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978-1-107-02742-8 - Asian Capitalism and the Regulation of Competition: Towards a
Regulatory Geography of Global Competition Law

Edited by Michael W. Dowdle, John Gillespie and Imelda Maher

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Introduction and overview

MICHAEL W. DOWDLE, JOHN GILLESPIE,
AND IMELDA MAHER

This is a rather unorthodox treatment of global competition law and Asian competition law. We do not explore for the micro-economic ideal type of global competition law, nor do we survey the convergences with and deviations from this ideal type to be found throughout the countries of Asia. For this we would recommend, for a start, David Gerber's *Global Competition Law*¹ and R. Ian McEwin's *Competition Law in Southeast Asia*.²

(Of course, there is no 'global competition law' in the positive law sense of the term. Here, following David Gerber, global competition law refers to and is identified by that projected point of convergence to which many argue that domestic competition law is or should be evolving. See Chapter 1, pp. 21–4.)

Rather, this is an exploration, not of the possible unities of global competition law, but of its possible diversities. It is founded on a proposition that global competition law is best seen as encompassed not in a single ideal type, but in a multiplicity of ideal types – in the wide diversity of roles and functionalities that markets and market competition actually have in human society. Peter Hall and David Soskice have shown us that there are many capitalisms, not just one.³ This being the case, the same would hold true for capitalism's way of structuring and regulating market competition. The future of global competition law does not lie in a particular 'sovereignty' but in pluralism.

¹ David J. Gerber, *Global Competition Law: Law, Markets and Globalization* (Oxford University Press, 2010).

² R. Ian McEwin, *Competition Law in Southeast Asia* (Cambridge University Press, forthcoming).

³ Peter A. Hall and David Soskice, 'An Introduction to Varieties of Capitalism', in Peter A. Hall and David Soskice (eds.), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001), pp. 1–70.

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For centuries, pluralism was a defining feature of the East and Southeast Asian legal world. It remains woven deeply into many regulatory systems there. As we shall see, it is reflected in Asian capitalism in the same way that the varieties of capitalism found in the North Atlantic reflect the different ways that national legal systems there regulate corporate governance. And it is reflected in the diversity of models that Asian countries use to regulate competition. In this sense, we examine this Asian diversity, this Asian regulation of competition, in order to find insights into our own condition.

This volume is divided into five parts. The first part maps out the various ideas, concepts, and concerns that frame this volume's investigation. The second part then looks more specifically at issues surrounding the core concept relevant to our investigation, that of competition. The next two parts then explore how the regulation of competition in Asia plays out against this more global concept. Part III looks at competition regulation in the representative Asian countries of Japan, China, and Vietnam. And Part IV then looks at particular cross-cutting experiences in Asian competition regulation, namely the special problems of peripheral environments and issues of public law and regulatory independence. Finally, Part V looks at Asian competition from an evolutionary, dynamic perspective, exploring patterns of change and possible evolutionary trajectories, both internally and from the perspective of a global competition law.

Part I sets out the issues and conceptual frameworks that will inform our investigation. In Chapter 1, Michael Dowdle introduces us to the particular topics and issues that this volume seeks to explore. As discussed above, this volume explores the relationship between Asian capitalism and its way of regulating competition (its 'competition law') and the global movement towards a global competition law. In order to conduct such an exploration, we need first to understand what is Asia in the context of Asian capitalism, what are the defining features of Asian capitalism, and why Asian capitalism's particular regulation of competition provides an especially promising lens for interrogating the emerging transnational movement towards a global competition law. This is the focus of Chapter 1.

