INTERNATIONAL LAW INTERRUPTED – A CASE OF SELECTIVE ADAPTATION

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INTRODUCTION

There has been considerable debate within the international community on the proliferation of international treaty laws.[1] The Treaty Section of the Office of Legal Affairs of the United Nations registers approximately four thousand treaties and treaty-related actions annually.[2] As societies advance technologically and become more closely connected, international law is developing by creating new specialized rules and areas of legal practice which would facilitate such specialization, diversification and interconnectedness of economies, and social actions by creating adequate regulatory regimes. The field of international law has thus broadened significantly, embracing new fields of activities and establishing linkages to other disciplines and specialized areas of law. For example, international trade law is now related to environmental

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[1] M. Koskenniemi & Paivi Leino, "Fragmentation of International Law? Postmodern Anxieties" (2002) 15 Leiden J. Int'l L. 553; T. Broude, "Principles of Normative Integration and the Allocation of International Authority: The WTO, the Vienna Convention on the Law of Treaties, and the Rio Declaration" (2008) 6 Loy. Int'l L Rev. 173.

[2] P. T. B. Kohona, *Strengthening the International Rule of Law: Contribution of the Treaty Section of the Office of Legal Affairs: An Overview* (presentation), online: United Nations <http://untreaty.un.org/English/Seminar/Hague/ts_overview.ppt>.

law, labour law and human rights law, to name but a few connections.[3] Consequently, in response to the needs created by globalization, international law is expanding, on the one hand, by unifying or harmonizing the rules that govern a wide range of social and economic activities around the world and, on the other hand, by fragmenting the international community by creating separate institutions with highly specialized and often complex rules and practices.[4]

The diversification and fragmentation of international institutions, norms, rules and practices, and the development of linkages and overlap between different legal specialties, have become phenomena that challenge the effectiveness and efficiency of international law. How can states manage to comply with the ever-increasing number of international laws and practices and the overlapping jurisdictions of tribunals in an environment that lacks a hierarchy of normative order and a general legislative body?[5] How can states preserve their domestic regulatory sovereignty, autonomy and diversity while complying with their international obligations they chose to undertake in signing on and ratifying international treaties?[6] How can they ensure the efficient

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[3] For more on linkages between international trade and other disciplines, see most recently T. Cottier, "Challenges Ahead in International Economic Law" (2009) 12 JIEL 3; J. Jackson, "International Economic Law: Complexity and Puzzles" (2007) 10 JIEL 3; S. Cho, "Linkage of Free trade and Social Regulation: Moving Beyond the Entropic Dilemma" (2005) 5 Chi. J. Int'l L. 625. Two seminal academic symposiums examined linkage as a phenomenon. From December 5-7, 1997, the International Economic Law Interest Group of the American Society of International Law organized a conference *Linkage as Phenomenon: An Interdisciplinary Approach* to examine "linkage" itself and to foster further research in linkages between trade and other areas of social concern. Contributions to this conference were published in 1998 in volume 19 of the University of Pennsylvania Journal of International Economic Law. The second noted symposium, *The Boundaries of the WTO: Triangulating the World Trade Organization*, focused on linkage of trade and non-trade issues. The American Society of International Law organized the conference in 2001, and contributions were published in January 2002 in the American Journal of International Law, volume 96.

[4] Study Group of International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of International Law Commission, UN ILC, 58th Sess., UN Doc. A/CN.4/L.682 (2006) at 10-13.

[5] Ibid. at 10.

[6] Armand de Mestral and Evan Fox-Decent have recently commented on the impact of international law on domestic law-making by noting that treaty implementation dominates over domestic legislative processes. In particular, they claim that certain areas such as intellectual property has been comprehensively regulated by international conventions--"virtually every type of intellectual property is now an object of an international convention that has given rise to implementing legislation." See A. deMestral & E. Fox-Decente, "Rethinking the Relationship Between International and Domestic Law" (2008) 53 McGill L. J. 573 at 577. The authors also say that not only multilateral but also bilateral and regional treaties have caused extensive legislative implementation in Canada, estimating that about "forty percent of federal statutes implement international rules in whole or in part." Ibid. at 577-578.

internalization of international norms and standards and maintain compliance with international rules that have underpinning norms which are significantly different from the states' own domestic norms and practices?

