

Introduction

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Managing the effects of trade policy on local human rights conditions is a critical challenge for the world today. While there is an emerging recognition of the need to balance international trade policy with human rights protection, empirical research and policy analysis are lacking.¹ In response, this book aims to explore the socio-legal dimension of the interaction between international economic law and human rights, and particularly the relationships between local arrangements and international legal regulations/rules. International economic law and human rights represent two branches of international law that have been rapidly evolving and expanding in the recent decades. This ongoing expansion raises many intriguing questions about the interplay between these two spheres of modern international law. The present study aims to shed light on socio-legal dimensions of the inter-relationships between trade and human rights, and particularly the interaction between international legal rules and the local context in which they are interpreted and implemented.

Coordination of trade and human rights compliance has been hampered by normative and organizational factors. From a normative perspective, the lack of consensus over the meaning and purpose of trade and human rights goals has often undermined local efforts at coordination.² As well, compliance with international trade standards tends to privilege consumption,³ local business models⁴ and reliance on financial and

¹ John H. Jackson, "Reflections on the Possible Research Agenda for Exploring the Relationship between Human Rights Norms and International Trade Rules" in Frederick M. Abbot, Christian Breining-Kaufmann and Thomas Cottier, eds, *International Trade and Human Rights: Foundations and Conceptual Issues* (Ann Arbor: University of Michigan Press, 2006), pp. 19–28.

² Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals*, 3rd ed. (Oxford: Oxford University Press, 2008), Sections 3B and 4B, pp. 160–74 and 280–93, respectively.

³ Jeffrey Barber, "Production, Consumption, and the World Summit on Sustainable Development" (2003) 5 *Environment, Development and Sustainability* 63.

⁴ Ian Barney, "Business, community development and sustainable livelihoods approaches" (2003) 38:3 *Community Development Journal* 255.

regulatory incentives for private behavior,⁵ which frequently are detrimental to enforcement of local human rights standards and policies. International discourses on private property and trade liberalization also work to limit the range of approaches available locally to promote human rights.⁶ Conversely, human rights discourses often tend to confront the norms and institutions of international trade as obstacles rather than potential contributors to human rights conditions. Achieving trade goals of efficiency, economic growth and private property rights is seen to conflict with enforcement of human rights standards in areas of both civil and political rights and economic, social and cultural rights.⁷ Coordinating local performance of international trade and human rights standards has also been difficult for institutional and operational reasons, as officials and specialists who manage local interpretation and implementation in these discourses often have few opportunities or incentives for collaboration. All of these factors contribute to inhibiting development of alternative approaches that might support coordinated performance of both trade and human rights standards.

In an effort to address these issues and offer policy solutions, a major international research project on “Coordinating Performance with International Trade and Human Rights Standards in Comparative Perspective” was launched in 2009 at the University of British Columbia with the support of the Major Collaborative Research Initiative (MCRI) Program of the Social Sciences and Humanities Research Council (SSHRC) of Canada. Under the direction of Dr Pitman B. Potter, the project involves more than 50 academic and policy specialists from more than a dozen universities and research institutes in North America, Europe, Australia and Asia, working collaboratively to explore the dynamic relationships among global trade and human rights policies and practices.

As part of our Coordinated Performance project, the current volume offers a collection of essays presented at a session on “Mapping the Impact

⁵ Bob Frame and Rhys Taylor, “Partnerships for Sustainability: Effective Practice?” (2005) 10:3 *Local Environment* 275; Douglas A. Kysar, “Sustainable Development and Private Global Governance” (2005) 83 *Tex L Rev* 2109.

⁶ Ernst-Ulrich Petersmann, “Human Rights and International Trade Law: Defining and Connecting the Two Fields” in Thomas Cottier, Joost Pauwelyn and Elisabeth Burgi, eds, *Human Rights and International Trade* (Oxford: Oxford University Press, 2005) 29.

⁷ See Walter Carlsnaes, Thomas Risse, Beth A. Simmons, eds, *Handbook of International Relations* (London: Sage Publications, 2002), pp. 518–21; Ross E. Burkhart, “The Capitalist Political Economy and Human Rights: Cross-National Evidence” (2002) 39 *Soc. Sci. Jour.* 155.

of International Trade and Human Rights on Local Practice” (July 2014) at the International Institute for the Sociology of Law in Oñati, Spain. The essays contribute to socio-legal studies by illuminating the role of norms and operational conditions for coordination of international economic law and local human rights performance. The conceptual orientation of the collected essays span two prominent discourses on international law development: (a) fragmentation of diverse rules of international law; and (b) convergence through constitutionalization of international law.⁸ The authors examined global regulation and the impacts of international organizations on domestic law of states by focusing on a variety of modes of interaction of global norms and local practice. The resulting collection of essays presented here offers conceptual approaches and operational policy methods for coordinating local performance of international trade and human rights standards in light of the challenges balancing regimes of fragmentation and convergence in international law.

