australia, and then globally, for mandatory airbag laws. They would then become allies in that campaign, in a similar way to that in which the US insurance industry was an ally in Nader's campaign. Australian consumers would have had to put up with higher prices for a time, but that would have been worth the lives saved, the increased long-term competitiveness of the Australian auto

industry and the huge national benefit of the sale of airbag technology to the rest of the world. All of this, it seems to me, would have been true because of the fact that the consumer movement knew that consumers were becoming more safety conscious and in the medium term would be demanding airbags. Moreover, the auto industry has known the truth of Porter's analysis for some time, witness a Chrysler Plymouth television advertisement I saw in the US in March 1994 which announced that Chrysler was "ahead of our time" because of "including all 1998 safety standards now".

If this seems a fanciful scenario, let me say Greenpeace are at present causing precisely such a scenario to unfold with the green fridge. This ozone friendly fridge uses a radical new coolant mix of propane and butane. Greenpeace targeted an East German fridge manufacturer that was facing bankruptcy. It persuaded the German government to plough DM5 million into their new technology and to change German law to mandate the new ozone-free standard. Now firms from other European countries, From China and Japan are picking up the new technology and the World Bank has accepted the technology as one worth funding for developing countries. If Greenpeace can make the global system work for them instead of against them, so can other citizen groups. There is no inevitability that global competition will produce either a race to the bottom or a race to the top.

Globalisation Happens!

Globalisation has become a trendy subject. But really globalisation of law should always have been trendy, because it has been going on for

thousands of years, albeit at an accelerated rate this century. Human beings have always had an overwhelming capacity to define big ideas as their own when in reality they were someone else's. Every great law reform has a hundred authors who claim it was originally their idea. Nations have the same capacity for delusion at a collective level. Nations level in the illusion that their laws are creations of their national imagination, of the capacities for problem solving of their local political institutions. Most political leaders do not realise that most of the time they are voting for laws that are nearly identical to laws previously enacted in other states. This when political scientists have documented systematic patterns of verbatim copying of laws to the point where even serious typographical errors get copied.³ That is because they are only dimly aware of the mechanisms of globalisation I shall discuss in this paper.

These mechanisms of globalisation to be discussed are military conquest, hegemony, cooperative adjustment, and modelling of various kinds.

Military Conquest. One of the most important forces for globalisation of law was the Roman Empire. Through military conquest the Romans spread throughout the Western world the very idea of the rule of law rather the rule of men along with a raft of more specific legal concepts that are still used today in both civil and common law nations.

³ See J. L. Walker (1969) "The Diffusion of Innovation Among the American States", *American Political Science Review*. 63: 880-900. More generally, see John Braithwaite (1994) "A Sociology of Modelling and the Politics of Empowerment", *British Journal of Sociology* 45: 445-79.

To read our university texts on the sociology of law you might be excused for believing that in Australia we have a law criminalizing rape because of some titanic struggle between a women's movement or some other interest group which demanded rape laws and other interest groups who resisted it. What happened was more banal. We acquired our rape laws without debate from British criminal law, as you did in Hong Kong I assume. The mechanism at work here was not interest group contestation within a polity, but military conquest. Laws about the sexual exploitation of women existed on the Australian continent prior to 1788, but these were delegitimated by dint of English musketry.

The very possibility of the debate occurring in the World Trade Organisation today on the globalisation of competition law has been enabled by the military conquest of Japan and Germany in 1945. The US occupation administrations forced both those nations to break up their cartels and to enact US-style antitrust laws. Germany than subsequently led all of Europe to enact similar laws and Japan to a much more limited extent had such an effect in Asia.

When Germany leads Europe to copy its anti-cartel laws, the second mechanism is at work - *hegemony*. Superpowers often get their way in the world system by a crude use of economic threats that is similar to the use of military threat. For example, in recent years the US has been systematically bullying smaller economic powers into adopting US-style intellectual property laws through threatening, and occasionally using, trade sanctions under the Special 301 provisions of its trade law.