This article outlines one possible discourse on the process of internalization of international law, "a coping strategy"[7] particularly utilized by developing states and societies to balance local needs against the requirement for compliance with external or non-local rules. It grew out of a series of examinations by a group of scholars from Australia, Canada, China, and Japan involved in the Cross-Cultural Dispute Resolution project on the selective adaptation discourse that provides an alternative perspective on how the rules of international law are locally contextualized. The article first explains the conceptual framework of selective adaptation and then proceeds to summarize the general hypotheses of the discourse. Next, it illustrates how selective adaptation is applied in international trade law and international human rights law and it concludes by indicating the manner and circumstances under which selective adaptation affects the dynamics of the application and enforcement of international law.

1. International Law Compliance and Related Legal Scholarship

As indicated earlier, the current debate over the efficiency of international law is framed by our understanding of the influence that globalization is having on the development of the international community and its social and economic actions. Globalization is often defined in broad terms as a closer integration, interaction and interdependence of countries, economies and peoples of the world. This interaction is brought about by the unprecedented development of science and technology and facilitated by the reduction in the costs of communication and transportation and by the removal of barriers to the movement of people, goods, services, capital and information across state borders.[8] Law, which always follows society and the economy, has also globalized and moved across borders, accompanied by the necessary institutional framework.[9] Law is no longer a product of the domestic regulatory regimes of individual states, nor is its enforcement solely within the power of individual states. Numerous international institutions and regulatory agencies have emerged, joining the existing state institutions and agencies in ensuring international cooperation and compliance with the principles of non-local laws.

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[7] P. Potter "Legal Reform in China – Institutions, Culture, and Selective Adaptation" (2004) 29 Law & Soc. Inquiry 465 at 478.

[8] J. Stiglitz, *Globalization and Its Discontents* (New York: W.W. Norton, 2002) at 9; A. Giddens, *The Consequences of Modernity* (Stanford: Stanford University Press, 1990) at 64.

[9] R. C. Wolf, *Trade, Aid and Arbitrate; The Globalization of Western Law* (Burlington, VT: Ashgate, 2004) at 3-11.

This increase in the number of regulatory regimes has had some unifying aspects but has also led to the fragmentation of international law and an increased interest in the understanding of the legal, political, social and institutional context within which international law is created and operates.[10] Studies now focus not only on global governance but also on local assimilation of global international rules. We now also concentrate on the analysis of local practices rather than on international rules and standards.

Ultimately, concerns over non-compliance with international laws and standards lead to an examination of the dynamic process of the reception of non-local rules (i.e. international and/or foreign rules) by assimilating their underlying norms into the local legal and political culture and the corresponding local institutional structure. As a result, numerous discourses explaining how international laws change their meaning in the context of different cultures and local practices have emerged. Two such discourses seem to be of particular importance for framing the paradigm of selective adaptation. The first is the theory of legal transplantation which is rooted in the sociology of legal adaptation. The second discourse is embedded in the norm-based compliance theories of international law. Both use culture as a metaphor for locality, and locality as a further metaphor for change.[11]

Briefly, theories of legal transplantation analyze legal change or reform in states' domestic legal systems as a dynamic process of borrowing or transplanting laws, principles, rules and institutions from other legal systems rather than one of creating them in the specific local context.[12] The phenomenon of legal transplantation has occurred consistently throughout history as a form of interaction of legal systems and traditions: from the reception of Roman law in medieval Europe, through the expansion of Western European law (common and civil) across other continents during

[10] See, for example, H. Kelsen, *General Theory of Norms* (Oxford: Clarendon Press, 1991); D. North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990); R. Bhala, *Trade, Development and Social Justice* (Durham: North Carolina Academic Press, 2003); A.-M. Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004); Y. Dezalay & B. Garth, *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (Ann Arbor: The University of Michigan Press, 2002); W. Twining, *Globalisation and Legal Theory* (Evanston: Northwestern University Press, 2000); and R. Appelbaum, W. Felstiner & V. Gessner, eds., *Rules and Networks; The Legal Culture of Global Business Transactions* (Portland, OR: Hart Publishing, 2001).

[11] For detailed description of the theoretical framework of the "selective adaptation" discourse developed by the Cross-Cultural Dispute Resolution Project, led by Professor Pitman Potter, and managed by the Institute for Asian Research at the University of British Columbia from 2004-2009, see L. Biukovic, "Compliance with International Treaties: Selective Adaptation Analysis" (2006) XLIC Can. Y-B. Int'l L. 451.