I. THE DILEMMA OF LOCAL PERFORMANCE: NORMS AND OPERATIONS

The fact that states agree to adopt international rules and practices does not mean that they have reached consensus on normative underpinnings of these adopted practices and rules or their practical application. The level of compliance with international rules ultimately depends on an understanding of differences between local and non-local norms, on the

⁸ For example, Ernst-Ulrich Petersmann, *State Sovereignty, Popular Sovereignty and Individual Sovereignty: from Constitutional Nationalism to Multilevel Constitutionalism in International Economic Law?* (European University Institute – Law Working Papers, 2006), available at <http://hdl.handle.net/1814/6446> (accessed 3 January 2017); Ernst-Ulrich Petersmann, “Multilevel Judicial Governance of International Trade Requires a Common Conception of Rule of Law and Justice” (2007) 10:3 J Int’l Econ L 529; Makau W. Mutua and Robert L. Howse, “Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization” (2000) Human Rights in Development Yearbook 1999/2000 The Millennium Edition 51; Robert Howse and Kalypso Nicolaidis, “Legitimacy through ‘Higher Law’? Why Constitutionalizing the WTO is a Step Too Far” in Thomas Cottier and Petros C. Mavroidis, eds, *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (Ann Arbor: University of Michigan Press, 2003) 307; Cottier, Pauwelyn and Elisabeth Burgi, eds, *Human Rights and International Trade* (Oxford: Oxford University Press, 2006); Harold H. Koh, “Why Do Nations Obey International Law?” (1997) 106:8 Yale LJ 2599; Jutta Brunnee and Stephen J. Toope, *Legitimacy and Legality in International Law* (Cambridge: Cambridge University Press, 2010).

degree of support from local communities and on the extent to which international standards are complementary with local norms.⁹ In addition, operational dynamics of local treaty performance involve matters of institutional capacity reflecting the impact of local socio-economic and political conditions on local performance.

By combining normative and operational perspectives, the essays presented in this volume reflect the application of socio-legal scholarship to issues of local treaty compliance and the coordination of trade and human rights performance. When legal forms such as treaties and statutes derive content and legitimacy from socio-cultural norms, legal performance operates at the intersection of law and society. When legal operations involve operational matters of institutional capacity, the interplay between legal and socio-economic and political conditions comes into sharp relief. These normative and operational perspectives in turn support policy solutions on coordination of trade and human rights performance that previously may have been out of reach. The challenge of coordinating performance of trade and human rights standards remains, but can be resolved through attention to the norms and operations of treaty behavior.

Understanding the potential for coordinating local performance of international trade and human rights standards necessarily involves engaging with local conditions, cultures and perspectives – what Clifford Geertz termed “local knowledge”.¹⁰ This has particular relevance in Asia, where commitments to trade liberalization have not often been coupled with attention to strengthening human rights protection. By building better understanding of the potential for coordinated performance of international trade and human rights standards in Asia, we hope to lay the foundation for policy responses on trade development and human rights protection in a significant region of the world. Understanding the potential for unifying contending policy and political constituencies associated with trade and human rights in Asia can also help to overcome competition for influence and resources among these constituencies that can be counterproductive to efforts to find common purpose and build cooperation domestically and internationally. Such an approach would strengthen the ability of economies in Asia to respond to different kinds of trade and human rights compliance challenges.

⁹ Pitman B. Potter, *Assessing Treaty Performance in China: Trade and Human Rights* (Vancouver: UBC Press, 2014).

¹⁰ Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983).

The common thread of the chapters in this volume involves the application of socio-legal paradigms to build knowledge and policy support for coordinating local performance of international trade and human rights standards in ways that are mutually sustaining rather than conflicting. While some work has already been done on the relationships between trade policy and human rights, most of these focus on the relationship between institutions and norms at the international level.¹¹ By contrast and in an effort to build on existing efforts, this volume focuses on coordinating performance of international trade and human rights standards in light of local normative and operational conditions.

A. Part I: Re-imagining Local Engagement with International Law

Proceeding from an appreciation of the importance of local knowledge, the contributors focus primarily on local conditions for coordinating trade and human rights performance. By combining normative and institutional analysis, the chapters in Part I of the volume identify key challenges in coordinating local performance of international trade and human rights standards while setting a foundation for the discussion that follows. Thus, the volume opens with an institutional overview examining issues of interaction among international legal regimes. These chapters discuss theories and methodologies as frameworks within which many of the dilemmas of coordinating local performance of international standards on trade and human rights were examined.

