Cosmopolitan Values in International Economic Law: Myths and Realities

Thomas Cottier*

* Thomas Cottier is Professor of European and International Economic Law at the University of Bern and Director of the Institute of European and International Economic Law. He is also Managing Director of the World Trade Institute.
Cosmopolitan Values in International Economic Law: Myths and Realities

Thomas Cottier

World Trade Institute, Berne

Finally, there’s just a great deal of everyday life that is utterly, humanly familiar. People in Ghana, people everywhere, buy and sell, eat, read the papers, watch movies, sleep, go to church or mosque, laugh, marry, make love, commit adultery, go to funerals, die.

(Appiah 2006: 94)

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 28, Universal Declaration on Human Rights, Dec 10, 1948

I. Introduction

International economic law, in particular international trade regulation, forms part of the Western tradition of Grotian international law and the concept of equal sovereignty of nation states. It is shaped on the basis of comparative advantage (Ricardo) and thus ideas of international division of labour (Smith), specialisation and competition on the basis of equal opportunities. It is not otherwise built upon a prefixed system of moral values and aspired outcomes. Different quarters may claim authorship or formulate criticism in a pluralist society: those defending national interests and stressing the difference of cultures and civilisations (Huntington 1997); or those defending shared values in the Kantian tradition of cosmopolitan values (Appiah 2006).

Both schools will look at issues of justice and fairness from their own angles. What they may share is that international economic law does not stand for uniformity and a single set of values and traditions. Moreover, they may agree that the system has been mainly shaped by Western ideas and concepts in the post World War II order. It is a child of rationalism and the enlightenment, emphasising the principle of non-discrimination and transparency. How does it affect other cultures and traditions? Is it imposing values, following the heritage of imperialism? Is it impeding others from developing and progressing?
The paper attempts to look at these questions in examining two core areas: intellectual property and agricultural policies and trade. Both are shaped by Western predominance, both form part of controversy and may help to come to grips with some of the underlying issues relating to values underlying the multilateral trading system. Both may help to show the relationship of values, power and interests. Both may help to realise that the insistence on traditional Western values has very different effects: Partly building, and partly preventing, a global system of fair competition respecting basic needs of people around the world. They may help us to assess how cultural differences, in particular relating to the rule of law, may play out in trade regulation. They may help us in defining some of the realities and myths, and in finding a way forward.

II. The Cosmopolitan World Trading System of the WTO

The Universal Declaration on Human Rights of December 10, 1948 marks a paradigm shift in the morals of international law and relations, the full effect of which we still have not absorbed. It brought an end to the limitation of fundamental rights and liberties to domestic constitutions and the perception of human rights as a purely domestic affair (which did not allow intervening against genocide in Nazi Germany). It brought an end to perceptions that fundamental rights and liberties apply at home, but not abroad in dominions and colonies (and to ways their inhabitants were treated, often in contempt and disrespect). The Universal Declaration brought human rights to all of mankind, irrespective of colour, race, religion and culture and political beliefs. Perhaps it’s most important function was – and continues - to tell the West that its values are not limited to its own realm, but that all humans deserve respect, dignity equal opportunities and legal protection, irrespective of their cultural and geographical background. It brought an end to imperial and colonial moral perceptions of cultural and racial prejudice which so much shaped European and North American culture and hegemony in the 19th and 20th Century (Said 1993). It established a very long term programme and set of values upon which the law and policies for coming decades should universally rely upon. The Declaration clearly expresses values common to all mankind for the 21st century and beyond. Indeed, legal guarantees of human rights built upon the Declaration in binding agreements purports the idea of universal and uniform values, the implementation of which – not the norm – may be subject to gradual and progressive achievement.

The Universal Declaration heralded the end of colonialism; it was possible in an age of American liberal hegemony, prior to the cold War. At the same time, the new foundations of the International Economic Order were shaped with the Bretton Woods Institutions (IMF and World Bank) and the General Agreement on Tariffs and Trade of 1947. They sought to contribute to the aspirations of Article 28 of the Universal Declaration. The preamble of the GATT took up goals of the New Deal, seeking “raising standards of living, ensuring full employment and a large and steadily growing of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods”. Fifty years later, the Charter of the World Trade Organization (WTO) amended this goals “allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development”. It is important to note in this context that trade liberalisation is not an end itself, but a means to an end.
Progressive liberalisation, the principles of non-discrimination and of transparency of the law is all are means to an end.

To what extent these goals of the preambles are pursued and achieved, is highly controversial. While some would argue that the post World War II institutions extend Western imperialism and realpolitik in new cloths and disguise, others argue that they truly are dedicated to the philosophy of equal opportunity and equal conditions of competition, and to efforts which help to bring such constellations about and the attainment of enhanced global welfare. In doing so, they do not impose uniformity and unilaterally defined and imposed values and policies, but allow different countries and cultures to maintain differences commensurate with levels of social and economic development.

