Some Legal Badges of Economic Globalization from Rome to the WTO and Regional Trade Agreements

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This is a short paper about a very long topic. As often as the term "globalization" is used in our daily speech, there remains a considerable difference of opinion over its meaning and significance for our economic, social, political and legal development.

In the words of one observer,

> "Everyone here is on all sides these days about globalization and its effects… the word is somewhat odd. It names both a process and a *fait accompli*. Globalization is at once something that has already happened and something that is happening now, perhaps with a distant horizon to its completion… Even the most insular and hermetically sealed nation has always been, to some degree, affected by international trade and by other influences coming from the outside, as in the ancient Muslim influence on China, not to speak of the importation of Buddhism into China. Nevertheless, everyone feels that the process of globalization has these days reached a hyperbolic stage. This justifies singling it out as a decisive factor in many realms of cultural, political and economic life."[1]

As an economic concept, "globalization" was probably first popularized by Klans Schwab and his World Economic Forum meeting in Davos some ten years ago.[2] Fred Bergsten, writing in *The Economist*, simply defined globalization as "international economic integration".[3]

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1 J. Hillis Miller, "Effects of Globalization on Literary Study" in Kwok-kan Tam et al., *Sights of Contestation: Localism, Globalism and Cultural Production in Asia and the Pacific* (Hong Kong: The Chinese University Press, 2002) 311.

2 B.D. Wood, "The Globalization Question" Encyclopedia Britannica online: http://search-eb.com/magazine/article?query=globalization&id=5&smode=3.

3 C.F. Bergsten, "The Rationale for a Rosy View: What a Global Economy Will Look Like" *The Economist* (September 11, 1993).

There are three positions in the debate over the meaning of globalization, neatly summarized as *radical, transformational and historical*:

> "[T]heoretical approaches differ markedly as to whether the present-day phase of globalization is believed to articulate a radically new epoch in world history, a process of transformation or a restructuring of the global political economy, or a historically contingent phenomenon that is by no means unprecedented."[4]

Thomas Friedman is an example of the popular combination of the first and second of those views. He describes globalization as "a dynamic, ongoing process… the inexorable integration of markets, nation-states and technologies to a degree never witnessed before."[5] Friedman argues that the marketplace and its "immovable passenger" capitalism drive the process of globalization with the result that "… globalization also has its own set of rules—rules that revolve around opening, deregulating and privatizing your economy, in order to make it more competitive and attractive to foreign investment."[6]

Joseph Nye and John Donahue argue a process along the lines of the third, historical position. They speak of "globalism as a phenomenon with ancient roots and of globalization as the process of increasing globalism".[7] They focus on how *thick* or *thin* the process of globalization has been over time. The thickness of the process relates to the extensiveness, intensity, and impact of relationships created by globalism. The greater the intensity, the thicker the process of globalization.

This paper follows Nye and Donahue along the third historical school of thought, but focuses on the more specific relationship between economics and law, assuming a definition that is less Western-focussed and less limited by time than Friedman's globalization. In opposition to the popular belief that globalization is a recent phenomenon stretching

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4 A.G. McGrew, "Global Legal Interaction and Present-Day Patterns of Globalization" in V. Gessner & A.C. Budak, eds., *Emerging Legal Certainty: Empirical Studies on the Globalization of Law* (Brookfield: Ashgate Publishing, 1998) 325 at 326.

5 T.L. Friedman, *The Lexus and the Olive Tree: Understanding Globalization*, 2nd ed. (New York: Farrar, Staus and Giroux, 2000) at 9.

6 *Ibid*.

7 J.S. Nye & J.D. Donahue, eds., *Governance in a Globalizing World* (Washington, D.C.: Brookings Institution Press, 2000) at 7.

back some hundred years, I posit that globalization, as a method and process by which market-driven economies have shifted laws and customs to facilitate economic development, has existed with varying influence and force since the earliest days of regional and international trade. The present stage of globalization[8] may be in our face, so to speak, but its antecedents in law and practice have been with us for centuries.

My proposed approach is not meant to marginalize or minimize the sharp differences of opinion over the meaning and effect of globalization. For economist John Helliwell, globalization "seems as much hype as reality", a conclusion which he admits "has an almost other-worldly air when juxtaposed with the debates and protests about globalization."[9] On one end of the spectrum, the *globaphiles* cannot see beyond the mantra of open universal markets and minimalist government as the key to higher living standards around the world. By comparison,[10] the *globophobes*

> "regard globalization as the tool multinational corporations are using to rob the world's poor by exploiting their labour, resources and environments; destroying their culture; and commanding their vassal governments to implement whatever laws and trade agreements would make these transfers easier to achieve."[11]

I do not plan here, to enter into another round of globalization trench warfare, however. Others have written and proselytized widely on the subject.[12] Rather, I will focus on thinking through the range and diversity of law and commercial practice that have created over time an amazingly durable, yet flexible and ever-changing legal framework for transactions between highly interdependent states in our "global village".[13]

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8 Derided by some as "Coca-Colonization" or "McMarketization".

9 J.R. Helliwell, *Globalization and Well-Being* (Vancouver: UBC Press, 2002) at 15-17, 77-78.

10 G. Burtless et al., *Globaphobia: Confronting Fears About Open Trade* (Washington, D.C.: Brookings Institution Press, 1998); P. Legrain, *Open World: The Truth About Globalization* (London: Abacus, 2002).

11 *Supra* note 9 at 78.

12 For example, see J.E. Stiglitz, *Globalization and Its Discontents* (New York: W.W. Norton, 2002); F.J. Lechner & J. Boli, eds., *The Globalization Reader* (Malden: Blackwell, 2000).