[12] For a summary of the evolution of the theories of legal transplants and related literature see M. Graziadei, "Legal Transplants and the Frontiers of Legal Knowledge" (2009) 10 Theoretical Inq. L. 723.

the colonial era, right up to the recent reception of Western legal models in developing countries with transition economies.[13] In this sense, according to some theories, the post-colonial process of transplantation was controlled by the elites in the borrowing countries that chose to speed up their domestic economic and social development and political change by borrowing laws and institutions from countries that had already achieved the desired level of development.[14]

There are two main points to the theories of legal transplantation. The first is that the process of legal transplantation is not simply the mechanical transplantation of laws and institutions from one legal system into another but that it is influenced by local conditions and the mediating actions of individuals involved in the process of transplantation.[15] The receiving state and society is neither homogenous nor a passive recipient; it consists of competing agents of transplantation (practicing lawyers, legislators and legal academics, or "formants")[16] who are interacting with each other and contextualizing the received laws differently because each have a different understanding of the received rules and different incentives to comply with them. When laws travel from one system to another they are not simply transplanted, but rather transformed and contextualized in accordance with local conditions, including culture, language, the political matrix and the level of economic development.[17] Consequently, the original context of transplanted law changes due to local cultural adaptation, even in cases where the laws are transplanted verbatim.[18]

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[13] See, for example, A. Watson, *Legal Transplants: An Approach to Comparative Law* (Charlottesville: University Press of Virginia, 1974) and *Legal Origins and Legal Change* (Rio Grande, OH: Hambledon, 1991); D. Berkowitz, K. Pistor & J-F. Richard, *Economic Development, Legality, and the Transplant Effect* (2006) [unpublished, archived at the Center for International Development at Harvard University], online at Harvard University: <http://www.hks.harvard.edu/centers/cid/publications/faculty-working-papers/cid-working-paper-no.-39>; F. Schauer, *The Politics and Incentives of Legal Transplantation*, (2000) [unpublished, archived at the Center for International Development at Harvard University], online at Harvard University: <http://www.hks.harvard.edu/centers/cid/publications/faculty-working-papers/cid-working-paper-no.-44>; D. Nelken & J. Fest, eds., *Adapting Legal Cultures* (Portland: Hart Publishing, 2001).

[14] See for example, Y. Dezalay & B. Garth, *The Internationalization of Palace Wars; Lawyers, Economists, and the Contest to Transform Latin American States* (Chicago: Chicago University Press, 2002) and P. Gajzl & V. Dimitrova-Gajzl, "The Choice in the Law Making Process: Legal Transplants v. Indigenous Law" (2009) 5 Rev. L. & Econ. 615.

[15] M. Graziadei, "Legal Transplants and the Frontiers of Legal Knowledge" (2009) 10 Theoretical Inq. L. 723 at 728-729 and P.G. Monateri, "The Weak Law: Contaminations and Legal Cultures" (2003) 13 Transnat'l L. & Contemp. Probs. 575 at 582.

[16] R. Sacco, "Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)" (1991) 39 Am. J. Compt. L. 343 at 343.

[17] W. Twining, "Have Concepts, Will Travel: Analytical Jurisprudence in a Global Context" (2005) 1 Int'l J. Law in Context 5 at 8-9.

[18] On impossibility of legal transplants due to cultural particularities of legal systems and legal traditions of both exporting and importing countries see P. Legrand, "The Impossibility of Legal Transplants" (1997) 4 Maastricht J. Eur. & Comp. L. 111.

The second point made by some theories of legal transplantation is that some legal concepts can be more easily transplanted without modification than others because, as Twining says, some legal concepts have a transnational or cross-cultural content that make them readily more transferable from the original context or normative system to others.[19] Twining mediates cultural relativism by indicating that concepts based on empirically standardized categories travel better than those based on complex normative categories that are dependent on cultural, social and economic context.[20] Indeed, numerous instruments of international trade law that standardize cross-border transactions are the result of the transplantation and convergence of related, specialized national laws (for example, the rules on promissory notes and letters of credit). This observation is important because it suggests that even though globalization is driven first and foremost by commercial rationale and international trade, which has already been operating on the basis of widespread common standards, some consideration should be given to the local conditions that determine the level of adoption of and compliance with international trade laws and their underlying norms.