Progressive liberalisation in international economic law stands for the proposition for gradually reducing trade barriers between countries within a given and harmonised framework. Otherwise, rules and policies are not uniform. While based upon market economies, it does not exclude state trading and monopolies in the pursuit of service public. Tariff levels of WTO Members are not uniform but country specific under the GATT. The same holds true for liberalising services under GATS. Levels of commitments are not uniform and offer ample flexibility to take into account country related specificities. The Most-Favoured-Nation principle provides the foundation of non-discrimination among Member States. It prevents arbitrary differential treatment among States which sovereignty otherwise perfectly allowed within the Westphalian State system. The principle of National Treatment calls for treatment no less favourable of foreign products and persons than that accorded to domestic products and nationals (Cottier & Oesch 2005: passim). It established the basis of international law of integration which, mainly through the European Economic Community and the European Union, were further developed and extended to comprise basic market freedoms.

Within this framework, the 1995 World Trade Organization, succeeding the GATT of 1947, leaves members ample room for tailor made solutions reflecting their own values and preferences, de facto even where common minimal standards were agreed. It is submitted that this system of embedded liberalism (Ruggie) responds to the aspirations of what philosophy termed cosmopolitanism. This we understand with Kwame Anthony Appiah to constitute values upon which all cultures may discuss and begin a conversation, but upon which they do not necessarily agree upon (Appiah 2006:57). Cosmopolitanism does not stand for world government and uniformity. According to Appiah, it stands for taking an interest and responsibilities beyond your own kin and citizenship, and to assume responsibilities in human lives “which means taking an interest in the practices and beliefs which lend them significance” (id at xv). In short, it represents “universality plus difference” (id at 151).

It is submitted that the principles of WTO law of progressive liberalisation and non-discrimination are values which are commonly shared in terms of cosmopolitanism, if partly not even universalism. To what extent this is also true for other areas of international economic law, we cannot further pursue.\(^1\) In trade regulation, the said principles and rules

---

\(^1\) Trade regulation amounts to a key part, but does not exhaust international economic law. Rules and principles relating to natural resources (land, sea, and air space), minerals, investment protection, labour relations, health, culture, environmental issues and climate change are important chapters which cannot
allow for dynamic evolutions in accordance with shifts in production and competitiveness. They seek to offer equal opportunity and thereby care for others as well. They support a high level of legitimacy of the multilateral system with its 150 Member States, despite often expressed criticism that the system is biased towards producers and ignores the interests of citizens and consumers.

The system basically does not purport to protect pre-existing privileges, but genuinely reflects economic developments and strengths. It shows a considerable track record of success. GATT 1947 allowed Europe to recover and develop in the most important trading block. It accompanied and protected the rise of Japan in the 1960s and 1970s. Korea and other countries followed suit. It has allowed China and other countries to become a predominant exporter in manufactured goods, and India to penetrate service industries in what today is called a flat world (Friedmann). Trade shares of developing countries have substantially increased in the process of globalisation over last decades; least developed countries show minor trade shares, but they are equally growing. Clearly, more needs to be done for them. But generally, trade grows faster than GDPs and amounts to a key factor in producing welfare. In comparison, it certainly did much better than systems of closed and planned economies.

Having said so, true deficiencies exist. In terms of principles, corrective equality to the benefit of poor developing countries (Special and Differential Treatment) is not sufficiently elaborated and fails to remedy in law large differences in terms of social and economic development. A major systemic weakness per se is that retaliation and trade sanctions strongly depend upon the size of the importing market and thus are less effective, or ineffective, for small nations in the pursuit of their rights. Moreover, the current modes of negotiations and decision making in the WTO no longer are able to meet the complexities of today’s interrelatedness of topics, such as goods and services and technical barriers in a coherent manner, or the relationship to other international agreements such as multilateral environmental agreements or human rights standards.

Other than that, the main deficiencies of the system are produced and brought about by distorting domestic policies of major powers in North and South. Indeed, the critique of the WTO and its regulations should mainly relate to domestic policies under these rules and not to the principles of the multilateral system per se. We should not bash the WTO but those responsible for shaping domestic policies. More than in other areas of international law, the WTO purports a rule-oriented approach, subject to dispute settlement and enforcement. Yet, ways and means of decision-making at home impede or retard the advance of realising common values. They mainly focus on domestic interest, all too often on vested interests. They do not consider the implications such policies may have for others. They restrain the evolution of WTO disciplines in negotiations, or they violate existing rules in the pursuit of domestically defined interests. They are responsible when gains of international trade are

be analysed in this paper. Many are closely interrelated with trade regulation as they operate on the basis of trade incentives and restrictions. Values – as opposed to interests in market access – may play a larger role in some of these areas, and we leave open the question to what extent they rely upon universal values (such as the ban on slavery or exploitative child labour), on cosmopolitan values or imposed obligations by means of power.
unevenly shared and do not trickle down, due to the lack of labour laws, social networks and investment in education. Deficiencies exit both in developing and developed countries alike.

Criticism of international trade, however, more frequently focuses on the WTO itself and thus international law. The introduction of minimal standard for intellectual property is criticised being both contrary to competition, free trade and the interest of developing countries. At the same time, NGO are much less ardent in challenging agriculture policies of the West, in particular to the extent that it purports to pursue policies of multifunctionality and sustainable development. The public and consumers do not call for substantial reductions of levels of support and border protection, and agricultural policies in the West enjoy substantial public support.