13 E. Carpenter & M. McLuhan, eds., *Explorations in Communication* (Boston: Beacon Press, 1960) at xi.

I. CLASSIFYING TRANSBORDER LEGAL CHANGE WAVES

While globalization may be a "contested concept", if we think of the term in its meaning for the flow of capital, people, goods and services and information across national borders, "we would be hard-pressed to deny [its] historical antecedents."[14] The legal badges or indicia of globalization are located in three merging waves of legal change, namely, the *unification*, *convergence* and *harmonization* of national legislative frameworks. Their cumulative effect underscores the evolutionary *thin* to *thick* process of legal regionalism and legal globalism that continues to the present day in the legal ordering of the global economy.

Unification happens when nation states approve a treaty or convention that invites the signatories to adopt unchanged the instrument as domestic law with full force and effect in their legal systems. The cumulative experience results in the acceptance of identical rules across the board. A relevant example would be the UNIDROIT Convention on the Uniform Law on the International Sale of Goods of 1964.[15] Another example is the UNCITRAL 1985 Model Law for International Commercial Arbitration,[16] which establishes a uniform legal framework for arbitration proceedings[17] and, in addition, has had "a unifying effect on new arbitration legislation in countries which did not even adopt the model law, as for example, in the case of the English Arbitration Act of 1996".[18]

Convergence of laws, on the other hand, takes place when nation states, beginning from different legal entry points, bring their laws by coordinated efforts closer together in terms of coverage, impact and administration. Membership in regional trading groups[19] and customs unions,[20] in the case of national commercial legislation and administration,

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[14] P. Potter, "Introduction: Globalization and Social Cohesion in Local Context" (2003) at 2 [unpublished, on file with author].

[15] R. Goode, *Commercial Law*, 2nd ed. (Harmondsworth: Penguin, 1995) at 17-18.

[16] *United Nations Commission on International Trade Law* (UNCITRAL), http://www.uncitral.org/en-index.htm.

[17] F. von Schlabrendorff, "Resolving Cultural Differences in Arbitration Proceedings" (2002) March supp. International Financial L. Rev. 38.

[18] P. Sanders, "UNCITRAL's Model Law on Conciliation," (2002) 12 Int'l J of Dispute Settlement 1.

[19] NAFTA is one example.

[20] The European Union is an obvious example.

has accelerated the convergence of member states' legislation. The result has advanced the emergence of hybrid or mixed systems of law that have challenged the classical schema of civil and common law legal systems, not to mention the socialist classification of legal systems in transitional economies from Vietnam and China to Russia and Hungary. The forces of economic regionalism and multilateralism have force-fed the pace of legal convergence, requiring new thinking in the classification of legal systems by comparative law scholars.[21]

Harmonization of laws occurs when different nation states use the same templates or sets of precedents as a basic foundation to which local adaptations are crafted to accommodate domestic cultural, economic and social considerations. Earliest examples would include the assumption of Roman law in Europe in the Middle Ages.[22] More recently, the World Trade Organization (WTO) has been the major institution pushing the harmonization of national trade laws and administration through mandatory Uruguay Round side agreements on a range of matters.[23] I will consider this most recent wave of legal globalization later in this paper.

II. EARLY LEGAL REGIONALISM IN ROMAN EMPIRE TERMS

My brief examination of early legal globalism begins with the Romans. The Roman legal regime was the first clearly secular legal system. Under the Roman Empire, diverse populations were brought under a common legal mantle. To make these laws "fit", to have the laws be applicable and enforceable over a broad range of peoples and situations, it was necessary to craft a legal system that would safeguard Rome's primary interests while recognizing local norms and customs that facilitated orderly community relations so long as they did not threaten Rome's governing capacity. Rome practised, if you will, its own version of adaptable Empire Law which, at its zenith, given the state of communications and the regional boundaries of trading activity, was the "globalized" law of its day.

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[21] R. Peerenboom, "The X-Files: Past and Present Portrayals of China's 'Alien Legal System'" (2003) 2 Wash. U. Global Studies Rev. 37.

[22] J. Braithwaite & P. Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000) at 43-44.

[23] Generally, see J.S. Thomas & M.A. Meyer, *The New Rules of Global Trade: A Guide to the World Trade Organization* (Toronto: Carswell, 1997).

Roman law, for our purposes, is primarily the law of property and contracts. The earliest texts of import in this area are the *Institutes* of Emperor Gaius (circa 161 C.E.) and the *Institutes* of the Emperor Justinian (circa 533 C.E.). The latter is modeled mainly on the former but is more expansive. The *Institutes* dealt with *privatum jus* (private law) though it should be noted that property and contract law in their present day incarnations do not find their precise notional counterparts in either of the Institutes.

Under the rule of Emperor Trajan (98-117 CE), the reach of Rome reached its territorial limits, supporting a commercial web that stretched through much of Europe into the edges of Asia and Africa. The legal system facilitating this commerce was practical, internally coherent and open to the flexible resolution of trade disputes.[24] Originally, only Roman citizens could benefit from Roman law but Emperor Antoninus in 212 CE granted citizenship to all free subjects of the Roman Empire and complications that had plagued the dual foreign law/Roman law system were put to rest.

Though the size of the Empire shrank during Justinian's reign, his four part legal compilation, the *Corpus* (consisting of the *Institutes*, *Digest*, *Codex*, and *Novels*), contributed a classification and coherence to the science of lawmaking that would have far reaching effects. The overriding impression of this early period of prevailing legal norms is consistent with harmonization.

Eight centuries later, legal scholars in Bologna refurbished the *Corpus*, handling the *Corpus* as a Gloss, following a centuries-old practice of annotating a text with marginal notes. Their efforts eventually produced a comprehensive and pertinent legal treatise that served as the foundation for Italian legal study, not only for the academic community, but also for administrators, judges, and advocates.[25]

The "reinvented" *Corpus* began to be adopted and adapted by local regions as its benefits became evident. The *Corpus* was, unlike regional law, a well developed system that had been amassed to deal with a variety of eventualities. Its quality as a written text lent it an air of reliability and

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[24] F. Schulz, *History of Roman Legal Science* (London: Oxford University Press, 1946) at 67-68.