But hegemony usually does not work so crudely. Indeed in the classic Gramscian sense, hegemony means that a weaker power comes to believe that its own interests are the same as the interest of the stronger power. Hence, Australia has not generally copied American concepts into our intellectual property law at the point of a Special 301 gun. We genuinely convinced ourselves that these laws were in our interest and indeed the media reporting of their enactment even gives the impression that we worked out these laws ourselves. In the most fundamental objective sense, however, the sweeping package of intellectual property law reforms of the TRIPS agreement signed with the GATT in Marakesh last year was against Australia's interests. Australia is a huge net importer of intellectual property rights and will continue to be. So when we increase patent terms from 16 to 20 years under the sway of US hegemony, we send huge monopoly profits back to US companies for an extra four years. We deny Australian consumers the benefits of competition for that extra four years. That is an extraordinarily heavy price for Australia to pay that is only minimally compensated for by the benefits that accrue to Australian exporters of the same intellectual property rights.

Essentially, Australia deluded itself into believing that the TRIPS agreement was something that was in our interests, something we should support the Americans on in the GATT negotiations. The mechanism at work here was hegemony. We had to be nice to the Americans. We needed them to support the Cairns group agenda on liberalising agricultural trade. So we became their sycophants in a variety of ways that sold out the interests of Australian citizens.

There is an interesting debate about the decline of US hegemony. In the domain of business regulation, that decline is often overstated. Yet one might say in the contemporary world that hegemony is being replaced by a tregemony of the US, the European Union (EU) and Japan. The US is still the initiator of most globalising initiatives with regard to business regulation. But if either the EU or Japan wants to veto them, the initiative is unlikely to become global law. Obversely, if the US, the EU and Japan are of one mind as to what should happen in Geneva - be it at the WTO, the World Intellectual Property Organisation, the International Telecommunications Union - then that is what will happen (at least most of the time).

Hegemony is often used in benign ways. In many areas of product safety and environmental protection, for example, the efforts of the great powers are directed toward helping poorer economies to build regulatory competence. This regulatory competence in say, detecting unsafe meat, is simultaneously in the interests of protecting domestic consumers in those poorer economies and in the interests in building confidence in the global trading of meat.

This leads us to the third mechanism of globalisation, *cooperative adjustment*. A great deal of the regulation of social life does not involve sacrificing one party's interest for the benefit of another. When you are driving South and I am driving North, it is in the interests of both of us that we comply with a regulation about sticking to the left hand side of the road. A direct analogy to global law is the regulation of satellite orbits by the International Telecommunications Union. No one wants to put up a satellite that will bump into another one.

There is in fact enormous scope in the world system for regulatory convergence that secures clear and simple advantages for both sides. Until now, we have not been very sophisticated in creating the forums to allow the negotiation of such win-win convergence to occur. APEC has a lot of potential in this regard. We need to learn how to encourage Australian companies to come forward with ideas about how both China and Australia would be better off if we both changed certain regulatory standards with regard to steel, for example. It is an exercise in the creation of deliberative forums that empower interested actors to come up with creative ideas for win-win cooperative adjustment.

Such deliberative forums are not only about enabling the constitution of win-win solutions when the interests at stake are obvious. They are also about the discovery of mutual advantages which were not at all obvious in advance of the deliberation. Hence institutions of global environmental deliberation have enabled Pacific Island states to discover that it is in their interests to be active in persuading rich nations to reduce their greenhouse gas emissions. Global deliberative forums have enabled nations to learn that there are economic as well as environmental costs to deforestation, such as loss of the resource of genetic diversity and the kind of soil erosion costs that both China and Australia now bear. Hence, global deliberative institutions, such as the Rio summit, increase our capacity to transform conflicts of national interest into deliberation that leads to the discovery of mutual advantage. Exchange of knowledge that leads to the discovery of enlightened mutual self-interest is therefore an increasingly important mechanism of globalisation.

Here, Giandomenico Majone⁴ has made an important distinction between reciprocal and non-reciprocal externalities. Externalities arise when one firm, or state imposes uncompensated costs on another firm or state. International externalities are reciprocal in a case such as US and Canadian firms both pouring pollutants into the Great Lakes. Both nations benefit from this pollution and both nations are victims of it. In circumstances of such reciprocal benefits and costs, prospects for cooperative adjustment can be good. However, if externalities are non-reciprocal - winds prevail such that US air pollution around the Great Lakes is blown into Canada, but Canadian air pollution is not blown into the US - then the non-reciprocal nature of the externalities creates no incentive for the US to be cooperative.