How to assess interests and values behind these Western policies in terms of cosmopolitanism? How do these values affect others, in particular developing countries?

A. The Case of Intellectual Property

In summer 2007, the United States filed a complaint with the WTO against the People’s Republic of China for failing to comply with its obligations to enforce intellectual property protection under the Agreement on trade-related Aspects of Intellectual Property Rights. When joining the WTO in 2001, China ratified extensive obligations to protect and enforce intellectual property rights in its different forms. The Agreement not only prescribes minimal standards inter alia as to the protection of copy right, trademarks and patents. It also entails extensive standards as to civil and administrative procedures and to penalties for copyright and trademark protection. In addition, China’s protocol of accession to the WTO comprises additional obligations to introduce and maintain judicial remedies and enforcement mechanisms applicable to all field of international trade. The jury on this case is still out. China made substantial efforts to enact appropriate regulations and bring its statutes into compliance with WTO obligations. The Chinese patent office today amounts to one of the largest in the world. China reformed the court system in doing so (Nie 2006). Yet, complaints among foreign investors and exporters insist that Chinese authorities are essentially ignoring their obligations and do not take appropriate steps against counterfeiting and piracy of intellectual property rights. Domestic Courts, is it argued, are not up to the task. These practices arguably are tolerated in building know-how and generating income within the country and on export markets which likewise remain lenient on combating inexpensive counterfeits and copy right piracy, e.g. in the field of pharmaceuticals, electronics, machinery and consumer goods. It all adds to further increase the vast trade deficit between China and the United States – a major source of contemporary tensions.

The case is interesting in a paper exploring cosmopolitan values in international economic law, and in international trade regulation more specifically. Intellectual property is clearly founded in Western utilitarian legal thought; it reflects the respect for individualism and property rights and the rule of law. Even though intellectual property has been part of international law for more than hundred years, developing countries upon achieving political independence largely refuted to adopt advanced standards until they agreed to do so within the World Trade Organization in 1995. Before, intellectual property protection was considered anathema to social and economic development, supporting policies of import substitution and mandatory transfers of technology for the purpose of economic development. The process of decolonization witnessed the abolishment of formerly imposed levels of
protection and gave way to regimes which largely encouraged technology development by taking recourse to inventions and products developed abroad. The legal regime reflecting these policies changed with the advent of the TRIPs Agreement. Does it amount to a case and example of unduly imposing Western standards, interests and values which conflicts with interests of developing countries? Is it a case of conflicting cultural values of different civilisations which cannot be harmonised and universalised with success? Does TRIPS reflect a universalistic and global perception of law which history will judge utterly unrealistic for the 21st Century, completing out of tune with a pluralist world of competing civilisations, and a late relict of Western arrogance and domination which no longer persists?

The extensive obligations to protect intellectual property both in terms of substance and domestic procedures, indeed, are unparalleled in international law. It does not exist for real property and estate except in bilateral investment agreement and customary law against arbitrary expropriation. Is does not form part of global human rights Conventions, except for protection of personality and moral rights. The obligation, for example, to provide for patent protection of pharmaceuticals for at least twenty years as of filing, amounts to a very detailed rule globally prescribing a legal and uniform regime of which the concept of appropriation and proprietary rights is at the heart. Legal anthropology tells us that the concept of private property is far from established in traditional and communal societies. It is largely unknown in a rural context and traditional lifestyles. Knowledge is generally considered to be part of the public domain and the idea of appropriating it as an incentive to create new insights and information, is alien to most civilisations. In Confucian thought, law was essentially limited to penalty (fa) while other conduct was guided by morality (li) (Nie 2006) The idea of securing individual autonomy vis-à-vis rules and government, as well competitors was alien to these societies. Communism, albeit a child of Western thought, of course abhorred the idea of individual ownership of intellectual property and left a sceptical legacy, despite modernism and industrialisation. China is just an important example in point.

It would thus appear that IPR protection is a typically Western value imposed upon the rest of the world. Many would argue so. And since imposition by the dominant economic powers and markets may be considered illegitimate, countries may consider themselves morally entitled to fudge and retard implementation of these obligations imposed. Universal intellectual property protection, thus the argument, is a myth. Reality shows that common and globally shared perceptions of property rights cannot legitimately exist. They do not form part of universal values, despite the fact that most countries have signed on to such standards under Western pressure. The arguments run parallel to cultural relativism in the context of protecting human rights. It may be argued that concept of intellectual property rights so inherently is a product of Western civilisation that its exportation to other civilisation only can be understood in terms of power politics and post colonial US, European and Japanese economic imperialism.