[25] A. Watson, *Roman Law and Comparative Law* (Athens and London: University of Georgia Press, 1991) at 90.

made it available for study and teaching.[26] This in turn meant that regions had the ability to focus on principles and structure so they could pick and choose how and what to apply to their own systems; in this way, "Roman law functioned as a kind of legal treasury for Europe"[27], bringing together a relatively thick convergence of laws throughout many parts of Europe.

III. THE LAW MERCHANT EVOLVES AND PROSPERS

The Roman legal principles in time permeated the borders of today's Spain, Germany, the Netherlands, France and beyond. However, the growth of the nation-state in the fifteenth and sixteenth centuries curbed the spread of reintroduced Roman law. Roman law applied only to the citizens of the new states, forcing out non-citizens to deal with each other using their local customary laws regardless of geographic location.

Previous to the widespread establishment of the (modern) nation state and its propensity to legislate commercial norms and practices, traders and merchants largely governed themselves through the application of the Law Merchant (*Lex Mercatoria*) which formerly stood apart from the local law. While the law merchant is normally studied as a phenomenon of English law, its effect on and connection to foreign trade calls for specific comment. In the words of Roy Goode,[28] "there have been few events more remarkable than the birth and development of the law merchant, which for hundreds of years subsisted as a distinct source of law, administered by its own mercantile courts."

A host of courts—maritime courts, the courts of the Fairs and Burroughs and the Staple Courts in company with other commercial courts of the Middle Ages, "determined disputes not by English domestic law but according to 'the general law of nations' based on mercantile codes and customs… and reflecting international maritime and commercial practice."

Little wonder, then, that these courts and their counterparts elsewhere in Europe became the adjudicators of choice not only for local merchants but foreign traders from all parts of the region, content to have their disputes resolved by tribunals which, though located in one jurisdiction,

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[26] J.J. Wolff, *Roman Law: An Historical Introduction* (Norman: University of Oklahoma Press, 1951) at 191.

[27] Braithwaite & Drahos, *supra* note 22 at 43.

[28] R. Goode, *Commercial Law*, 1st ed. (Harmondsworth: Penguin, 1982) at 31-32.

were conversant with both foreign mercantile usage and the fundamentals of the nascent civil and common law systems. The merchant courts offered speedy adjudicative relief, a common sense attitude towards the proof of facts and had little patience for the technical rules of evidence. Most of all, they possessed an overriding understanding of the argument that the good faith customs of merchants should constitute the prevailing norms that should be interpreted in a broadly uniform fashion. Commercial expectations were to be realized, not frustrated.

The next phase of harmonization took root as more nation states embraced the principal features of the *Lex Mercatoria* through statutes,[29] codes,[30] and the separate establishment of commercial courts[31] (though some merchants still used the courts set up at the seasonal fairs, fearing local discrimination).[32] In broad terms, this state formalization of the Law Merchant ranged between harmonization and convergence, depending on the degree and depth of nation-state adoption of and conformity to the customary commercial norms developed and recognized by the trading firms of their day.

The Law Merchant also developed mechanisms for the safe financing of crossborder transactions. While instruments of exchange had existed for centuries, bills of credit, promissory notes, and bills of exchange were more easily and reliably employed once they were standardized across Europe in the fifteenth century.[33] Besides facilitating trade, these documents introduced and normalized the concept of a paper transfer of an intangible.[34] These documentary innovations eventually led to the acceptance of negotiable instruments, the backbone of international commerce.

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[29] Goode, *supra* note 15 at 4.

[30] H.J. Berman, *Law and Revolution: the Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983) at 355.

[31] P. Stein, *The Character and Influence of the Roman Civil Law: Historical Essays* (London: Hambledon Press, 1988) at 218-219.

[32] L.E. Trakman, *The Law Merchant: The Evolution of Commercial Law* (Littleton: Fred B. Rothman, 1983) at 19.

[33] M.M. Postan, *Medieval Trade and Finan*ce (London: Cambridge University Press, 1973) at 54.

[34] Braithwaite & Drahos, *supra* note 22 at 47.

IV. TRANSPLANTING TRADE AND COMMERCE LAWS INTO THE COLONIES—PACIFIC GLIMPSES

As *Lex Mercatoria*'s reach matured in both customary and statutory form, its formative influence on global trading law norms and practices fed into the transplantation of commercial laws and business norms into the far reaches of the colonial empires established by the English, the Dutch, the Spanish, the Portuguese and the French. The experience in South-East Asia illustrates the transplant phenomenon.

Their imperial forays transplanted their trading and commercial laws and institutions into the colonies sometimes through the medium of state monopolies,[35] often with the explicit goal of insulating the commercial interests of their citizens and business associates in the colony's economy from local law or custom.

France, for example, like other European colonial powers in Southeast Asia, created parallel legal systems in its Indochinese territories, including Vietnam, where

> "a civil law system like that of metropolitan France governed French citizens, Europeans, and others with a substantially similar national law, while the local [Imperial] Code and customary practice continued to govern the indigenous Vietnamese and Chinese."[36]

Similar nationality and (often) race-based economic legislation was developed and used by the Dutch in their Netherlands Indies (Indonesia) colony.[37] The larger picture of colonial legal transplants (often most pronounced in commercial law) would include the experience in British India, Burma, Malaya, Ceylon, Hong Kong and the Philippines.

In this connection, we might capture the flavouring of this era of exported law through the observations of Andrew Harding:

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[35] J. Keay, *The Honourable Company: A History of the British East India Company* (Hammersmith: Harper Collins, 1993).

[36] J. Gillespie, "Private Commercial Rights in Vietnam: A Comparative Analysis" (1994) 30 Stanford J. of Int'l L. 326 at 329.

[37] C. Coppel, "The Idonesian Chinese as 'Foregin Oriental' in the Netherlands Indies" in T. Lindsey, ed., *Indonesia Law and Society* (Sydney: Federation Press, 1998) 33.