Chapter 1 also explains the concept and phenomenon of what this volume terms 'regulatory geography', which brings the legal-theoretical construct of 'global competition law' into communication with the economic-geographical construct of 'Asian capitalism'. The idea of regulatory geography stems from a recognition that asymmetries in spatial

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distributions of economic and cultural capacities, as detailed for example in the disciplines of economic geography and cultural geography, generate corresponding spatial asymmetries in regulatory needs and capacities. Dowdle shows how this means that global competition law, as it is presently conceived, is not uniformly viable across geographic space in the way that it assumes itself to be. He then applies this resulting regulatory geography of competition law to 'Asian capitalism', generating in the process a speculative and preliminary 'mapping' of Asian competition regulation that details possible spatial patternings of diversities in regulatory issues and needs, which include diversities that are internal to Asian capitalism itself, and diversities that might distinguish Asian capitalism as a whole from North Atlantic varieties of capitalism.

Whereas Dowdle looks at how global competition law is likely to impact Asia, David Gerber, in Chapter 2, examines how Asia is likely to affect global competition law. As he describes, at its heart global competition law is a project of global convergence in national competition law regimes. Gerber explores what effect Asian experience with competition, much of it very recent, might have on this desired dynamic of convergence. When viewed from the perspective of formal law, Asia's recent experiences do appear convergent in the way in which global competition law projects. But, as he shows, underneath this formal surface lies a fair number of historical, economic, and social dynamics that render some of this apparent convergence illusory. Ultimately, he concludes that in order for this convergence to proceed, global competition law will probably have to evolve so as to better accommodate at least some of the challenges and issues of Asian capitalism, just as Asian capitalism is evolving so as to accommodate the agenda of global competition law.

The volume will return to re-examine the issues and hypotheses raised in this first part in its final chapter, but before doing so, these hypotheses and the value of the analytic frameworks that gave rise to them need to be interrogated through the lens of actual practice. This is done through the studies that make up the remaining four parts of the volume.

Part II looks at the political economic dynamics that structure, inform, and constrain the regulatory aspirations of global competition law. Imelda Maher first examines the institutional structure and foci of that law, focusing in particular on the networked structure that it is adopting on a more global level, and the agencification that it is adopting at the national level. These two institutional developments derive from the same phenomenon, a desire to isolate competition regulation from politics. Domestically, this isolation is promoted through the use of

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independent regulatory agencies. Globally, it is promoted through the establishment of regulatory networks that allow these agencies to communicate and co-ordinate with each other directly, without having to pass through formal state-to-state protocols that are designed for the pursuit of global politics. Maher concludes by showing how this effort to separate competition from politics has proved to be problematic even in the contexts of the North Atlantic states, where the institutionalization of this separation has been most robustly explored and pursued. This separation and its problematics will be further explored specifically in the context of Asia by Tony Prosser in Chapter 10.

In Chapter 4, Ngai-Ling Sum uses a cultural political economy approach to explore the evolving ideological frameworks that global competition law uses to drive its convergences. Here, the story becomes more complicated, as the international community has over the years been forced to adopt a number of different justifications for the global adoption of particular laws and structures for regulating competition. Originally, this ideology focused on the global good of free trade. But with the collapse of the Doha Round of international trade negotiations among the membership of the World Trade Organization (WTO), it evolved into an ideological focus on economic development. More recently, the global competition community seems to have given up the search for an ideological underpinning, and has instead turned simply to presenting itself as an expert in economic regulation, whose regulatory prescriptions, proffered primarily in the particular formularies known as 'best practices', are recommended simply on the basis of the advocating agency's claim to have superior knowledge of the issue.

Bob Jessop's chapter that follows helps to explain the ideological instability detailed by Sum. Jessop shows us that underneath and concealed by the unified conceptual front presented by global competition law is an extraordinarily complex melange of competing and often contradictory concerns, interests, goals, and understandings. Jessop shows how market competition actually encompasses and is shaped by a huge diversity of often competing social, political, and economic dynamics, and that neither competition law nor the orthodox, neoliberal understanding from which it derives – of what it is and how it is that market competition contributes to social welfare – get anywhere close to adequately capturing these dynamics, and often ends up blinding itself to crucial contradictions within its particular world view – such as the internal tension between competition and 'competitiveness', or between competition and innovation. Jessop concludes that, given this complexity,

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standard Weberian conceptions of regulation may not be up to the task, and that competition regulation may require more heterarchical forms of regulation, sometimes known as meta-governance. The volume returns to this issue in its concluding chapter.