Before passing judgment, we need to look into the dynamics of intellectual property protection and how it evolved in the West, and within industrialised countries. The advent was equally controversial in the 19th Century. For example, Switzerland introduced patent protection for chemicals only under the threat of German trade sanctions. Later, it introduced product patents for pharmaceuticals only in the 1970s, once a strong pharmaceutical position was established. While the United States was first in protecting inventions as a matter of constitutional law, the knowledge of the country was built upon unrestricted copying of foreign materials throughout the 19th Century. Japan built its economic powerhouse by taking
recourse to copying and improving western technology in the 1960s, and it was exposed to comparable pressures which China faces today. The point I wish to make is this: The effective level of protection of intellectual property induced by international law and relations has been de facto always commensurate with the level of economic and technological development of a given society. It is an attribute of modernization and industrialization. Attitudes to intellectual property change as countries evolve. Currently, this can be observed in the emerging economies, in particular India and China, which increasingly develop an interest to protect their own products around the world. Moreover, efforts to rebalance the TRIPS Agreement by enhancing property rights in the field of agriculture and of traditional knowledge shows that people are genuinely interested in improving the protection for their products and to benefit from traditional knowledge which is increasingly used in the field of genetic engineering and biotechnology. It is interesting to observe that China develops a strong interest to bring about enhanced global protection of traditional medicines, a view shared by stakeholders in the field. What first appears to be an undue imposition of western values and concepts emerges as an important mainstay of the Chinese economy: it is a matter of adjustment and transition, commensurate with economic development. It is a necessary ingredient when playing on global markets and in accordance to the tunes defined therefore. Intellectual property protection therefore is less of a cultural issue than a reflection of social and economic development under the paradigm of market and mixed economies.

The TRIPS Agreement obliges countries (other than the group of least developed ones) to introduce quite extensive minimal standards in legislation and to make available intellectual property protection. It can be argued that the imposition of such standards undermines social and economic development as it is not necessarily commensurate with current levels of development in a given society. At the same time, the system still offers considerable flexibility and options. Moreover, it has been recently adjusted to specific needs of developing countries with a view to facilitate the exportation of generic drugs in combating HIV/AIDS which otherwise are under patent protection and exclusive control by right-holders (95% of all essential drugs are off patent anyway). More importantly, however, enforcement of standards by means of the trading system and possibly referring to economic sanctions will be de facto commensurate with levels of competitiveness achieved. Intellectual property protection will be sought and used by foreign exporters and investors to the extent that the domestic industry becomes competitive. As to other countries and non-competitive sectors - unlike today in the case of China – nobody is likely to complain within the WTO; protection is subject to what I call the policies of benign neglect. Members of WTO will only intervene when an economic sector of a country reaches levels of competitiveness which requires it to play by the same rules. As long as such levels are not achieved, implementation and enforcement by means of international trade sanctions and pressures do not take place. It is not a coincidence that most cases brought so far relate do disputes between industrialised countries.

The reality therefore can be depicted as a gradual phasing in of property protection, commensurate with social and economic development of a country and of the competitiveness of the sector concerned. Despite the fact that the TRIPs Agreement sets minimal standards for implementation, the reality reflects a model of graduation and progressive regulation. In reality, it tolerates and leaves room for countries to progress on diverging levels of protection and enforcement; albeit it may be argued that the introduction of standards in domestic legislation per se may reduce the pace of achieving competitiveness in the first place. Since China as an emerging economy has reached levels of international competitiveness, the country is now held accountable to the standards to which it agreed. Other countries like and
India, Argentina and Brazil are likely to face similar challenges in coming years. Inadequate or lack of protection of IPRs will amount to extensive market access restrictions and therefore distortions. It will possibly affect innovation. The gradual realisation of effective protection of intellectual property therefore is coherent with the principles of equal opportunity and competition. It is therefore coherent with cosmopolitan values if China is held accountable.

B. The Case of Agriculture

Let us turn to the second example which triggers great controversy and criticism: agricultural trade policy. Other than in the field of intellectual property, defensive western interests are pursued within the framework of WTO; again upon pressures of strong lobbies. Is the criticism justified under a cosmopolitan philosophy?

A major obstacle to achieving equality of opportunity and the realisation of comparative advantage today paradoxically relies to a large degree with western economies: persistent protection of agriculture with a view to traditional patterns of production in North America, the European Union, Switzerland, Norway as well as Japan undermines the values enshrined in the multilateral system. In Switzerland, the aggregate level of protection amounts to some 3.6 Billion SF annually. Agriculture – perceived as a traditional value, representing traditional cultural lifestyles, food security and heimat in a globalising world, triggers strong emotions of identity which powerful lobbies put to use despite the fact that the agricultural today merely amounts to some 3-5 % of the population.

Liberalisation of agricultural trade (amounting to some 10 percent of world trade) has been retarded for more than fifty years in GATT for such reasons. The Agreement on Agriculture and tariffication of extensive quantitative restrictions in 1995 only marked the beginning of a long term process of adjustment. And even today it may be argued from the point of view of developing countries that the agreement is strongly biased in favour of traditional protectionist policies of the West. It does not offer others, in particular Africa, a fair change to overcome its dependence upon food imports, let alone to build new prosperity upon its rich potentials in the field.

