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Coordinating International Trade and Human Rights as an Innovative Approach to Cross-Cultural Dispute Resolution

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In recent years, globalisation has fostered ever more frequent and intimate interactions between states and societies in the Asia-Pacific region. Unfortunately, this has also increased the potential for disputes, particularly regarding international trade and human rights. The Asia-Pacific Dispute Resolution Program, which is run jointly by the Institute of Asian Research and the Peter A. Allard School of Law at the University of British Columbia, seeks to better understand, explain and predict when such disputes will arise, combining state-of-the-art approaches from law, political science, communications, sociology, international relations, economics and business. To manage-and ideally prevent-such disputes, the world is in urgent need of resolution approaches that meet the needs and expectations of the different cultures involved. The objective of the Program is to propose innovative interdisciplinary approaches to dispute resolution that international communities of scholars and policymakers can use to promote intercultural communication and reconciliation.

Keywords: Coordinated Compliance, Selective Adaptation, International Trade, Human Rights, Dispute Resolution, Asia-Pacific, Chinese Law

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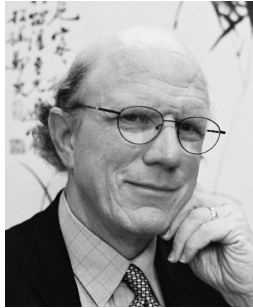
1. Introduction

The Asia-Pacific Dispute Resolution (APDR) Program, a joint initiative helmed by the Institute of Asian Research and the Peter A. Allard School of Law at the University of British Columbia (UBC), supports research, analysis and policy proposals on cross-cultural dispute resolution in the areas of international trade and human rights in the Asia-Pacific region. The project features a network of colleagues from UBC and partner institutions in North America and Asia, including many leading international experts in legal culture and globalisation in the Asia-Pacific region. It is further enriched by collaborations with a wide range of non-governmental organisations and policymakers in a variety of countries. Although the project initially focused on Canada, China and Japan, it has recently been expanded to include Indonesia and India.



Financial support for this project has come from a number of sources. Phase I, which began in 2004 and lasted five years, was supported by the Major Collaborative Research Initiatives of the Social Science and Humanities Research Council of Canada. Phase II, which had lasted for seven years, has the theme of Understanding Integrated Compliance with International Trade and Human Rights Standards from a Comparative Perspective.

The principal investigator of the APDR Program is Dr. Pitman Potter, the current Professor Emeritus at UBC's Allard School of Law and an internationally acclaimed expert on human rights, foreign trade and dispute settlement in China and the Asia-Pacific region. Dr. Potter is also a Fellow of the Royal Society of Canada and was appointed to the Order of Canada.



Dr. Pitman Potter

The APDR Program's website is a forum for scholarly exchange between the project's research collaborators. It also serves as a reference for anyone interested in cross-cultural studies, law and society, and emerging developments in the dialogue about trade, human rights and civil society in Canada, China, India, Indonesia, Japan and elsewhere. The information in this introductory briefing is partially extracted from and can be found on the APDR Program website,¹ as well as in a number of APDR project publications.²

2. Phase I: Cross-Cultural Dispute Resolution in the Asia-Pacific: Theoretical Concepts

The APDR project has two phases. Phase I supported research, analysis and policy proposals aimed at building knowledge of how disputes are resolved across different cultures, including mediation, arbitration and court adjudication. To harness the expertise of world-class researchers and pioneering practitioners, the APDR project is organised into three substantive research groups, covering: (1) international trade; (2) human rights; and (3) cross-cultural dispute resolution, as well as into teams from three countries: Canada, China and Japan. These teams provide local context for a range of research questions and analysis of the research findings. Their diverse area expertise and cultural knowledge provides a rich foundation for the research.³

Globalisation has led to more frequent and intimate interactions between states and societies in the Asia-Pacific region. In this context, cross-cultural dispute resolution has thus become increasingly important. Resolving cross-

cultural disputes requires an understanding of the interplay between the standards of conduct associated with different cultural communities and an appreciation of the power relations that affect dispute resolution. Power imbalances between developed and developing states have strengthened the authority of rules of governance associated with North America and Europe.⁴