The norm-based theories on compliance with international law are the second discourse that shares premises on the reality of domestic interpretation and application of non-local rule regimes with the selective adaptation paradigm.[21] In sum, norm-based theories argue that the level of commitment to international laws and rules depends on: perceptions about the legitimacy of the outside initiatives and, in particular, on the substantive character of the international norms; on how well they are incorporated into the domestic legal system and on the degree of their legalization.[22] Francks' legitimacy theory, Chayas' managerial theory and Koh's transnational process theory all argue that the manner of integration of international treaties into a domestic legal system influences the extent of compliance with these treaties.[23] Others argue that individuals' attitudes about the particular law and perceptions about its fairness and legitimacy, and about the justice and values that underpin the law are the bases for compliance with it.[24]

In conclusion, the approaches presented above provide the baseline for a discourse on selective adaptation by proposing that the analysis of a state's compliance with, and implementation of, international norms has to start with the understanding that the process of compliance is a dynamic interaction between international norms

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[19] Twining, *supra* note 17 at 9.

[20] *Ibid.* at 9-10.

[21] See more on the norm-based theories on compliance with international law in Biukovic, *supra* note 11.

[22] *Ibid.* at 455.

[23] T. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990); A. Chayes & A.H. Chayes, *New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge: Harvard University Press, 1995); H.H. Koh, "Why Do Nations Obey International Law" (1997) 106 Yale L. J. 2599.

[24] T. Tyler, *Why People Obey Law* (New Haven: Yale University Press, 1990).

and local conditions rather than a process of passive transplantation of the non-local norms. The selective adaptation paradigm evaluates the extent of implementation of the rules of international law within the domestic legal order through an analysis of three factors, perception, complementarity and legitimacy, and of the institutional context within which the non-local norms are to be internalized. It claims that in reality non-local rules are interpreted and applied according to the extent of commonality between the norms underlying those rules and the local cultural norms and practices.[25]

2. Selective Adaptation: An Alternative Path toward a Better Understanding of Compliance with International Law

The general hypotheses of selective adaptation are that the sharing of international practice rules does not necessarily indicate consensus on the normative order underlying those rules. The first hypothesis is that the behaviour of people who are involved in the interpretation and application of international practice rules is informed by their *perception* of the purpose, content and effect of the non-local rules and the norms underlying them.[26] International laws can acquire a variety of local meanings depending on local norms and practices and the local understanding of the non-local rules. Positive perceptions of international rules and their underlying norms are prerequisites for a shift toward voluntary compliance.

The second hypothesis is that *complementarity* between local and non-local practice rules and norms depends on the historical background, political ideology, policy priorities, the structural and organizational environments, the substantive and procedural precedents and other factors particular to specific rules and norms. Complementarity as a dimension of analysis may reveal the extent of accommodation of, or resistance to, international standards in the light of local conditions and needs.[27] It relates to circumstances in which the international and local norms are capable of coexisting and operating together in non-conflicting and effective ways despite the fact that they might substantively contradict each other.[28]

Finally, selective adaptation hypothesizes that compliance with non-local practices and norms depends in part on the degree of *legitimacy* accorded by the affected communities to the processes and results of interpretation and application. In other words, compliance with non-local rules and norms varies in relation to the degree

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[25] L. Jacobs & P. Potter, "Selective Adaptation and Human Rights to Health in China" (2006) 9 Health and Human Rights 113 at 114.

[26] Potter, *supra* note 7 at 480.

[27] P. Potter, "Selective Adaptation, Institutional Capacity and the Reception of International Law under Conditions of Globalization" in L. Biukovic & P. Potter, eds., *Globalization and International Trade* (Vancouver: UBC Press, 2010—forthcoming).

[28] Biukovic, *supra* note 11 at 453.

of support that members of the local community give to the process of reception of the non-local norms and the local institutions associated with that process.

Analysts are able to determine reasons other than cultural relativism for non-compliance with local norms by referring to the factors of perception, complementarity, legitimacy and institutional capacity. While cultural relativism might well be one of the reasons for non-compliance, it might not be the only reason, or the one most responsible, for the non-compliance. Selective adaptation, then, is a paradigm for evaluating compliance by: examining the relationship between international rules and norms underlying them on one hand and local cultural norms on the other hand, and by focusing on the existence of consensus between the norms of the international regimes and the local norms rather than simply alluding to cultural differences as a justification for resistance and/or non-compliance. Selective adaptation then becomes a useful discourse to reveal other factors of non-compliance, such as the lack of political will or of institutional capacity.