Still today, people, consumers and politicians alike, rarely square these values and agricultural traditions, of which they are proud as part of their national heritage, with the fate of deprived farmers and children in developing countries where some 70 % of the population depends upon agriculture. Due to severe import restrictions and domestic subsidies in developed countries, they remain in subsistence farming and cannot develop substantial exports of processed products. The main difficulties to conclude the current Doha Development Agenda – a round semantically termed to benefit developing countries – are caused by industrialised countries which have been defending the values of an open system in the field of manufacturing and services.

There is a clear lack of cosmopolitan values. It must be ascribed to domestic constituencies and not to the overall goals of the WTO which seeks to overcome these imbalances. The same holds true for current policies to turn to bilateral agreements, rather than pursuing interests within the multilateral system under MFN. Governments of developed countries are pressed to seek market accession concessions bilaterally, while preserving high levels of protection in agriculture. While preferential trade may be of interest to some emerging countries, it is
evident that other countries, in particular the least developed countries, stand to lose from this evolution.

As much as China is bound to adjust to intellectual property protection, Western countries need to adjust to global markets in agriculture. Insistence on traditional values deprives others to develop basic needs and livelihood. The control of large markets in the United States and the European Union, however, allows to unduly protracting such adjustments. It amounts to what in the final analysis is arrogance and imperial attitudes, exploiting dependencies. It is not the expanse of intellectual property protection world wide in a globalising economy which is inconsistent but the abuse of power in defending outdated farming policies ignoring the potential and comparative advantage of developing countries. The current policies cannot be justified from the point of view of cosmopolitanism. In the process of increasing trade shares, production and control over monetary resources and policies, emerging countries are increasingly in a position to exert pressure to bring about changes. They will happen over the next decades, and it is a matter to bring about proper reforms.

III. The Impact and Challenge of Cultural Divergence

Perhaps the greatest contribution of trade, besides enhancing material quality of life, is that it has brought into contact different civilisations and exchange of views and opinions. In the discourse among different cultures and civilisation, trade was the first and persist to be among the most important channels of communication. What we can learn from observations on intellectual property and agriculture is that the multilateral system is driven by the pursuit of domestic economic interests, commensurate with the economic structure of a particular country. Values, at best, are called upon to defend such interests. Accordingly, trade regulation is much less exposed to cultural relativism which otherwise characterises the debate on human rights, political liberty and democracy. And where values are involved, they mainly play a role in disputes between members who otherwise belong to the same civilisation. Invoking fundamental differences in cultural values among developed and developing countries is a myth; the reality is that the system basically serves most countries alike and allows those willing to participate in the world economy to pursue their interests. Crisis of legitimacy is mainly caused by policies of industrialised countries who fail to liberalise in sectors and areas of prime interest to developing countries and insist on policies of mercantilist policies of reciprocity in defence of sectoral interests. This is where the west should act in the first place.

While cultural differences play out less on the level of international law between different civilisations in the field of trade, they show on national levels, as the example of enforcing intellectual property rights in China exemplifies. Different civilisations and countries have diverging attitudes to law and the legal system. While it is at the heart of western civilisation (albeit with varying degrees as well), other cultures have relied more extensively on other forms of social control and interaction, be it families or clans or party ruling. The rule of law, or the absence of it, perhaps amounts to the most important feature in the present context. Despite obligations under international law shared among countries, obligations and rights face diverging respect and treatment in domestic society. Trade regulation shares the same trait as other areas of the law. Where legal traditions are and remain weak, domestic implementation of trade regulation is equally weak, and exporters and investors need to take this into account when making appropriate decisions. It is here that we face perhaps the
largest plurality, and the scene is far from uniform. Differences also exist among western countries in dealing with international law at home. They equally exist among developing countries, many of them showing weak structures of legal governance and judicial control. It is here that different traditions enshrined in civilisation and histories of countries play out. It is here that domestic participation in decision-making and trade policy formulation greatly varies in accordance with different sets of values in place. Importantly, weaknesses are not limited to developing countries. While they often lack judicial protection, developed countries show weaknesses in decision-making as well organised lobbies exert disproportionate influence upon decision-making in the political process. Both should be addressed.

This is the moment where hard questions emerge. We already mentioned that major deficiencies are produced by domestic processes and thus deficiencies of political and legal structures at home. To what extent can and should the international system address these issues and bring about convergence and thus shape domestic structures of governance and decision-making, including legal protection of foreigners and nationals alike? Can we find areas of common, cosmopolitan values, or should matters be left to a model of mere coexistence between different cultures and civilisations? What is required to render the international economic system operative and effective, while respecting diverging political and economic cultures? How to assure than non-trade concerns are appropriately taken into account in decision-making, seeking greater coherence between different policy areas?

These are the questions with which research and modern developments in the international economic system are confronted. For example, to what extent should it influence modes of production of goods and services? Should the ban on exploitative child labour be enforced by means of trade regulation and restriction? Should methods of production damaging the environment and global commons be influenced, and products failing to meet such standards excluded from importation? Should trade rules be linked to the protection of human rights, should they be linked to democratic governance and respect of the rule of law at home? Labour relations, the place of women in the workplace, environmental issues and decision-making structures of trading partners all are deeply influenced by domestic values and traditions. How far can convergence go? When does the presently interest driven trading system starts encroaching upon values which may cause tensions and even lead to international conflict?