> "The English common law tradition, with a heavy dose of the great Anglo-Indian codes, was imposed in Burma and the Straits Settlements, and later in Malaya, Brunei, Sabah, and Sarawak, while its American cousin became a permanent legal influence throughout the twentieth century in the Philippines. The French civilian tradition was imposed in Indo-China and also, along with German, Swiss and Japanese models, influenced Thailand; and Dutch law was imposed in Indonesia. As a result, all the legal systems of Southeast Asia, even that of Thailand, which was not colonised, have a clearly European-style framework, and all modernised their legal systems and their criminal, civil and *commercial* laws with European-style codes just before or just after the turn of the twentieth century, or a little later."[38]

V. THE MIDDLE KINGDOM'S MODEST CONTRIBUTION TO LEGAL OUTREACH

If we shift from our Eurocentric chronicling of the ebb and flow of commercial law and practice that facilitated trade and investment between fiefdoms, trade fairs, early nation states, and their colonies in South East Asia, can we identify similar evolutionary, accommodating trends in the case of China's customary or formal economic laws?

The answer is not for the lack of an empire. The last dynasty of the Chinese Empire, the Qing (1644-1911), produced and relied upon one of the great legal Codes of human history. The *Qing Code* applied to a territory and a population

> "that was as large or larger than that governed by Roman law, either when it was the law of the Roman Empire, or when it became the dominant law of medieval and modern Europe. In addition to governing China itself, China's legal system formed the basis of the legal systems of those nations which were subject to its influence: Korea, Japan and Vietnam. It was only when Roman law spread out beyond Europe and the Mediterranean that it began to exceed Chinese law in importance."[39]

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[38] A. Harding, "Global Doctrine and Local Knowledge: Law in Southeast Asia" (2002) 51 Int'l and Comp. L. Qtly 35 at 43 (emphasis added).

[39] W.C. Jones, *The Great Qing Code* (Oxford: Clarendon Press, 1994) 1.

In the case of Roman law, as we have seen in our treatment of property and contract relations, law was always looked at from the point of view of the individual and its basic concerns arose from person-to-person relationships. For this reason, Roman Law spoke directly to commercial law which is primarily about the terms of business relations between private parties or "rights-bearers".

In imperial China, however, private rights and business law were "considered only when they directly affected the interests of the Emperor".[40]

This meant, for example, that the regulation of marriage would find expression only in the Code because the stability of marriage and family (the "cell" of society) was essential to social stability and the "cosmic harmony" that were required for the very security of the Empire. To choose a second example, the collection of taxes, the Code spelled out very specific rules (and punishments for breaches thereof), just as in our system today, because tax revenue was the only guarantor of the economic sustainability of the regime.

Torts would be treated together with crimes but very little attention was paid to private matters, with almost no treatment of contracts. Contracts and the settlement of commercial disputes were seen as private questions which were best handled in the community by respected intermediaries, mercantile elders or extended family members. Early comparative law scholars refused to regard these facilitation methods as "law" or "legal rules". As one commentator observed: culturally fixed "categories of Western law did not work"[41] in studying the *Qing Code*.

The export of Chinese law was most explicit in the case of Vietnam which provides the only example of a wholesale adoption of foreign law, in concept and substance in South-East Asia.[42] Vietnam's fifteenth century *Lê Code* mixed *Ming Code* law (1397) with local law and the later *Gia-Long Code* (1812) is considered a replication of the *Qing Code* (1740).

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[40] *Ibid.* at 6.

[41] *Ibid.* at 8.

[42] M.B. Hooker, ed., *The Laws of South-East Asia: The Pre-Modern Texts*, vol. 1 (Vancouver: Butterworths, 1986) 20.

The Vietnamese legal system would undergo another transformation under the colonial grasp of the French, between 1867 and 1954.[43]

As in Europe, the Chinese mercantile and trade guilds were an important source of local rules that governed market entry, labour and product prices and quality standards. The guilds were organized by craft or by trade and place of origin for particular sets of merchants and trades. These largely self-governing entities developed their own organizational and dispute resolution tools because the *Qing code* was mainly silent on commercial matters. The guilds had highly formalized codes of trading practices that, in addition to fixing standards of weight and methods of payment, directed members to take their disputes to the guild leadership for settlement. These directives, as in the European case of the Law Merchant, were often accepted by local magistrates as equivalent to formal law on those rare occasions when the courts became involved in non-state economic disputes.[44]

At the end of the day, the weak Chinese state never had any ideological interest in formalizing commercial custom into formal law.[45] Market regulation was only concerned with security and revenue issues. Villages, trading towns, guilds and extended family units were left to their own devices, in large part, to oversee and mentor the facilitation of business transactions.

This era of formal legal apathy may be contrasted with the recent legislative frenzy undertaken by China in order to satisfy the legal harmonization conditions of WTO membership.[46]

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[43] M.B. Hooker, "Legal Pluralism: An Introduction to Colonial and Neo-Colonial Law" in *French Civil Laws and the Laws of Indo-China* (London: Oxford University Press, 1975).

[44] *Ibid.* at 15-16.

[45] This account in no way seeks to minimalize the separate significance of pre-modern China as the centre of an Asian world economy for over five centuries, addressed by A.G. Frank in his masterful study, *ReOrient: Gobal Economy in the Asian Age* (Berkeley: University of California Press, 1998), unfortunately with little reference to contracting practices, operative dispute resolution mechanisms or the relevance of "legal" rules. See also A.G. Frank, "The World Economic System in Asia Before European Hegemony" (1994) 56 Historian 259.