The next section of this article summarizes two possible applications of the discourse on selective adaptation: the first one is an analysis of China's compliance with its international obligations in the area of health and human rights[29] and the other is an examination of the capacity of China and of Japan to comply consistently with the World Trade Organization (WTO) principles.[30] Both case studies examine the factors of perception, complementarity and legitimacy of international human rights and international trade norms to test the countries' compliance with the relevant treaty obligations. A mere comparison of the legal cultures of the two countries and the normative underpinnings of international rules and standards would suggest that normative and ideological differences between the international standards and the two countries' should warrant some exceptions from application of the international standards. An analysis of the three factors of selective adaptation, however, suggests that cultural particularity is not always the most accurate determinant of success in the application of international law, although it is often used as the excuse for a lack of government commitment to international obligations.

3. Selective Adaptation of International Trade Law and International Human Rights Law

Although the international trade rules and international human rights rules developed alongside each other during the 20th century, the two fields developed parallel but separate

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[29] Jacobs & Potter, *supra* note 25.

[30] L. Biukovic, "Selective Adaptation of WTO Transparency Norms and Local Practices in China and Japan" (2008) 11 JIEL 803.

set of rules, institutions, and issues of concern.[31] Both fields expanded rapidly at the end of World War II, specifically after the creation of the *General Agreement on Tariffs and Trade* (GATT)[32] in 1947 and the *Universal Declaration of Human Rights* (UDHR)[33] in 1948. GATT would eventually lead to the formation of the WTO and its related trade regime. The UDHR was eventually followed by the *International Covenant on Civil and Political Rights* (ICCPR)[34] in 1966 and the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR).[35] The two systems appear to be completely separate even though both have the same normative underpinnings—those associated with the Western ideas of liberal democratic capitalism which are embedded in the rule of law and neo-classical economics.[36] Justice, as the empowerment and protection of individuals through constitutional rights, must be seen not only as the ultimate objective of government and civil society but as a central objective of international rules and international institutions.[37] Both international trade and human rights rules are therefore embedded in the right-based philosophies of liberalism and the Western traditions. On the other hand, non-Western traditions, such as those of China or Japan, based on different philosophies or ideologies such as communitarianism and collectivism, and ultimately with a different understanding of individual rights,[38] must follow the difficult path of compliance with international standards that endorse a very different normative context from their own. The studies advancing selective adaptation start out by recognizing this normative divide but then use the indicators of perception, complementarity and legitimacy to test each country's commitment to improving its compliance with international standards and honouring its international treaty obligations.

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[31] On the common history of international trade and human rights see B. E. Hernndez-Truyol & S. J. Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (New York: New York University Press, 2009) and E-U. Petersmann, "International Trade Law, Human Rights and Theories of Justice" in S. Charnovitz, D. Steger & P. Van Den Bossche, eds., *Law in the Service of Human Dignity* (Cambridge: Cambridge University Press, 2005) 44.

[32] *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187, Can. T.S. 1947 No. 27 (entered into force 1 January 1948).

[33] *Universal Declaration of Human Rights*, G.A. res. 217(III), UN GAOR, 3rd Sess., Supp. No. 13, UN Doc. A/810 (1948) at 71.

[34] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976).

[35] *nternational Covenant on Economic, Social, and Cultural Rights* , 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976).

[36] D. Kinley, "Human Rights, Globalization and the Rule of Law" (2002) 7 UCLA J. Int'l L & For. Aff. 239.

[37] Petersmann, *supra* note 31 at 45.

[38] For the most recent overview of Chinese and Japanese cultural and traditional particularities and their attempts to "modernize" and adapt to neoliberal underpinning of international law and global market see in particular R. Peerenboom, *China Modernizes* (Oxford: Oxford University Press, 2005) and S. M. Pekkanen, *Japan's Aggressive Legalism* (Stanford: Stanford University Press, 2008).

4.1. China's Practice: International Health and Human Rights Standards

Jacobs and Potter used the discourse of selective adaptation to examine China's commitment to international health and human rights standards it its response to two of the country's health crises—that is, the one associated with the Severe Acute Respiratory Syndrome (SARS) that first emerged in November 2002 in Guangdong Province and the one related to the treatment of persons living with HIV/AIDS.[39] The authors argued that China's response to its international obligations differed significantly in the two cases but that application-related problems could not be explained solely by the normative and ideological differences between Chinese and international human rights standards or by China's cultural particularity.