For example, processes involving China's accession to the World Trade Organization (WTO), Asia-Pacific Economic Cooperation (APEC) trade liberalisation and human rights reporting illustrate the capacity of liberal industrial states to disseminate their preferred rules of governance around the world. However, many states and societies in Asia have refused to uncritically accept liberal models for regulating trade and human rights, as indicated by their mixed record of compliance with principles of trade liberalisation associated with APEC and WTO, as well as tensions over policies and doctrines associated with the Bangkok and Vienna Declarations on Human Rights.⁵ Differing approaches to trade and human rights have sparked disputes between states, business actors, civil society organisations and individuals across the Asia-Pacific region. Trade disputes have challenged cooperative economic relations between Canada, Japan and China, while human rights disputes have arisen over such issues as annual human rights reports, NGO challenges to infrastructure projects and individual human rights claims within particular countries. To manage and ideally prevent these kinds of disputes, we need approaches to dispute resolution that accommodate the needs and expectations of the different cultures involved.⁶

The APDR project is based on certain assumptions about the influence of cultural norms on behaviour.⁷ Cultural norms are reflected in formal laws and regulations as well as in informal procedures and practices. The distinction between rules and the cultural norms that they represent are especially important when rules particular to one cultural group are used by another without assimilating the corresponding underlying norms.⁸ In today's globalised world, for example, liberal rules of governance generally associated with Europe and North America are often disseminated to other areas with little concern for local acceptance of the norms on which such rules are based.⁹ As international trade and human rights are matters of particular importance, concerns over compliance with international standards often reflect misplaced expectations regarding the enforceability of rules without agreement on underlying norms.¹⁰

These issues are often brought to the fore in dispute resolution, where substantive and procedural standards of conduct are contested and where power relations often determine processes and outcomes. In the context of globalisation, economic and political power has allowed particular practice rules associated with liberal democratic capitalism to be imposed on societies outside the European tradition, but it has been less effective in displacing local cultural norms.¹¹ Disputes over compliance with trade treaties on issues concerning subsidies or human rights agreements, such as employment standards, often reflect the absence of a normative consensus despite the sharing of particular practice rules. Disputes thus emerge over the meaning and implementation of practice rules, and the results of dispute resolution proceedings are challenged even when they are grounded in accepted rules. Thus, effective cross-cultural dispute resolution, whether through mediation, arbitration or court adjudication, requires an understanding of the conflict between conformity in shared rules and diversity in underlying norms. In this regard, and effective responsive measures must be developed. This is the challenge that the APDR project seeks to address.¹²

Building on work by Dr. Potter and other fellows on dispute resolution in cross-cultural contexts,¹³ the APDR project supports new and innovative approaches to research and analysis through its emphasis on the process of selective adaptation and the related concepts of perception, complementarity and legitimacy. Selective adaptation is the process by which practices and norms are exchanged across cultural boundaries.¹⁴ Selective adaptation is shaped by the ways in which governments and elites express their normative preferences in the course of interpreting and applying practice rules.¹⁵ States and societies of the Asia-Pacific region engage in selective adaptation, balancing local needs with the requirements of practice rules imposed from outside. Dominant powers may also engage in selective adaptation, as illustrated by North America's increased reliance on mediation and other consensus-based dispute resolution systems, which are derived in part from the collectivist traditions of Asia.¹⁶ Selective adaptation also operates within societies, as different groups interact with and respond to dominant discourses.¹⁷ Although selective adaptation explains a great deal about the general conditions for the exchange of practice rules and norms between cultural communities, more work is needed to confirm the operational details of selective adaptation; identify the internal components; and explain the

implications for cross-cultural dispute resolution.¹⁸

During Phase I of the APDR Program, collaborators gathered empirical data and conducted qualitative and quantitative analyses to generate and test hypotheses about selective adaptation and related concepts that inform the exchange of practices and norms regarding trade and human rights. The results of this research have been published in numerous books and papers.¹⁹

3. Phase II: Coordinating International Trade and Human Rights

Phase I of the APDR project focused on the dynamics of selective adaptation and institutional capacity to explain the normative and structural contexts of local compliance in Canada, China and Japan, with international legal regimes on trade and human rights as separate discourses. Informed by the discoveries made and new knowledge disseminated in Phase I, Phase II examines conditions for coordinating local compliance with international trade and human rights standards.²⁰ This project supports interview and archival research in dispute resolution as well as development of local case studies selected and developed with Canadian policy needs in mind. It also involves data collection and comparative analysis in Canada, China and Japan.