Cooperative adjustment is still possible when externalities are non-reciprocal by linking two non-reciprocal externalities (where the direction of damage is reversed and counterbalanced). Issue linkage can transform non-reciprocal externalities into reciprocal externalities. Hence, the wider political irony : "when agreement is impossible, broaden the agenda on which agreement is being sought". For example, with the Uruguay Round of the GATT, the US position was "No TRIPS, no agreement", The position of the Cairns group of agricultural exporters was "No agriculture, no agreement". The TRIPS agreement was not objectively in the interests of any of the Cairns group, since all were nett importers of intellectual property rights. Yet the combined package of agricultural liberalisation and TRIPS was objectively in their interests. This kind of agenda widening is another way of understanding

⁴ Giandomenico Majone, (1994) "Comparing Strategies of Regulatory Rapprochement", in Organization for Economic Co-operation and Development, *Regulatory Co-operation for an Interdependent World*, OECD, Paris., pp. 155-78.

why so many nations signed an intellectual property agreement that was against their interests, narrowly conceived.

Modelling. The final mechanism is modelling. The mechanisms I have outlined so far - military conquest, economic domination, Hegemony, cooperative adjustment to secure obvious mutual advantage and deliberation to discover non-obvious mutual advantage are all rather too rational to capture of lot of the reality of the way human beings copy one another. Why do businessmen waste some time each morning putting on a tie? The understanding of this phenomenon is not so much to be found in rational choice explanations but in the importance to human beings of copying others so that they share a sense of common identity - in the case of the tie, as a polite male.

Let's stick with the globalisation of intellectual property regimes. A major factor in the diffusion of Anglo-American conceptions of intellectual property throughout the world has been the shared world view of intellectual property lawyers. Perhaps the most important thing that WIPO (the World Intellectual Property Organisation in Geneva) does for globalisation is that it constitutes what the international relations scholars call an epistemic community. When developing countries which have virtually no intellectual property lawyers get financial support from the North to send delegates to WIPO, they are invited into a prestigious Geneva club with which they would like to identify. Because they want to fit in and to be invited again, they begin to identify with the WIPO world view. They come to see knowledge not as a common heritage of humankind, something to be shared, but as something to be owned and protected. If their nation is to shared in the identity of being a sophisticated economy, then they come to see the

adoption of the concepts in intellectual property law as an essential part of that identity. In time, notions of monopoly rights to knowledge which seemed culturally strange at first, come to seem natural. They even come to see it as morally wrong, as theft, to take certain kinds of ideas from others. Prestigious law schools in the North that propagate the ideology of Western intellectual property are important in this same sense of being clubs that lawyers from the South want to identify with, want to get qualifications from.

Elite lawyers who were educated in elite law schools in another country as a consequence often write laws for their own country which are explicitly or implicitly modelled on the laws of the country where they learnt their trade.

From considering all these mechanisms, we can begin to see how it is possible that almost a hundred nations can sign a TRIPS agreement that will cause their balance of trade with the intellectual property exporting nations such as the US and Germany to deteriorate significantly. The first one is ignorance. Many developing nations had no intellectual property lawyers in Geneva and simply did not understand the long-term economic implications of what they were signing. The second one is knowledge. The international network of intellectual property lawyers who seized this agenda were an epistemic community. They shared a common way of thinking about knowledge as property that should be owned and they successfully touted it as a more legally sophisticated way of thinking about knowledge. Military coercion is never totally irrelevant in trade negotiations where the US (and formerly the Russians) frequently remind nations to be cooperative allies (as in the current US trade war with Japan) for strategic reasons.

While military coercion made no major contribution to securing the implausible accomplishment of TRIPS, economic coercion was a decisive factor. Many nations (notably earlier opponents such as India, Brazil, Egypt and South Korea) signed TRIPS because they saw its multilateral losses as a lesser evil than bilateral US trade sanctions. Finally, cooperative adjustment was accomplished by strategic agenda widening in the Geneva corridors of the GATT. Nations that were losers from TRIPS were given wins on other fronts to make the total GATT package worth the commitment. Hence, we need to consider the entire gamut of mechanisms - coercion, hegemony, cooperative adjustment and modelling - if we are to understand why most nations sold out their domestic consumers through the TRIPS agreement.