Jacobs and Potter further argue that China's initial response to SARS was secretive, as it denied the existence of the first cases of the disease for two months. According to these authors, this is China's traditional approach to handling epidemics, part containment and part secrecy, in order to avoid possible social unrest and panic. This approach was acceptable in terms of the international rules as they existed at the time. The World Health Organization (WHO) did not put in place any special rules for SARS, and so, technically, China was not non-compliant. After WHO teams were granted access to certain cities and areas to which SARS had spread, and after inaccuracies in the local heath authorities' and the Minister of Health's reports were revealed, however, the Politburo Standing Committee ordered more openness and accuracy in reporting and a more timely response to the epidemic. The health authorities then swiftly moved to implement strict, large-scale quarantine measures that went beyond the WHO guidelines. Despite this overreaction, the international reports noted that the Chinese regime's transparency and commitment to international norms increased significantly in the time from the start to the end of the epidemics.

Jacobs and Potter attribute this shift in China's practice to a shift in the country's perception of the WHO role in combating disease and, in particular, in its perception of the support offered by that organization to the Chinese health services.[40] An examination of the factors of complementarity and legitimacy revealed additional reasons why China was committed to complying with the WHO standards. The authors show that China had embraced the WHO directives and that the real problem had been the failure of local authorities to comply with the central government directives implementing international standards and to protect the national interest. Finally, the fact that international standards as promoted by WHO give wide discretion to individual member states to determine the measures for controlling disease was important in establishing the legitimacy of the international norms.[41]

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[39] Jacobs & Potter, *supra* note 25.

[40] *Ibid.* at 122.

[41] *Ibid.* at 123.

China's response to its increasing problems related to the treatment of people with HIV/AIDS has been very different than its response to SARS. Again, the traditional secrecy and denial of the problem has been apparent. Jacobs and Potter state that while China officially estimates only 840,000 cases of HIV/AIDS nationwide, the United Nations estimates that in 2010 China could have as many as ten million people living with HIV/AIDS.[42] Despite the fact that the HIV/AIDS problem was reported in the 1980s, though only regarding foreigners, it was only in 1998 that the State Council established the first working committee on HIV prevention and it was in 2004 that the first strategic plan for HIV prevention was drafted.[43] The response was non-specific and ideological, focusing on behavioral change rather than on structural and organizational aspects of prevention and control, and that left the health care professionals without adequate support from the local authorities. The Ministry of Health, and the central government in general, had not put an adequate program in place to deal with the ignorance of local authorities.

China's perception of the HIV/AIDS problem and the international standards of equal access to medical services for all persons, including those living with this disease, have been filtered through the government's concern over the long term financial commitments needed to prevent and control this disease.[44] In the case of SARS, the government commitment to its prevention was different and was certainly less burdensome financially, since SARS was a short-term epidemic. In the authors' opinion and from the perspective of complementarity, China's obligations to persons living with HIV/AIDS creates financial and social obligations that are incompatible with the national economic and political reforms that have led to the dismantling of its health care system. This dismantling ultimately brings into question the legitimacy of the government's health care system, and demonstrates that it was the lack of government commitment rather than the country's cultural particularities that resulted in the failure to provide proper health care to persons living with HIV/AIDS.[45]

4.2. China's and Japan's Practice: International Trade and Transparency Standards

Another case study that takes the selective adaptation discourse into account focuses on the importance of Chinese and Japanese local practices, their regulatory infrastructure and local cultural norms in the selective adaptation of the WTO transparency norms.[46] This author believes that a shift has occurred in China and Japan in the perception of regulatory transparency norms, causing significant administrative law reforms

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[42] *Ibid.* at 125.
[43] *Ibid.* at 125-126.
[44] *Ibid.* at 128.
[45] *Ibid.* at128-129.
[46] Biukovic, *supra* note 30.

in the two countries and improving their compliance with international standards.[47] The analysis here focuses on WTO transparency measures in the context of member implementation of the *Agreement on Sanitary and Phytosanitary Measures* (SPS Agreement).[48]

The principle of transparency is one of the main pillars of the world trade system. It is the principle that underpins the rule of law and is a key element of good governance as embedded in the Western ideas of modern statehood.[49] In that sense, the transparency of laws, administrative decisions and procedures facilitates competition, trade and foreign investment and is central to the full functioning of the world trade system.[50] Many developing countries, that are WTO members, find the SPS Agreement's transparency measures to be excessive, burdensome and costly as they require the establishment of a strong institutional infrastructure to deal with the application of international standards. In addition, the developing countries find that it is much easier for developed countries with liberal market economies to comply with these transparency requirements because their administrative law is much more suited to application of the SPS standards and monitoring procedures.[51] For example, Article 7 and Annex B of the SPS Agreement incorporate the transparency principle in recognition of the importance of public control of government's policies related to public health protection and in order to prevent "arbitrary or unjustifiable discrimination among members" and "a disguised restriction on international trade".[52] Article 7 of the SPS Agreement mandates the publication and monitoring of national SPS measures, be they laws, decrees, or general ordinances.[53] Moreover, the SPS Agreement fosters intergovernmental regulatory coordination and harmonization of standards and prevents covert protectionism by requiring that the public be notified of such measures in accordance with the provisions of Annex B, at the same time that it allows governments to impose measures that they deem necessary to protect public health in keeping with scientific principles and established international standards.[54] Again, the argument may be made that those international standards themselves are culturally influenced and that they largely mirror those of the developed countries.[55]