[46] Over 850 specific legislative change commitments (with timetables for enactment and implementation) were given by China to the WTO. For a review of the more significant undertakings, see Baker & McKenzie, *Guide to China and the WTO* (Hong Kong: Asia Information Associates Ltd., 2002); the relative lack of transparency in

VI. PRIVATE INTERNATIONAL LAW CONVENTIONS AND LAW UNIFICATION ORGANIZATIONS—FORMAL MULTILATERALISM TAKES OVER

First convened in 1893, the Hague Conference on Private International Law (HCPIL) redefined itself by 1955 as a multilateral drafting organization committed to "the progressive unification of the rules of private international law".[47] Through its negotiation and drafting efforts, the legal specialists of its member states successfully negotiated unified approaches to a range of matters affecting international commerce. Perhaps the most recent initiative is the Hague Securities Convention which attempts to resolve conflict of laws issues to ensure in advance the choice of governing law for international securities transactions.[48]

The obvious rationale for the unification approach to legislated globalization is to increase the efficiency and predictability of transborder transactions by the application of uniform standards to commercial dealings. Perhaps one of the most successful instruments in this respect would be the UNCITRAL Convention on the International Sale of Goods. UNCITRAL, the "core legal body of the United Nations system in the field of international trade law", was founded in 1966 and tasked by the General Assembly "to further the progressive harmonization and unification of the law of international trade."[49]

Initially established under the League of Nations, UNIDROIT (the International Institute for the Unification of Private Law) was entrusted from the outset with an ongoing responsibility for "study[ing the] needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States."[50]

China's legal system and its relevance to ensuring China's performance of its accession obligations are discussed in S. Biddulph, "Through a Glass Darkly: China, Transparency and the WTO" (2001) 3 Asian Law 59.

47 http://www.hcch.net/e/event/events/html.

48 *Hague Convention on the Law applicable to Certain Rights in respect of Securities held with an Intermediary*, December 13, 2002.

49 United Nations Commission on International Trade Law.

50 International Institute for the Unification of Private Law, http://www.unidroit.org.

With its 59 current member states, UNIDROIT's original unification of law objectives have been refashioned to legal convergence through the drafting and advocacy of model laws, commercial "best practices" and sector-specific legal guides.

We might also cite the continuing role played by the International Chamber of Commerce (ICC), headquartered in Paris. Founded in 1919 as a global association of corporations, trading interests and business organizations, the ICC now has members from some 130 countries. The ICC has initiated and promoted a number of sets of uniform rules or "best practices" that govern the conduct of transborder business. Interestingly, although these rules are voluntary, they have been widely accepted by banks and merchants, and by more than a few courts of law, thereby becoming recognized commercial norms.[51]

VII. ENTER THE GATT/WTO AS THE GREAT LEGAL GLOBALIZER

Support for the harmonization of commercial laws and practice also flows from the EEC treaty in Article 3 which commits the members of the Customs Union to a "common commercial policy… and the approximation of the laws of Member States to the extent required for the functioning of the common market."[52]

In contrast to the Rome Treaty, the *General Agreement on Tariffs and Trade* (GATT), which serves as the basis for the WTO, fails to mention harmonization of national laws or domestic policies of its members as one of its objectives. Quite to the contrary, the GATT, according to its Preamble, was to contribute to "the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce."[53]

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[51] International Chamber of Commerce, http://www.iccwbo.org. Braithwaite & Drahos, *supra* note 22 at 27-28: "The ICC is an important actor in the globalization of regulation because, in addition to having an interest-group strategy for shaping regulation, for 70 years it has had a private ordering strategy based on recording its members' customary practices and releasing them in the form of model rules and agreements."

[52] *Treaty Establishing the European Economic Community*, March 25, 1957, 298 U.N.T.S. 11, art. 3. See also at 47-49.

[53] *General Agreement on Tariffs and Trade*, 55 U.N.T.S. 194 [hereinafter *GATT*]. The World Trade Organization (WTO) was established, effective January 1994, by the

As a matter of principle, a GATT member state is free to adopt any domestic policy it deems fit so long as the law or policy applies to both domestic and foreign products alike without discriminating against foreign products based on their origin.

How then did the GATT/WTO transform itself into a legal change agent in the past decade? Did it happen overnight or did it come about gradually and in specific steps, following the completion of the 1994 Uruguay Round of negotiations?

Take the case of antidumping and countervailing duties.[54] Antidumping and countervailing duties are an exception to the rule against imposing import duties in excess of a party's bound tariff on a particular product. Abuses of this exceptional protectionist device were rampant in the 1960s, resulting in the negotiation of the 1967 Antidumping Code, then the 1979 Tokyo Round Antidumping Code and ultimately the current Antidumping Agreement[55] during the 1994 Uruguay Round. The 1994 Agreement (which all WTO members are obliged to follow) sets out some thirty pages of what is nothing less than highly detailed commitments and procedural provisions that leave little room for divergent or significantly dissimilar national regulation. The same inclusivity is evident in the countervailing duty section of the separate Subsidies Agreement.[56] Not surprisingly, the WTO Antidumping Agreement has spawned remarkably similar, if not almost identical, antidumping and countervailing duty legislation in most WTO member states.[57]

Marrakesh Agreement Establishing the World Trade Organiszation, April 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 [hereinafter *Marrakesh Agreement*] The WTO's legal framework includes the GATT and a number of mandatory and voluntary side-agreements, including the mandatory Ag*reement on Trade-Related Aspects of Intellectual Property Rights* (TRIPs), which is discussed below.

[54] I am grateful to A. Reich, "The WTO as a Law-Harmonizing Institution" (2002) [unpublished, with author] for his insights into the legal harmonization influence of the 1994 Uruguay Round mandatory agreements. This is a draft paper kindly provided to me by the author.

[55] *Agreement on Implementation of Article VI of GATT 1994* [hereinafter *1994 Antidumping Agreement*], reprinted in *The Results of the Uruguay Round of Multilateral Trade Negotiations—The Legal Texts* (Geneva: WTO, 1995) 168 [hereinafter *Results of the Uruguay Round*].

[56] *Agreement on Subsidies and Countervailing Measures* in *ibid*. 264 at 278.

[57] See J. Miranda, R.A. Torres & M. Ruiz, "The International Use of Antidumping: 1987-1997" (1998) 32 World Trade 5.