Whither Sovereignty?

What are the implications for democracy, for the sovereignty of citizens, of such a globalising legal order? Globalisation that results from each different mechanism has different implications. Globalisation that results from epistemic communities based in the North can be democratised when we see the importance of nations of the South nurturing their own elite law schools and nurturing intellectual traditions within those law schools that are not subservient to models forged in the North.

With international convergence of law that arises from cooperative adjustment to secure mutual advantage, two or three nations can be left better off yet with each suffering a loss national sovereignty. Recently, we have seen the big three players (the US, EU and Japan) give up on

the World Health Organisation as the key forum for the harmonisation of pharmaceutical testing standards and set up their own trilateral forum called the International Conference on Harmonisation (ICH). Countries like Australia and China will have little choice but to follow what the big three decide through ICH. We lose national sovereignty, yet we gain from the way harmonisation enables drugs to be got more quickly onto the market and with better global sharing of safety data.

Yet do we lose even in terms of sovereignty? If one's conception of sovereignty is not national sovereignty, but the ultimate sovereignty of citizens, it is not clear that ICH is a bad thing. In Australia, as in most national states, health regulators have been excessively secretive, giving citizen groups very limited inputs into their regulatory negotiation with the pharmaceutical industry. In comparison, the ICH is a model of access and transparency. Consumer groups can sit in on the debates at ICH, even contribute to them. The most technically competent consumer advocates from the entire global consumer movement can be given this watchdog role at a central forum. Citizen group oversight (and therefore effective sovereignty) is enhanced through the way the centralisation of decisionmaking enables the concentration of scarce advocacy competence. Transcripts of the debates and proceedings that lead to the trilateral regulatory standards are published⁵. This openness has not occurred in response to the pleas of citizen groups, but in response to the pleas of aggrieved nation states such as Australia, who do not have a formal seat at this critical negotiating forum. So we have a paradox of sovereignty, a national democratic deficit that becomes a democratic

⁵ E.g. *Proceedings of First International Conference on Harmonisation, Brussels*, 1991, P.F. D'Arcy and D.W.G. Harron (eds.). Belfast: Queen's University of Belfast.

surplus for citizens. Grievance over the diminution of the sovereignty of the nation state delivers a global regulatory regime with enhanced citizen sovereignty.

Just as military coercion can be partially countered as a sovereignty-crushing mechanism by collective security arrangements, so economic hegemony can be countered collectively by the weak. The Cairns Group of agricultural exporters at the World Trade Organisation is an example of just such collective countervailing economic power against US and European hegemony. The international consumer movement and the global environmental movement are other examples of collective organisation of the weak against the loss of their democratic sovereignty to the strong in the world system. I have tried to show how they can work the cross-cutting currents of the world system to sometimes prevail against the odds. It may or may not be that a unified global business community can always defeat a unified environmental movement. But the global business community is not always unified. Hence, we have seen how an American business community will effectively join forces with the environmental movement to defeat Japanese and European business in a matter such as the Montreal Protocol on Ozone Depleting Substances. Why? Because business had long since been forced by the US Congress to meet the standards in the Protocol and they wanted their competitors in Europe and Japan to be put to the same disadvantage. Obversely, European business is currently sympathetic to supporting green lobbying for tougher international environmental management and eco-labelling standards through the

International standards Organisation⁶ because the European Commission has already mandated tougher standards in Europe that have not been mandated in the US and Japan. The pursuit of collective global strength by weak citizen movements is therefore far from pointless.

As the International Conference on Harmonisation of pharmaceuticals shows, there can be paradoxes of sovereignty where globalisation is associated with an increase rather than a decrease in sovereignty, properly conceived as the capacity of citizens to understand decisions that will affect their lives and to raise their voices in a way that influences those decisions. There is certainly no need to wring our hands about the threat to sovereignty which globalisation does pose, when we can get on with preserving and enhancing the voice of weaker players in the world system through building vibrant, participatory international movements of citizens concerned with health, environment, consumer protection, workers' rights, indigenous rights and womens' rights. Progress here requires that NGOs get off the national sovereignty bandwagon and engage with strategic globalism in pursuit of enhanced citizen sovereignty.

⁶ Joe Cascio (1994) "International Environmental Management Standards", ASTM Standardization News, April, 44-49.