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[47] *Ibid.*

[48] World Trade Organization, *The Results of the Uruguay Round of Multilateral Trade Negotiations, the Legal Texts* (Cambridge: Cambridge University Press, 2003) at 59.

[49] F. Fukuyama, *State-Building: Governance and World Order in the 21st Century* (Itacha: Cornell University Press, 2004).

[50] Article X of the GATT 1994 is the central transparency-related provision that imposes an obligation on all members to the WTO to publish all applicable laws and regulations and to administer them properly.

[51] Biukovic, *supra* note 30 at 811.

[52] *Ibid.* at 809.

[53] *Ibid.*

[54] *Ibid.* at 809-810.

[55] *Ibid.* at 811.

Both Japan's and China's commitment to the GATT/WTO transparency principle has been the subject of considerable debate among scholars and strong criticism from the two countries' major trading partners. This article argues that each country has had to internalize this principle, which is based on the Western (especially US) legal tradition, into a very different legal and administrative environment—a local culture that grants great discretion to administrative agencies and the uncontested political authority of the Emperor's servants in the case of Japan and the Communist Party in China.[56] There was little or no place for judicial review of administrative rules and decisions within those environments. The most important decisions were often made in an informal way by the administrative authorities, and such decisions, not widely accessible to the general public and influencing the business community through moral persuasion, were difficult for the courts to review and for foreign businesses to comprehend.

China and Japan each changed their perception about the country's role and involvement in the world trading system in the early 1990s. That resulted in a shift in their perception of the rule-based WTO system. In brief, both countries clearly wanted to advance their economic interests. Japan's priority was to strengthen its position as the second largest trading power in the WTO while China's big power aspirations, which became more evident in the 1990s, led to the country engaging more fully in international affairs in general and trade in particular. These changes in attitude resulted in, for example, Japan's increased participation in the WTO dispute settlement mechanism[57] and China's bid for WTO membership and its commitment to the WTO regime of rights and obligations,[58] including regulatory transparency.

The complementarity factor is used here to describe the circumstances surrounding internalization of the WTO and SPS Agreement's transparency principles in Japan and China. The development of internal regulatory transparency in Japan is complementary not only to the goal of compliance with the WTO provisions but also with what another author calls "the development of Japanese aggressive legalism,"[59] the ultimate goal of which is for Japan's government to enhance that country's competitiveness in the world trade system. Japan, therefore, launched widespread administrative and regulatory reforms in the 1990s, including changes to its civil procedures and legal education.[60] As a part of that shift, Japan passed the *Law Concerning Access to Information Held by Administrative Organs* relating to the disclosure of information by government administrative agencies.[61] The statute was modeled after the US *Freedom of Information Act* but carefully and selectively adapted to Japanese local circumstances. For example, the statute does not require

[56] *Ibid.* at 813-815 and 819-820 respectively.
[57] For more on Japan's transformation and the role in WTO see Pekkanen, *supra* note 38.
[58] On China's recent transformations see Peerenboom, *supra* note 38.
[59] Pekkanen, *supra* note 38 at 4-5.
[60] Biukovic, *supra* note 30 at 814.
[61] *Ibid.*

government agencies to take proactive steps to publish or otherwise make documents publicly available. Rather, it provides to the public the right to request the disclosure of information and imposes on government the corresponding obligation to respond to such requests.[62]

The SPS Agreement's transparency provisions have been equally subject to selective adaptation. Japan's newly created central institutions, located in the International Trade Division Economic Affairs Bureau of the Ministry of Foreign Affairs, publishes detailed information on government institutions, legislation, and procedures dealing with food safety, animal health, and plant protection. While all the information is published in Japanese, however, the set of publications in English is less complete.[63] Even though Japan has complied with its SPS Agreement related obligations on the institutional centralization of food safety and of animal and plant protection, its internalization of the norms remains selective since the majority of the documents are available only in Japanese. This language barrier strengthens the position of Japanese businesses over foreign ones.