In Parts III and IV we look at how competition regulation actually plays out in various countries and with regard to particular issues in Asia. Part III focuses on particular countries. These include Japan, a representative core economy (as per Dowdle's mapping in Chapter 1), China, Asia's principal intermediate economy, and Vietnam, a more peripheral economy. These will be followed, in Part IV, by chapters looking specifically at how Asian competition regulation manifests itself in economically peripheral environments, and at the interplay in numerous Asian countries between politics and competition policy, as particularly expressed in the notion of regulatory independence.

In Chapter 6, in his investigation of Japanese engagement with competition regulation, Simon Vande Walle documents Japan's well-recognized ambivalence towards North Atlantic – and particularly American – models. Basically, he finds that, when the economy is doing well, Japan tends to embrace a more managed form of competition that is in conflict with standard global competition law understandings of how competition should be regulated (and towards what ends). But when the economy stagnates, as it has done particularly over the past two decades, Japan has tended to find the orthodox, North Atlantic regulatory perspective from which global competition law derives more attractive. In demonstrating this, he shows that conventional portrayals of Japan's economic-regulatory experiences as either confirming or disproving the universal applicability of the neoliberal presumptions that inform global competition law are too simplistic. Japan both embraces and rejects this model in different ways and at different times.

In Chapter 7, Wentong Zheng introduces us to China's competition regulation regime. China's efforts to regulate competition through law (as opposed to simply through the party-state bureaucracy) is of relatively recent vintage, and it remains to be seen how many of its positive, legislative articulations will play out in practice. Like that of Japan, China's approach to competition regulation is distinctly fragmented. But whereas Japan's fragmentation articulates itself temporally, through cyclical changes in legislative approach, China's fragmentation is coeval, articulating itself in the framing legislation itself. It is a fragmentation in which different sectors of the economy are subject, sometimes formally,

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sometimes informally, to different competition regulatory regimes, and in which enforcement of this regime is also fragmented across numerous regulatory authorities (none really independent in the sense of an independent regulatory agency).

Finally, Chapter 8, by John Gillespie, explores competition regulation in Vietnam, a more archetypically peripheral Asian environment. Here we also find a fragmented regulatory environment, one fragmented coevally as in China. But in contrast to that of China, in which the fragmentation is partly formalized in the law, Vietnam's formal competition law runs primarily according to global models. Vietnam's fragmentation is largely informal, and corresponds with fault lines that separate the informal legal structures associated with social class. This has a number of important implications for competition regulation. It shows, consistent with the observations of Bob Jessop, that market competition can be regulated by numerous regulatory regimes, both informal and formal, social and legal.

In the next chapter Dowdle explores some further regulatory implications of this particular kind of fragmentation. That chapter, Chapter 9, opens Part IV, and looks at the special problems that the orthodox model of competition poses to peripheral economic environments in Asia. Using China's recent problem with melamine milk adulteration as an example, it shows that adulteration was more than anything else the product of neoliberal market competition as it operates within the context of a peripheral regulatory environment. More specifically, it was due to the fact that neoliberal forms of market competition – and in particular its demand that market regulation be institutionally segregated from non-economic, social regulation – require complementary regulatory conditions and capacities that generally are not present in or available to peripheral economic environments. Without such conditions and capacities, the neoliberal model can become socially dysfunctional, as was the case with melamine milk adulteration.

Following on from this, Chapter 10, by Tony Prosser, examines how competition regulation interacts with politics in various countries throughout the region. As described in Imelda Maher's chapter, the orthodox model prescribes that market competition be regulated through independent regulatory agencies, so as to effectuate the segregation of economic regulation from social regulation critiqued in Chapter 9. Consistent with themes introduced to us by Bob Jessop, Prosser shows that the reality is much more complicated than this model portrays, even in the North Atlantic economies it is often claimed to be channelling.