Thomas Cottier's chapter "International trade, human rights and policy space" explores the implications of a multilevel governance doctrine for the local protection of human rights. Cottier focuses on the concept of public policy as a component of regulatory theory that facilitates the allocation of regulatory powers between different layers of governance, international and domestic included, which share fundamental values, including human rights, non-discrimination and the rule of law. He explains that policy space also facilitates the appropriate allocation of powers among different institutions on the layers of governance that are involved in the interpretation and application of laws at both international and national levels. Cottier concludes that trade regulation and human rights norms need to be interpreted together and suggests how the protection of different rights can be allocated to different levels of governance. In his opinion, the effective protection of human rights does not necessarily

¹¹ Abbot, Breining-Kaufmann and Cottier, eds, (note 1 above); Cottier, Pauwelyn and Burgi, eds, (note 11 above).

need more domestic policy space; on the contrary, it may need stronger international cooperation in enforcing international trade law.

In “Cosmopolitan constitutionalism: linking local engagement with international economic law and human rights” Ernst-Ulrich Petersmann presents a range of normative and operational dilemmas that continue to pose obstacles for coordinated compliance. He discusses the controversies regarding Hobbesian claims for “policy space” in the context of human rights obligations of all United Nations member states. Petersmann focuses on the effects of intergovernmental “management” and power politics in undermining processes of constitutional democracy and points to the need for greater accountability. The chapter emphasizes the importance of further developing “cosmopolitan constitutionalism” empowering citizens and civil society to hold limited “constituted powers” for multi-level governance of international public goods (in the broader sense of *res publica*) in a globalizing world.

B. Part II: Structural Aspects of Trade and Investment

Following discussion of conceptual issues of multilevel governance and constitutionalism, Part II of the volume considers structural dimensions of international standards and policy. It situates modalities of local performance within specific contexts of the interplay between global and local conditions in several policy areas such as anti-dumping, transparency, foreign direct investment and government regulation. These chapters illustrate how the structures and policy dynamics of international trade and investment affect local policy arrangements in the context of existing international laws and standards.

Ljiljana Biukovic’s chapter, “Transparency evolution: more than the right to know”, examines the ways in which trade norms associated with the General Agreement on Tariffs and Trade have continued to evolve in response to local conditions and interpretation. In particular, Biukovic examines the ways in which the principle of transparency as a fundamental pillar of the rule of law is internalized through local practices of individuals and various interest groups (including local governments) in the process of their performance of international treaty obligations. She argues that adherence to the principle of transparency has a spillover effect on local practice beyond mere compliance with international trade rules and provides opportunities for a broad range of local interest groups to challenge governments’ development loan arrangements.

Naayeli Ramírez-Espinosa’s chapter, “Challenging an investment agreement in Canada: Hupacasath First Nation’s application for judicial review against the CCFIPPA”, focuses even more closely on the

interaction between the global and the local through her paper on the Hupacasath First Nation's legal challenge to the 2012 China-Canada Foreign Investment Promotion and Protection Agreement (CCFIPPA). The chapter examines questions around indigenous peoples' self-government and their right to be consulted and accommodated under the constitutional framework in Canada, and the impacts on local compliance with the CCFIPPA treaty. The chapter concludes that due to the current lack of channels for communication and negotiation with federal and provincial governments, indigenous peoples are often the last to learn of the interests of investors to exploit resources in their territories.

Finally, Erika Cedillo's chapter, "The impact of Mexico's 2011 human rights constitutional amendment on arbitral practice: a view from local actors", focuses specifically on human rights standards as a factor in Mexico's policy responses to enforcement of arbitral awards. The chapter focuses on the legal framework and the structural changes that Mexico has set up for the protection of human rights and how local actors perceived its potential effects on arbitration practice and Mexico's status as a pro-arbitration jurisdiction. Cedillo analyzes responses as indicators of legal practitioners' understanding of the concept of public policy. She suggests that the 2011 human rights-related constitutional amendments could affect the way in which judges decide on the enforcement of foreign arbitral awards in Mexico.

C. Part III: The Impact of Communities and Local Culture

The chapters in Part III examine the effects of local normative conditions on coordination of international trade and human rights performance – suggesting that culture generally and legal culture in particular play an important role. Reflecting on social construction of international trade and human rights law, the chapters in this part provide a close examination of the contingencies of local culture and perspective in the implementation of international standards. For, with all its hegemonic features, the international system must still confront the challenges of local performance.

Mor Mitrani argues that the attempt to explain the intersection between local and international practices requires depicting what is the realm of international practices. Her chapter, "Demarcating the international community: where do international practices come from?", examines the historical, legal and political factors affecting the potential for international community. Despite the fact that scholars, practitioners and international political leaders have been regularly using the term "international community", it is not clear how each of these interpretative groups

are perceiving the concept and how the concept is constructed by states. The chapter therefore looks through four possible ontologies for the international community: historical, legal, political and discursive, and argues that it is appropriate to use the epistemological method to determine the meaning of the concept as “constructed by states and through inter-state discourse”.