China's accession to the WTO triggered significant changes to its legal system and, in particular, to its regulatory transparency and administrative law. The *Protocol on the Accession of the People's Republic of China to the WTO*[64] imposed on China greater obligations related to transparency than other members have had to meet.[65] It also required a series of in-depth administrative law reforms in order to achieve competence and accountability at the central, provincial and municipal government levels and to ensure transparent, simplified and consistent procedures by which individuals and companies can challenge administrative laws and decisions.[66]

Note, however, that the transparency rules have been internalized selectively, primarily to advance the internal political interest of the country's central government and the Communist Party. The general duty of public disclosure imposed on all levels of government (central and local) does not apply to Party committees and they continue to make decisions with important legal implications.[67] The new regulations fail to address adequately a private party's right to a remedy for losses caused by unlawful

[62] *Ibid.* at 815.

[63] *Ibid.* at 816.

[64] WTO, *Accession of the People's Republic of China*, WTO Doc. WT/L/432 (2001).

[65] For a detailed analysis of the increasing Chinese obligations related to the WTO membership see S. Ostry, "China and the WTO: Transparency Issue" 3 UCLA J. Int'l L. & Foreign Affairs 1; J. Ya Qin, "'WTO-Plus' Obligations and Their Implications for the World Trade Organization Legal System" (2003) 37 J. World Trade 483 and K. Halverson, "China's WTO Accession; Economic, Legal, and Political Implications" (2004) 27 Boston Col. Int'l. & Comp. L. Rev. 319.

[66] For more detailed survey of administrative reforms see Biukovic, *supra* note 30 at 819-821.

[67] On 2007 Regulations on Government Disclosure of Information see Biukovic, *supra* note 30 at 820.

administrative actions. Instead, they focus on determining the precise role that local authorities are to play in making administrative decisions.[68] The shift in perception on transparency seems to be incomplete and filtered through the interests of the central government. The central government complements the WTO transparency principle with its own goals to discipline local authorities and to limit their role in the economic development of various regions of the country.

The Chinese regulations that implement the SPS Agreement and the related transparency principle are equally selective.[69] Despite the fact that the central national authority in charge of food safety, animal health and plant health has been established and is overseen by a single ministerial administrative organ that falls directly under the State Council (the highest executive state organ of China), its mandate is incomplete, and it has limited publicly accessible activities. Not all laws and implementing directives are available in English on the agency's website although all laws, regulations, ordinances and notices are available in Chinese. The formulation of national standards seems to be under the jurisdiction not only of the highest central government body but also under that of the provinces, autonomous regions and municipalities, all of which have the power to formulate compulsory standards within their administrative areas.[70] This split makes it more difficult for foreign businesses than local ones to comprehend the regulatory measures that are spread over several pieces of legislation.

In sum, the analysis of Chinese and Japanese practices with respect to their implementation of WTO obligations regarding the principle of transparency has been selective. An examination of the factors of perception and complementarity illustrate that, although the initial difficulties in complying with the international trade requirements imposed by the WTO treaties might have been associated with the cultural particularities of the two countries, their non-compliance or the less than full shift in their perception of the international norms is often the result of the lack of political will to build normative consensus between the international rules and local practices.

CONCLUSION

Selective adaptation describes the localized responses to the global unification of legal rules and institutional practices as a dynamic process of interaction between local and non-local norms that are influenced by factors of perception, complementarity and legitimacy as well as by institutional capacity. This discourse signals that progressive compliance with international regulatory norms is a complex process that takes different paths in different countries. The underlying point of the selective

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[68] *Ibid.* at 821.

[69] Detailed overview of China's implementation of the SPS Agreement and its transparency provisions see Biukovic, *supra* note 30 at 821-823.

[70] L. Biukovic, *supra* note 30 at 823.

adaptation discourse is that normative tensions lead to conflicting and non-uniform reception of international standards by various local communities and administrative bodies. If the current assessment of states' compliance with their international law obligations is taken as the starting point for the reform of international institutions and the development of a more coherent international legal order, then selective adaptation offers a valuable insight into the realities of the compliance process. It is increasingly important to understand this entire process—from the acceptance of the international obligations by state parties to the translation of these obligations into local rules and practices—especially with today's proliferation of international law and international institutions, increasing membership in international institutions, and growing diversity in the socio-historical, economic and political development of acceding states.