The Agreement itself mandates that members' laws, regulations and administrative procedures must conform with the provisions of the Antidumping Agreement.[58] Many developing countries upon their joining the WTO have often just copied the provisions of the Antidumping and Subsidies Agreements and translated them into their own language and adopted them as national law.[59]

In its first year (2002) as a WTO member, China's lawmakers moved at a frenetic pace to set up a framework of laws and regulations at all levels of government to govern trade in goods and services according to the WTO principles of transparency and national treatment. An important number of trade-related laws and regulations were drafted or amended through the State Council (the cabinet) and the National People's Congress. One of the very first measures passed was the first antidumping law and it was used quickly in disputes involving steel imports from Japan, South Korea and Taiwan and chemicals from South Korea, Malaysia and Indonesia. There is considerable evidence that developing country members of the WTO have now caught up to traditional leaders such as Canada, the US and Australia in their employment of WTO-recognized antidumping protectionist legislation.[60]

Within the realm of customs administration, a further example of legislative harmonization on the signatories' laws and procedures may be seen in the Rules of Origin[61] applying to imports. Rules of Origin criteria are used to define where a product is made and are probably the most important part of import administration given their legendary capacity, unless they are uniformly administered, to discriminate unfairly against imports, thereby frustrating the force of the GATT's fundamental Most Favoured Nation rules. Under the terms of the preamble of the Rules of

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[58] *1994 Antidumping Agreement*, *supra* note 55, art. 3.

[59] For example, see "Vietnam to have antidumping ordinance", Vietnam Business Forum, www.vnbizadmin@vietlinks.net (last modifie: September 15, 2003).

[60] "Unfair Protection" *The Economist* 349:8093 (November 7, 1998) 75: "Protectionism is on the rise in a new guise: Anti-dumping cases are multiplying in America, Europe and around the world." Also see *Asian Wall Street Journal*, Weekly Edition, November 22-28, 1999) 4, "'Emerging markets are making use of anti-dumping rules'—explosion of cases in Asian region show US and E.U. that such actions can cut both ways." India initiated the highest number of antidumping investigations in 2002, followed by Thailand, Australia and the US: *Far Eastern Economic Review* (May 15, 2003) 25.

[61] *Results of the Uruguay Round*, *supra* note 55 at 241.

Origin Agreement whereby the members confirm their desire to "harmonize and clarify rules of origin", considerable progress has been made in the development of uniform and compatible rules which, if successful, will harmonize this notoriously difficult area of trade legislation and administration.[62]

VIII. THE WTO AND TRADE-RELATED INTELLECTUAL PROPERTY RIGHTS (TRIPS)— UNIFICATION BY ANOTHER NAME?

The first European, patent, trademark and copyright laws were simple and based on notions of territoriality, merely recognizing the creator's rights. In the mid-nineteenth century, when copying foreign creations was a matter of course, the argument for protecting creators' 'rights' started to be considered.[63] IP became the subject of bilateral treaties which, in turn, set the foundations for two Conventions—the Paris Convention of 1883 which created a union to protect industrial property and the Berne Convention of 1886 which protected literary and artistic works.[64] The global implications of intellectual property rights eventually led to the founding of the World International Property Organization (WIPO) which today counts 179 nations as member states.[65] This rather benign picture of low key international regulation of IPRs started to change after World War II when developing countries joined the Paris and Berne Conventions. For example, in the 1960s India redesigned its patent law to lower its prescription medicine prices. Instead of granting patents for chemical compounds, India granted patents for the process of creating the pharmaceutical.[66] India also headed an initiative to allow developing countries greater access to copyright materials, a project that took form in the 1967 Stockholm Protocol.

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[62] Ironically, the rapid proliferation of Preferential Trade Agreements (PTAs) in the Asia Pacific region threatens to propel the harmonized Rules of Origin to almost absurd lengths as party states strive to keep non-member goods out of their preferred markets. The Rules of Origin provisions of the recent Japan-Singapore PTA account for 200 of the Agreement's 360 pages: see J. Ravenhill, "The Move to Preferential Trade in the Western Pacific Rim" 69 *Asia Pacific Issues* (June 2003) 4.

[63] B. Sherman, "Remembering and Forgetting: The Birth of Modern Copyright Law" (1995) Intellectual Property J. 1 at 7-10.

[64] Braithwaite & Drahos, *supra* note 22 at 59.

[65] WIPO, http://www.wipo.org/about-wipo/en/overview.html.

[66] Braithwaite & Drahos, *supra* note 22 at 61.

U.S. reactions to these perceived impairments of their corporations' IPRs took the form of a series of amendments to the 1974 Trade Act, including the development of the "301" sanctions to identify nations "abusing" their IPRs. The 301 process in turn put pressure on nations involved in bilateral trade agreements with the US to curb the production and distribution of counterfeit goods and misappropriated US patents. Conflict and negotiation ultimately resulted in the development of the TRIPs Agreement—the *Agreement on Trade-related Aspects of Intellectual Property Rights*, which was concluded as part of the Uruguay Round.[67]

Strictly speaking, TRIPs is not concerned with international trade measures. It speaks directly to domestic laws and policies which under the TRIPs Agreement must comply with TRIPs' mandated minimum standards of legal protection.[68] The requirements are, in fact, more than minimal and invariably reflect the level of intellectual property protection prevailing in industrialized countries. The core of the TRIPs Agreement is the adoption of standards from existing intellectual property treaties that ironically, until recently, were not considered to be "trade-related".

TRIPs is not like the other examples of win-win trade liberalization initiatives tied to harmonized legislation and administration. Put shortly, the TRIPs Agreement does not necessarily benefit countries that are net importers of intellectual property. This applies, in large part, to developing countries.[69] This was understood by the developing countries in 1994 when they signed on to the TRIPs as part of a broader bargain inherent in such broad-based negotiations.[70]

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67 *Results of the Uruguay* Round, *supra* note 55.

68 *Agreement on Trade-related Aspects of Intellectual Property Rights*, April 15, 1994, Marrakesh Agreement Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197, art. 1(1) [hereinafter *TRIPs*].