These questions are largely unresolved and highly controversial. They entail dimensions of extraterritorial jurisdiction and intrusion into competing value systems. Is it possible to define globally accepted and shared values to which all countries may eventually subscribe? Where are the reasonable limits of international economic law in shaping domestic civilisation beyond the pursuit of economic interests and market access in a process of give and take? Where do we reach rivers which should not be crossed? What is the role of sovereignty, given high levels of mutual interdependence?

Simple recourse to sovereignty – the classical concept of States in international law – no longer offers adequate answers. Allocation of trade policy decisions no longer is a matter of national governments and parliaments; it has partly moved to the international level many years ago as a consequence of the law of integration and its principles of non-discrimination. States today operate within a complex system of multilayered governance where some decisions are taken within international institutions, while others remain with domestic governments. Horizontal networks among national administrations complete the picture of interdependence and communication. Europe, with the European Union, is by far the most...
advanced achievement of international and economic integration. The example of intellectual property, discussed at the outset, however explains that integration today is not limited to regions but entails a new phenomenon of global law negotiated and settled at the level of the WTO.

The questions mainly need to be answered by those in power. The West no longer is in a position to define answers on its own, albeit it bears substantial responsibility as it represents the main consumer markets upon which most countries depend upon. Yet, such dependence may alter in due course, and shifts are occurring as trade among developing countries has increased. The West no longer is in a position to write the rules of the game as it did when the current multilateral system of Bretton Woods and GATT was designed. Solutions, even if adopted unilaterally, need to respond to shared long-term interests of all countries alike. They need to emanate from, and respond to, cosmopolitan values. It is at this point that recourse to philosophy and international relations theory becomes useful.

IV. Recourse to Shared Values

In his influential book “The clash of Civilizations and the Remaking of World Order”, Samuel R. Huntingdon does not explicitly deal with international economic law. His analysis is based upon fundamental differences of different civilizations, all of them mainly shaped by different religions. He advises restraint and the adoption of a policy of coexistence, rather than integration, with a view to avoid future clashes of civilisation. His argument is mainly based upon the insight that the West no longer is in a position to dominate and world. Instead, it needs to reinforce Western alliance and abstain from intervention in the name of democracy, freedom and the pursuit of human rights. The author is frequently interpreted in support of policies of disengagement, stressing differences which cannot be bridged. The experience and tragedy of the current war in Iraq lend much support to this. He also may be invoked in defending protectionist policies, putting first things first in your own civilisation. His thorough analysis risks being abused and invoked in the pursuit of nationalism if not racism. The true and genuine goal of Huntington, however, is to avoid clashes of civilisations in the first place. To this effect, he also stresses the need to build upon common values where they exist and can be found. Upon discussing a (somewhat benignly authoritarian) white paper which identified the specific cultural identity of Singapore as opposed to, and different from Western values, he continues to say:

Certainly a statement of Western and particularly American values would give far more weight to the right of individuals as against those of the community, to freedom of expression and truth emerging out the contest of ideas, to political participation and competition, to the rule of law as against the rule of expert, wise, and responsible governors. Yet even so, while they might supplement the Singaporean values and give some lower priority, few Westerners would reject those values as unworthy. At least at a basic “thin” morality level, some commonalities exist between Asia and the West. In addition, as many have pointed out, whatever the degree to which they divided humankind, the world’s major religions – Western Christianity, Orthodoxy, Hinduism, Buddhism, Islam, Confucianism, Taoism, Judaism – also share key values common. If humans are ever to develop a universal civilisation, it will emerge gradually through the exploration and expansion of these commonalities. Thus, in addition to the abstention rule and the joint mediation rule, the third rule for peace in a
multicivilizational world is the commonalities rule: peoples in all civilizations should search for and attempt to expand the values, institutions, and practices they have in common with peoples of other civilizations. This effort should contribute not only to limiting the clash of civilizations but also to strengthening Civilisation in the singular (hereafter capitalized for clarity). (Huntington 1997: 319/320).

In identifying common values of this kind, cosmopolitans would go a step further and expand the thin moral ground more firmly. Indeed, there is more in common to mankind and the human condition than cultural differences tell. It is the business and interest of anthropologists and ethnologists to emphasise the difference of civilisation and culture. Yet, we have seen that humans share common interests in the principles of the multilateral trading system, even in intellectual property protection, and they debate on appropriate farm policies with a view to achieve better lives and prosperity. Alleviation of poverty is a shared goal, albeit often disavowed by predominance of special interests in specific policy areas.