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Turning to Asian articulations of this relationship, he finds that whereas the orthodox model prefers juridical negotiation of the conflict between economic and social goals, Asian countries in general seem to prefer to conduct such negotiations through the political system. He suggests that one of the possible causes of this difference is that, in contrast to competition law in North Atlantic countries, in Asia competition law and regulation come more in the form of legal transplants (often adopted under pressure from transnational actors). Such transplantations are themselves ultimately political decisions, and this gives a distinctly political colour to the transplanted competition law, something not found in the competition laws of most North Atlantic countries. Since competition law is more innately political in Asia, it naturally favours political as opposed to juridical forms of regulatory negotiation. And this argues against an independent regulatory agency model of regulation.

Finally, Part V explores Asian capitalism and its attendant regulation of competition from a more dynamic, evolutionary perspective. It opens with a chapter by Henry Yeung that explores the evolving nature of Asia's distinctively disaggregated production processes – that is, production chains. He shows that these processes are becoming more inter-linked, resulting in an evolution from production chains to 'production networks'. One of the major consequences of this evolution is that it is freeing Asian capitalism from its traditional dependence on the 'developmental state'. In Chapter 12, Frederic Deyo then looks at the implications of this evolution for Asian approaches to competition and competitiveness. Looking in particular at a specific kind of industrial park, one that first emerged in Taiwan and South Korea, he identifies a new, social-regulatory side to Asian efforts to promote competitiveness. This Asian form of the industrial park goes far beyond its North Atlantic counterpart in providing not simply infrastructural attractions to residential firms but also a wide variety of social services both to firms and directly to the employees of these firms, such as skills upgrading and networking and referral services. (Interestingly, however, Deyo's analysis also suggests that this linkage tends to break down the further one extends into the periphery: both China and Thailand have attempted to establish these kinds of industrial park, but with much less success in using them to address the social side of their participating firms.) In sum, in Asia, as state-centric production chains morph into stateless production networks, the competitive-regulatory model of the developmental state seems to be morphing into a post-developmental state model in which the state plays more of a supporting role focusing on the

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development of infrastructure and factor endowments while leaving the more strategic aspects of development policy to the private firm networks described by Yeung in his chapter.

But what does this mean for competition regulation, and for the future of global competition law? This is the subject of the final chapter, which engages in a synoptic review of the other chapters in this volume to extrapolate what, collectively, they might imply both for the future of Asian capitalism and, more significantly, for the future of global competition law. It argues that, collectively, the chapters of this volume do indeed suggest a distinctly Asian approach to competition, but that its distinguishing features are not those that are most commonly attached to purportedly 'Asian' styles of regulation as described by the preliminary mapping set out in the first chapter of this volume. Instead, what really distinguishes Asian capitalism, and its regulation of competition, is its distinctly pluralist structure – a kind of pluralism that corresponds to the legal pluralism that Michael Barry Hooker has famously identified as a long-standing distinguishing feature of Southeast Asian legal systems in particular. In contrast to the varieties of capitalism discussed by Hall and Soskice⁴, Asian capitalism does not evince a single form of capitalism that dominates the full reach of national social, economic, and legal space, in the way that liberal market economies and co-ordinated market economies tend to do throughout the North Atlantic. Rather, Asian states tend to evince multiple capitalisms operating simultaneously within a single national space. The regulation of these capitalisms is similarly pluralist, involving multiple models of competition regulation.

This should not, however, strike us as particularly deviant. As a number of the chapters in this volume make clear (perhaps most particularly Dowdle's Chapter 1 and Jessop's Chapter 5), capitalism and competition are much more variegated – to use Jessop's term – than orthodox models and theories acknowledge. The real question that needs to be asked is not 'why is Asian capitalism pluralist?', but 'why are North Atlantic capitalisms monocratic?'. This, too, will be addressed in the final chapter, which concludes by suggesting that, ultimately, global competition law will itself have to be pluralist, and that Asia's particularly pluralist style of regulating competition law might have something important to tell us in this regard.

⁴ Hall and Soskice, 'Introduction'.

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PART I

Asia, Asian capitalism, and global competition law: conceptual mappings

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