Building on the successes of Phase I, Phase II was developing an expanded model to forecast conditions for coordinated compliance with international trade and human rights standards. Phase II features an expanded scope that includes research on India and Indonesia. Trade and human rights challenges in these countries are particularly pressing, as their rapid integration with the world economy in recent years has raised issues regarding compliance with both international trade and human rights standards.²¹

A. Theories and Concepts

In Phase I, the paradigms of selective adaptation and institutional capacity were applied to separate discourses on human rights and international trade. In Phase II, these paradigms are being used to build new knowledge about the critical issue of coordinated compliance with international trade and human rights standards.²²

B. Research Questions

The project focuses on a range of trade and human rights issues that are both intrinsically important and of practical concern to local political authorities, whose support for the project is essential. The general research questions concern the associations between compliance with specific international trade disciplines for each of the regions under study, and compliance with human rights standards. The intermediate research questions explore the effects of “selective adaptation” and “institutional capacity” on the coordination of trade and human rights compliance. The specific research questions concern how the internal “selective adaptation” elements of *perception*, *complementarity* and *legitimacy* and the internal *institutional capacity* dynamics of *purpose*, *location*, *orientation* and *cohesion* affect coordinated compliance with international trade and human rights standards.²³

C. Research Methods

In light of the achievements of Phase I and given the dynamic relationships between trade and human rights policies and practices in Canada and Asia, they have developed hypotheses regarding the effects of selective adaptation and institutional capacity on the integrated implementation of international trade and human rights standards.²⁴

Data illuminating coordinated compliance with trade and human rights standards have been drawn from archival records of dispute resolution cases, public and private sector documentation, media reporting and other sources. Survey interviews have been conducted to illuminate the normative and institutional dimensions of coordinated compliance. In addition, data has been collected from local case studies that examine the potential for coordinated compliance with international trade and human rights standards.²⁵

The APDR project addresses the challenge of coordinating local compliance with international trade and human rights standards in the Asia-Pacific region. Through its interdisciplinary programme of research, analysis and policy intervention, the project is building conceptual understanding and policy analysis in support of coordinated compliance with international standards on trade and human rights. This is a critical issue for the globalised world, as international, regional and subnational disputes over issues of trade and human rights have

become increasingly serious obstacles to international cooperation. Resolving and - where possible - preventing such disputes will not only benefit international cooperation in areas of trade and human rights, but also reduce transactional, operational and opportunity costs that make relationships more complex and costly, require significant management costs and distract public and private sector leaders from more productive pursuits.²⁶

Coordinating local compliance with international trade and human rights standards is difficult in part because of conceptual differences and assumed trade-offs between these two regimes.²⁷ All too often, human rights standards in areas such as labour, health and housing are seen as incompatible with the trade goals of efficiency, economic growth and private property rights. Conversely, trade policy in areas such as transparency and rule of law, subsidies and dumping, and intellectual property rights are seen as threatened by human rights advocacy and criticism. In addition, coordinated compliance with international trade and human rights standards is difficult to achieve because the officials and specialists who manage the local interpretation and implementation of these regimes often have few opportunities for institutional collaboration.²⁸

Mindful of these conceptual and organisational challenges, Phase II of the APDR project applies the normative and institutional compliance paradigms developed in Phase I to build knowledge and policy support for coordinating local compliance with international trade and human rights standards in mutually sustaining ways.²⁹ Through analysis of data drawn from five Asia-Pacific economies, this project is developing a compliance model that can explain the opportunities for and obstacles to coordinated compliance with international trade and human rights standards and build policy support for integration. Doing so is important not only because it can provide a better understanding of the interplay between trade and human rights compliance in particular economies but also because of its potential to prevent disputes over trade and human rights compliance and thus reduce the costs of international cooperation.³⁰

The project involves collaboration between researchers from eight institutions in North America and East Asia, all of whom share collaborative research experience, including through Phase I. Collaboration on this scale is required by the nature of the research, as close cooperation with local scholars is essential to build the trust necessary to conduct local empirical research on sensitive issues

of trade and human rights policy. The team members come from law schools, social science departments, policy research institutes and dispute resolution organisations and have a wealth of interdisciplinary training and experience in cross-cultural and comparative research.³¹

4. Research Outcomes

This project will generate policy proposals for building treaty compliance programmes, processes and institutions that are more responsive to cross-cultural differences aiming to resolve and, where possible, prevent disputes over trade and human rights. The results of the research will enable interdisciplinary scholars and policymakers in Canada and internationally to better understand the requirements for coordinated compliance with international trade and human rights standards.³²

This project has already produced numerous publications on themes associated with Asia-Pacific legal culture, international law and globalisation.³³ The roles of international law and regulations and their selective adaptation at a local level are a key research focus. The project yields rich interdisciplinary insights into questions of legal culture, international law, globalisation and dispute resolution in the countries of the Asia-Pacific region. It is breaking new ground through rigorous empirical research and qualitative and quantitative analysis of international trade and human rights.³⁴

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