Humans all share basic common needs in material want, need for dignity and respect, love and friendship, education and learning by doing as they go along in their lives. How much is common in describing the human fate in world literature across different cultures; and how much were differences artificially cultivated, to arrogance, prejudice, racism ultimately based upon power and imperialism (Said 1993)? Witnessing, year for year, classes of international students from more than thirty countries and different backgrounds in the very same classroom at the World Trade Institute reinforces both the insight that there are more commonalities in human interaction than divisions and different cultural traits, albeit they do exist. This is an experience of great hope and gives raise to confidence. The commonalities go way beyond what forms the so called Davos Culture (Huntington 1997: 57) of a universal civilisation shared by a small and arrogant elite not amounting to more than one percent of global population and communicating in English spoken my merely 7.6 percent in 1992 and perhaps somewhat more today. It is the way people interact, ask questions, argue, develop hopes and ambitions, friendships which they share, and aversions they feel, that shared values show in daily life. Perhaps the largest differences exist in terms of attitudes to authority which, of course, has been formed in specific contexts of family, education and governance, and which more than anything else is specific to different cultures and civilisation. Yet, they all subscribe and share a great number of human commonalities.

V. Towards Impact Assessment and Flanking Policies in Trade Regulation

The crucial question remains to what extent such human commonalities and basic needs can and should translate into international law beyond human rights protection, into economic law and trade regulation in particular. Trade regulation, the vanguard of exchange among cultures ever since, is a prime candidate and door of entry to develop Civilisation (in capital letters). Meeting basic needs cannot be a matter for trade policy alone, as trade liberalization per se does not bring about domestic distributive effects. Policies and international efforts in aid, infrastructure, product development and trade promotion, labour relations, education and health outside the WTO remain essential. It is under such headings, in particular aid that ethical responsibilities towards meeting basic needs are generally discussed (Appiah 2006: 158, discussing the Singer principle and muddy pond problem). Yet, trade regulation can make its contribution. It is a fact that basic needs of the many are still denied by the pursuit of economic interests driven by powerful lobbies in industrialised countries and developing
country governments alike. This should be taken into account in shaping appropriate procedures and policies.

Firstly, we need to bring about impact assessment of different policies as to basic needs and sustainability. Domestic processes in industrialised and developing countries alike need to be shaped in a manner that they effectively take into account the basic human needs inside and outside the particular polity. Sustainable development is not a matter of charity; it is a matter of open markets in trade regulation and disciplines of distorting subsidies and excessive and protectionist regulations. It is a matter of making available appropriate flanking policies protecting shared values. It is a matter of designing new policies which take into account the satisfaction of basic needs and sustainable development. This entails new conditionalities for imports in terms of social and environmental standards. Lessons should be learned from liberalizing textiles: Upon dereliction of an utterly protectionist regime (Multifiber Agreement) in 1995 and the phasing out of the interim textile agreement in 2005, many developing countries lost production and trade to China which upon joining the WTO in 2001 emerged as a major producer. No safeguards on sustainable production and labour standards (opposed at the time by developing countries) were introduced. Liberalisation must be accompanied by appropriate regulatory regimes safeguarding basic needs and cosmopolitan values.

Secondly, In the field of intellectual property protection, it may be possible to translate the policy of benign neglect into a formal policy of progressive regulation, calling for IPR protection commensurate with the level of competitiveness of a particular economy or even sector (Cottier 2006). The approach could be generally used for standards setting rules in trade regulation. It would enhance regulatory flexibility to be domestically with a view to satisfy basic needs in a more efficient manner.

Thirdly, in agriculture, the realisation of basic needs and opportunities for most people around the world requires to review western policies in the very first place. It amounts to an ethical imperative. The impact of conservative values on people abroad needs to be confronted. We need to perceive agriculture no longer as a purely national issue, but one of regional and global dimension. These ethics can be translated in policies. The overall aim must be to enhance market access for products of countries that depend upon exports in order to sustain a decent life. We need to focus on least developed countries in the first place. Import regimes need to be shaped accordingly, entailing tariff reductions, an effective General System of Preferences which no longer allows the exclusion of so called sensitive, i.e. competitive, products. These policies need to be accompanied with aid for trade and support in creating and building markets for innovative products. It must be accompanied by the further reduction of border protection, domestic levels of support, recourse to conditionalities promoting fair trade, social and ecological labelling schemes and the promotion of private product standards within policies of Corporate Social Responsibility. All this requires a different mindset, giving up conservative nationalist traditions and mentalities and adopting cosmopolitan ethics and responsibility.

Fourthly, to this effect, new decision-making procedures need to be designed to curb rent seeking protectionism in Western democracies, again in the first place. The basis tenets of these procedures should be defined on par within WTO Law. As much as transparency of law and judicial review of trade measures is required today, as much should basic principles of decision-making and impact assessment of policies be more firmly prescribed by, and monitored by international bodies. Those affected abroad by policies should be heard before
the regulation is adopted in law, either directly or by means of public interest representation of NGOs. Legal protection at home should be reinforced. Courts, after abstaining from assuming responsibilities in international relations, need to find their place in protecting basic needs at home and abroad.