Valentina Vadi’s chapter examines how economic globalization interacts with cultural diversity. In “Local communities, cultural heritage and international economic law”, the author argues that economic globalization can promote as well as jeopardize cultural diversity. She suggests that economic globalization has stimulated an intense global debate among states regarding the promotion of cultural diversity. The chapter first investigates how international economic law governs cultural diversity. Finally, it proposes legal methods to reconcile different values promoted by international trade and investment regimes, on the one hand, and the international human rights regime, on the other, and proposes the adoption of amendments to the existing body of international economic law.

Moshe Hirsch looks at trade and human rights policies as indicators of the EU’s identity. In his chapter, “Identity matters: the enforcement of global human rights treaties by European Union’s trade instruments”, Hirsch argues that there is a correlation between social identity of a nation/state and the enforcement and compliance with international law. He focuses on the EU’s use of human rights conditionality, included in its trade agreements with third countries, as an external trade instrument for the promotion of human rights worldwide. This EU policy is significantly motivated by the EU identity, and it is expected to affect the identity of states targeted. The chapter argues that the use of a social identity analysis of the EU trade and human rights policies offers important practical recommendations that may enhance the prospects of compliance with the EU measures with international law.

Lisa Toohey’s chapter, “Observing the small gestures: human rights vectors in the Vietnamese trade law environment”, looks at the nexus between trade law and human rights through the case study of human rights lawyers in Vietnam. Since international integration under its open door (*dôi mõi*) policy of the 1980s, Vietnam has remained a subject of substantial and broad-ranging human rights criticism. Toohey suggests that the Asian region provides an interesting context for a study of interpretative communities because of the fact that regional integration has been driven by local economic imperatives that often lead to disregard of human rights dimensions of international trade law. Yet, the chapter argues that international economic integration can be responsive to human rights standards if human rights lawyers conceive and oper-

ationalize international economic law in ways that combine human rights discourse with the trade practice.

D. Part IV: Dilemmas of Local Performance: The Case of China

The final section of the volume presents two chapters on the People's Republic of China (PRC), as case studies on coordination of local performance of trade and human rights standards. China offers a compelling case study for understanding local treaty performance and suggests intriguing possibilities for coordinating local performance of international trade and human rights standards. Moving from the "what" and the "how" of treaty performance in China – much of which is well known – to the "why" is an essential step. Thus, although the circumstances of China's accession to international trade and human rights treaties are widely discussed, our understanding of the reasons affecting China's performance of international trade and human rights standards remains imperfect. The two chapters in this section offer important insights in this regard.

In "Coordinating human rights and trade policy in China: the case of environmental protection", Pitman Potter examines the relationships between China's environmental protection regime and performance of international trade standards, and suggests possibilities for improvement. Noting that China's longstanding environmental challenges and the legal regime established to resolve them have affected trade policy performance in areas of subsidies, discriminatory enforcement and food safety, Potter suggests that coordinating normative and operational dimensions of environmental performance locally may improve trade policy performance internationally. Drawing on paradigms of "Selective Adaptation" and "Institutional Capacity" from previous work,¹² Potter explores possibilities for coordinating China's performance of international trade and environmental standards through mechanisms of corporate social responsibility.

In "Structuring China's engagement with international human rights: the case of wage protection law and practice", Sarah Biddulph examines labor rights and the PRC government's policy imperative of maintaining stability as a precondition for export-led economic growth, and highlights contradictions between trade liberalization and protection of human rights at the local level. Enjoyment of social and economic rights is a core promise of the Chinese Party-state to its people that follows principles of the right to development. But beyond the rhetoric, what policies and

¹² Potter, (note 15 above).

attributes of governance affect the definition and implementation of social and economic rights? The chapter advances the argument that the definition, modes of implementation and responses to citizen demands to respect these rights in domestic law and policy are all shaped by the Chinese Party-state's preoccupation with social stability. Biddulph explores the multiple and shifting ways in which stability imperatives affect the definition and implementation of social and economic rights, with particular attention to labor rights. She considers the ways in which the maintenance of social stability produces distinctive modes of governance of rights and rights claims.

Through conceptual and structural analysis coupled with local analysis and a China-focused case study, this volume aims to provide insights on the dilemma of local performance of international standards on trade and human rights. Through the perspective of "Coordinated Performance", the volume suggests new approaches to government policies on trade development and human rights protection. We hope that readers of this volume will appreciate both the substantive excellence of the research presented and the complexity and acute challenges that face policy efforts to coordinate compliance with international trade and human rights standards.

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