69 M.J. Trebilcock & and R. Howse, The Regulation of International Trade (London: Routledge, 1995) 253.

70 According to Braithwaite & Drahos, *Three tests of US trade policy on intellectual property rights*, http://www.nthposition.com/politics_Drahos.html, developing countries had agreed to TRIPs "in the hope that the US would be content with its standards and the gains it brought to the US economy. It was a naïve hope and it turned out to be one in vain. TRIPs, as we will see, has turned out to be a floor without a ceiling".

Perhaps the TRIPs Agreement "broke the faith" in the multilateral harmonization of national trade law, regulation and administration by its aggravation of the "North-South" divide.

This conclusion arises from recent evidence which suggests that the WTO, in the TRIPs case, may have reached its high-water mark as the primary force for the globalization of economic law. It seems safe to predict that the legislative harmonizers in the short and middle term will be US regional and bilateral trade agreements[71] and law reform templates drafted as the legal conditionalities of the IMF and World Bank financial support and other model legislation drafted by various overseas legal advisory programs heavily influenced by the "free markets" ideology of the "Washington Consensus".[72]

Why has TRIPs tripped up the WTO harmonization momentum? The story starts in late May 2003 when the World Health Organization's Annual Assembly formally endorsed a resolution[73] giving the WHO a central role in advising its 192 member governments on how to ensure that pharmaceutical patent protection policies do not harm public health. Initiated by Brazil, the empowering resolution was adopted by consensus after the US dropped an earlier resolution calling for a strengthening of patent protection to encourage drug innovation.

The WHO resolution calls on its members to adapt their national intellectual property laws to make full use of the provisions in the WTO patent rules that allow countries to give priority to public health and nutrition. The argument that won the day was that, in too many cases, developing countries have adopted patent laws that are more restrictive than necessary to comply with TRIPs. The impetus for the resolution

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[71] Most obviously, the NAFTA precedent, which, *inter alia*, required Mexico in chapter 15 to enact an antitrust law compatible with Canadian and US legislation; the recent US-Vietnam Bilateral Trade Agreement committed the Vietnamese to massive legal change which, in several instances, went beyond their forthcoming WTO legal obligations (Vietnam is not expected to join the WTO until 2005). Compare Ravenhill, on "The Move to Preferential Trade in the Western Pacific Rim", *supra* note 62.

[72] W.A.W. Neilson, "The Rush to Law: IMF Legal Conditionalities Meet Indonesia's Legal Realities" in Duncan & Lindsey, eds., *Indonesia After Soeharto: Reformasi and Reaction* (Victoria: Centre for Asia-Pacific Initiatives, 1999) 4. See P. Hughes's paper in this volume for a fulsome analysis of the "Washington Consensus" and its impact on legal change agendas in recipient states.

[73] For context, see WTO/WHO Joint Study, 2002.

undoubtedly came from the September 2002 report of the Independent Commission on Intellectual Property Rights entitled "Integrating Intellectual Property Rights and Development Policy."[74] The central message of the Commission's report

> "is both clear and controversial: poor places should avoid committing themselves to rich-world systems of IPR protection unless such systems are beneficial to their needs. Nor should rich countries, which professed so much interest in 'sustainable development' at the recent Summit in Johannesburg, push for anything stronger."

The impact of IPR on poor nations has centred on the issue of access to expensive patent medicines produced by multinationals in the industrialized world. Developing country members of the WTO at the November 2002 Doha meetings[75] presented the case for the primacy of public health over IPR, demanding that the world's least-developed countries should be given at least until 2016 to introduce patent protection for pharmaceuticals.

In May 2003, the "Cheap Medicine Agreement" was negotiated after frenetic bargaining amidst an openness that rarely attends WTO negotiations.[76] The Agreement will permit WTO members facing public health crises such as HIV/AIDS, malaria or tuberculosis to import the needed medicines from other countries that authorized the manufacturing of generic drugs. To make the purchase, the soliciting country, with some exceptions, will be subject to oversight and approval by the WTO Secretariat and its Council on TRIPs.

While there is much debate over whether the Cheap Medicine Agreement will really help less-developed countries import cheaper generic, life-saving drugs,[77] one thing is clear: the generic drugs accord

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[74] "Intellectual Property: Patently Problematic" *The Economist*, 364:8290 (September 14, 2002) 75; reported in wtoforum@yahoogroups.com, September 13, 2002 (Digest No. 96).

[75] C. Correa, *Implications of the Doha Declaration on the TRIPS Agreement and Public Health* (Geneva: WHO, 2002).

[76] F. Fleck, "WTO Finally Agrees on Cheap Drug Deal" (2003) British Medical Journal 517.

[77] For example, see R. Elliott, "Canada can carry much more" *The Globe and Mail* (September 23, 2003).

pierced the underbelly of the legal globalization juggernaut and presaged the political force of the developing member states to stymie or even reshape WTO uniform standards deemed to favour the corporate interests of developed member states.

The failure of the recent WTO talks in Cancun underscored the growing limitations of the WTO as a force for trade liberalization (and its partner, legal globalization), especially when the 149 Member body attempts to deal "by consensus" with an issue as contentious as agriculture.

The Cancun talks collapsed, in short, because a remarkably cohesive coordinated group of developing countries, including the African Caribbean and Pacific Group (ACP), the African Union, the Less Developed Countries Group (LDC), Brazil and Asian countries such as India and Malaysia, rejected the offer of mild cuts in EU, US and Japan subsidies and food import quotas.[78]

IX. PARKING THE WTO'S "SINGAPORE ISSUES"

Perhaps more important for our immediate purposes, the real reason why the Cancun meeting ended without an agreement on the Ministerial Text was that many developing countries would not agree to launch negotiations on the so-called "Singapore issues" which have been pushed by the European Union and the US (and sometimes Canada) for the past seven years.

The Singapore issues referred to the development of common approaches (or even, hopefully, harmonized legislation) by WTO members to foreign investment rules, competition law, government procurement procedures and uniform trade facilitation measures. Although about 80 Developing Countries (DC) formally submitted their position that they would not want negotiations to start, the Conference Chairman (the Foreign Minister of Mexico) came out with a draft that called for negotiations in three of the four areas (procurement, trade facilitation and investment).[79]

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[78] S. Chase, "Impasse Scene Hurting WTO" *The Globe and Mail* (November 16, 2003) B3.