It will be immediately objected that substantial differences in civilisation and cultural differences render such thoughts utopian, let alone the difficulties to get them accepted given the distribution of economic and political powers in the nation state. Sovereignty would not allow such intrusion into domestic affairs by means of international law and governance. To this I respond: Sovereignty is not absolute and a recipe for clinical isolation of domestic affairs. International law has come a long way of negotiating away and reducing classical sovereignty in the pursuit of mutual interests and benefits. Nation States today increasingly find themselves de facto and de jure within a system of multilayered governance which operates on the basis of vertical checks and balances and controls. Nation states have agreed to measures addressing their own failures and shortcomings. It is all a matter of degree. But it is also a matter of values which may change once cosmopolitan thinking prevails. In principle, additional steps in procedural terms with a view to curb powerful domestic lobbies when shaping trade regulation are thus by no means excluded. It is a matter of convincing citizens and governments that their own legitimacy will be increased, their own constitutions stabilised, if they the international system sees to it that trade policy formulation does indeed take into account shared cosmopolitan values. As these instruments will operate, common values are likely to increase. This is far from simply imposing Western style democracy and the protection of all human rights enshrined in the International Covenants by means of trade policy. It is primarily a task to be achieved within countries responsible for large markets and thus having a special responsibility in the field. Moreover, it is a matter of convincing others to follow suit in return for market access, rather than imposing structures of good governance which may be at odds with the political traditions of their own civilization. The commonality of shared values allows doing so.

VI. Conclusions: Realities and Myths

Non-discrimination and equal conditions of opportunity and competition amount to a shared, cosmopolitan value. It allows people to be involved, to communicate, but does not impose predefined outcomes; cultural and economic differences persist. These common values, it is submitted, are real and realities. They provide an important basis upon which to build. It is equally a reality that peoples and governments pursue, within that framework, their proper interests in maximising benefits. The quest to realise world wide protection of intellectual property protection is as much interest driven as the protection of traditional farming structures. This is real and a reality, too. Both these interests touch upon a core Western value: the role of property and property rights. Proactive intellectual property policies around the world as much as defensive policies protecting existing patterns ultimately seek to safeguard existing properties.

Cosmopolitan values of non-discrimination and equal conditions of opportunity and competition, however, allow assessing these interests. Frequently, IPR policies are considered intrusive, illegitimate while defensive agricultural policies meet much sympathy, for reasons discussed in this paper. From a cosmopolitan perspective, it is the other way round.
The establishment of a world wide intellectual property regime, taking effect once a country and its economy are becoming competitive, amounts to an important ingredient of overall fair framework conditions. It is necessary to realise the shared values of equal opportunities in the global economy. The obligation of China and other emerging countries to play by these rules therefore is essential. Countries of a lesser level of development may still enjoy some more time, until these obligations need to be meet. The policies of benign neglect, or in the future, of formal graduation, are able to bring about appropriate realities of phasing in these commitments. The defence of property rights therefore is justified, and it is a matter to work out an appropriate regime which takes into account the needs of sustainable development and of basic needs of all humans alike.

Agricultural protectionism, to the extent still implemented in Western economies, does not support cosmopolitan values of equal opportunities and conditions of competition. High levels of tariff protection, stringent foods standards and subsidization creates a crossly uneven playing field which does not allow others to compete. It denies equal opportunities to developing countries, and to those in need to develop export markets, in an excessive manner. The defence of property and acquired rights (as farmers perceive it) to this extent therefore cannot be justified. It undermines shared cosmopolitan values.

It is a reality that the achievement of cosmopolitan values – both in the field of IPRs and in agriculture – will largely depend upon power relations. Those in need of market access are likely to adjust more rapidly than those defending existing structures. Emerging economies therefore are likely to adjust more rapidly to absorb a new regime of intellectual property in adjusting their structures. Western powers will cede agricultural protection only to the extent that in return their market access interests are otherwise impaired. This also is a reality. It is a myth to believe that things will change simply because constellations are not consistent with cosmopolitan values. And yet: values also are realities, and they are of key importance in justifying and legitimizing policies. Policies not supported by basic cosmopolitan values are not sustainable. They will gradually fall apart, some day. A new balance which respects the principles of equal opportunities on both sides of the equation will be found, taking in particular into account the basic needs of humans in all countries alike. We need to develop appropriate flanking policies, new forms of graduation, and to adopt new procedural mechanisms which oblige to take these considerations into account: impact assessment and forms of participation which offer a hearing to those affected abroad. We need to widen the constitutional framework and further develop democracy – firstly at home in curbing predominant vested interests.

The doctrine of equal conditions of competition and opportunity is of Western descent. It laid the foundation of the international economic system; and it is submitted that these values were largely and globally adopted. They are to the benefit of all. The pursuit of interests within this framework needs taking this into account. Given that the West still offers the largest markets and that its regulations exert a profound impact on the livelihood of millions of people outside these markets, amounts to a particular moral responsibility in the process of law- and policy making. In the pursuit of economic interests, only policies should be supported and implemented which respect the basic tenets of cosmopolitan values of equal opportunity and the protection of basic and common needs shared by all mankind alike. Reading Article 28 of the Universal Declaration on Human Rights along these lines could be a beginning to take that statement and vision seriously.
References