[79] The Developing Country perspective on the Singapore issues is graphically summarized by B. Lal Das, *On the Status of Singapore Issues Post-Cancun* (Third World Network, 2003).

This railroading did not sit well with the DC group. It could be said that the WTO at Cancun set itself up for failure. As late as August 2003, it was clear that major differences could not be resolved amongst groups of countries in a short period of time in areas of extreme importance such as agriculture and non-agriculture market access, and the fate of the so-called Singapore issues. The whole process and the preparations for Cancun forecasted defeat and collapse of the negotiations where Ministers could never be expected to make large compromises in five days on an extremely ambitious agenda when the Members themselves are nowhere near compromise or settlement.

What are the immediate and short term repercussions of the collapse of the Cancun Ministerial Conference? For one thing, more pressure will be brought to bear to move the Singapore issues off the WTO agenda since, much like some aspects of TRIPs, they are not core trade issues and attempts by the EU at Cancun, in particular, to bring them into the WTO system only exacerbated long-standing acrimony and division. Whether the "democratic deficit" of WTO negotiations can or will be repaired, after the Seattle and Cancun debacles, is an open question.

The Director-General of the WTO recently appointed a group of "sages" (APEC used to call them "Eminent Persons") to advise him on issues affecting the future of the organization, including its governance structure and framework for negotiations. Unfortunately, it does not appear that "concerned members of the public will be able to share their views about these matters with this group, or participate in its deliberations".[80]

X. WERE THE URUGUAY ROUND AGREEMENTS THE HIGH WATER MARK OF LEGAL GLOBALIZATION?

The Uruguay Round Agreements undoubtedly provided the most legislative templates for the harmonization of national commercial and trade legislation in modern history. Membership in the WTO now stands at 148 nations. More legislative harmonization has occurred in the past ten years than in any other comparable period of time.

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[80] R. Howse, "Eminences grises" WTO Forum, Digest Number 351, September 18, 2003.

However, we must remember that in the WTO, in contrast to the methods and outputs of organizations such as UNIDROIT and UNCITRAL, the reality of the "Single Undertaking" approach leaves many countries no choice

> "but to accept the package of agreements negotiated within a given round of the WTO. It is not surprising to find, therefore, much more sensitivity and resistance among many member countries, especially during the last few years following the experience of the Uruguay Round, toward the introduction of any new issue onto the negotiation agenda."[81]

Cancun marks the first time that a bloc of (developing) member states openly thwarted efforts by developed member states (led, in this case, but with varying levels of conviction and political expediency by the European Union, the United States and Japan) to bully them towards a "consensus" result (that is then expressed as a Single Undertaking).

There is some similarity in the Cancun results and the demise of the OECD-backed Multilateral Investment Code ("MAI") where a range of capital-importing developing states, by concerted effort, refused to take up the model legal framework proposed by the OECD (supported by the ICC).[82]

Interestingly, some of the more contentious recommended MAI legal prescriptions favouring foreign investors turned up in several of the legal conditionalities imposed by the IMF in its financial support packages extended to Indonesia, Thailand and South Korea following the 1997 Asian Financial Crisis.[83] Other, more expansive statements of foreign investor treatment have also appeared in recent bilateral trade agreements negotiated by the United States, for example, with Vietnam.[84]

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[81] Reich, *supra* note 54 at 33.

[82] OECD, *The Multilateral Agreement on Investment* (the MAI Negotiating Text, 24 April 1998). For a Canadian perspective on the MAI text and its process of negotiations, see Smythe, 1998.

[83] Neilson, *supra* note 72.

[84] *Agreement between the United States of America and the Socialist Republic of Vietnam on Trade Relations*, effective January 1, 2002. This Agreement is often described as a "WTO-Plus" agreement, given the significant concessions by Vietnam on a range of issues, including US investor national treatment issues, government procurement and limited transition time for reducing goods and services barriers.

There is every reason to believe that a majority of the so-called Singapore Issues will find legislative expression in the growing number of US free trade agreements just negotiated or under negotiation with Asian trading partners.[85] The United States Trade Representative, after the failure of the Cancun talks, announced his government's intention to pursue "zealously" regional and bilateral trade agreements with developing countries in Latin America and Asia[86] who are seeking improved access to the US market.

For commercial and economic legislation, this next round of trade agreements (which Canada is pursuing in its own right) may appear to be a downsizing of legal globalization—however, its cumulative effect may actually prove to be more pronounced and pervasive in pushing US/western legal templates into the legislative frameworks of the developing world.

XI. On Surveying the Thin to Thick Evolutionary Process of Legal Globalization

In this brief essay, I have obviously plotted only some of the ebbs and flows of legal change regulating and facilitating trade and commerce both regionally and globally over the centuries: the legal inclusivity of the Romans, the adaptability and pervasive impact of the Law Merchant, the largely insular legal experience of the Middle Kingdom, the influence of colonial legal transplants and the early state trading monopolies, taking us to the days of rationality and the search for unified law, largely centred in western Europe, in the late nineteenth and early twentieth century.

We then considered the reorganization, indeed the revitalization, of international trading and financial relations that followed the Second World War, epitomized in the humble beginnings of the GATT and the ongoing influence of business organizations such as the ICC as an advocacy group promoting "best practices" conduct codes and model legislation. This took us to the recent WTO Cancun Ministerial Conference where the continuing after-effect of the Uruguay Round Master Agreements was stymied, if not buried, by the coordinated efforts of the less developed countries. Their efforts, we should note, were dedicated to changing global legal rules as opposed to not localizing them.

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[85] Ravenhill, *supra* note 62 at 4-5.

[86] Stratfor's Global Intelligence Report, September 25, 2003.

Hopefully, this paper has helped to set the stage for the question of where participatory justice fits into the legal structuring of the global economy.