

# Asian Capitalism and the Regulation of Competition

Towards a Regulatory Geography of  
Global Competition Law

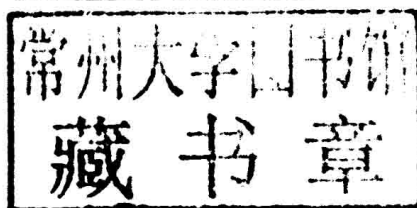
EDITED BY

Michael W. Dowdle, John Gillespie,  
and Imelda Maher

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# ASIAN CAPITALISM AND THE REGULATION OF COMPETITION: TOWARDS A REGULATORY GEOGRAPHY OF GLOBAL COMPETITION LAW

*Asian Capitalism and the Regulation of Competition* explores the implications Asian forms of capitalism and their regulation of competition have for the emerging global competition law regime. Expert contributors from a variety of backgrounds explore the topic through the lenses of formal law, soft law, and transnational regulation, and make extensive comparisons with Euro-American and global models. Case studies include Japan, China, and Vietnam, and thematic studies include examinations of competition law's relationship with other regulatory terrains such as public law, market culture, regulatory geography, and transnational production networks.

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## ACKNOWLEDGEMENTS

The subject of this book was not born of our own imagination. We stole it.

In spring 2008, Michael Dowdle ran a graduate seminar on 'Asian Regulation' at Sciences Po in Paris. As with many graduate seminars, or at least the better ones, he was as much student as facilitator, meandering his way through an idea that he was never completely certain was really a topic worth the name. All that changed when he received a term paper from one of the students in that seminar, Soojin Nam. Working out of the variety of capitalisms literature, and tying it together with John Haley's work on Japanese competition law and regulation and Kanishka Jayasuryia's work on Asian styles of law, she offered an extremely compelling demonstration that the best and most fruitful lens for exploring for an Asian regulation would likely be found in its regulation of market competition – that is, competition law. In this case, the student ended up teaching the teacher, as the good ones often do.

Since he works primarily in public law regulation, Dowdle could not go about stealing Nam's idea immediately. But opportunity came knocking in summer 2009, when the Asia-Pacific Business Regulation Group (APBRG) of what is now the Department of Business Law at Monash University, where he was at the time a Visiting Professorial Fellow, offered him a sizeable grant to organize an international workshop on some aspect of Asian regulation. He immediately recalled Nam's paper, and recognized this as a unique chance to explore her thesis further. Monash agreed, and he and the director of the APBRG, Professor John Gillespie, set about organizing the workshop.

The first issue that needed to be decided was where to hold the workshop. For this, Dowdle and Gillespie decided to approach Professor Imelda Maher at the Law School of University College Dublin (UCD). Competition law at UCD is not only renowned throughout Europe, but its pronouncedly comparative focus meshed particularly well with the unique expertise of the APBRG in the diverse practices of

business regulation found in the Asian region. UCD agreed to host the workshop under the auspices of its newly formed Centre for Regulation and Governance, and also agreed to provide additional funding.

The workshop, entitled 'The Regulation of Competition: The Case of Asian Capitalism', ran from 30 September to 2 October 2010. A nice write-up, complete with photo, can be found at [www.ucd.ie/reggov/newsevents/body,71121,en.html](http://www.ucd.ie/reggov/newsevents/body,71121,en.html). In addition to the contributors to this volume, other participants in that workshop included Dr Michele Ford of the Department of Indonesian Studies at the University of Sydney, Dr Niamh Hardiman of the UCD School of Politics and International Relations, Professor David Levi-Faur of the Department of Political Science at the Hebrew University of Jerusalem, Professor Ian McEwin of the Faculty of Law at the National University of Singapore, and Professor Colin Scott of the UCD School of Law. Soojin Nam – then completing her JD at the Harvard Law School, now an associate at Axinn, Veltrop & Harkrider LLP in New York – also participated and, in addition, served as the workshop's rapporteur.

The workshop would not have been a success were it not for the support and contributions of a number of others. These include the then dean of the UCD Law School, Professor John Jackson, research assistants John Biggins, Marek Martyniszyn, Yichen Yang, Justyna Cudo, and especially Dan Hayden, through whose immense competence Imelda secured considerable competitive advantage (as is only appropriate for a workshop dealing with capitalism). On the administrative side, the talents of Angela Ennis and Sinead Hennessy proved invaluable. We are also very grateful to the National University of Ireland – especially its registrar, Dr Attracta Halpin, and its staff – for allowing us to hold the workshop in its wonderful Merrion Square house.

In March 2012 the APBRG held a follow-up seminar on the findings of the workshop, whose participants have greatly helped us to understand the possibilities and implications of the studies we had collected. Particularly deserving of mention in this regard are Professor Brandon Sweeney of the Department of Business Law at Monash (also a member of the APBRG group) and Professor Walter Stoffel of the Department of International Law and Company Law at the University of Fribourg and a former president of the Swiss Competition Commission.

Finally, we would like to express our deepest appreciation to Philippa Youngman and her editorial team at Cambridge University Press. Being able to work with her on this project was an unqualified privilege, and the book is inestimably better thanks to her efforts.



Funding from both the Asia-Pacific Business Regulation Group and the UCD School of Law is again gratefully acknowledged.

\* \* \*

Chapter 7, 'State capitalism and the regulation of competition in China', by Wentong Zheng, was adapted from his 'Transplanting Antitrust in China: Economic Transition, Market Structure, and State Control', as published in the *University of Pennsylvania Journal of International Law*, vol. 32 (2010): 643–721.

Chapter 12, 'Addressing the development deficit of competition policy: the role of economic networks', by Frederic C. Deyo, was adapted from Chapter 11 of his book, *Reforming Asian Labor Systems*, published by Cornell University Press in 2012. We are grateful to Cornell University Press for permission to publish this adaptation.

*Michael W. Dowdle, Singapore*  
*John Gillespie, Melbourne*  
*Imelda Maher, Dublin*

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## Introduction and overview

MICHAEL W. DOWDLE, JOHN GILLESPIE,  
AND IMELDA MAHER

This is a rather unorthodox treatment of global competition law and Asian competition law. We do not explore for the micro-economic ideal type of global competition law, nor do we survey the convergences with and deviations from this ideal type to be found throughout the countries of Asia. For this we would recommend, for a start, David Gerber's *Global Competition Law*<sup>1</sup> and R. Ian McEwin's *Competition Law in Southeast Asia*.<sup>2</sup>

(Of course, there is no 'global competition law' in the positive law sense of the term. Here, following David Gerber, global competition law refers to and is identified by that projected point of convergence to which many argue that domestic competition law is or should be evolving. See Chapter 1, pp. 21–4.)

Rather, this is an exploration, not of the possible unities of global competition law, but of its possible diversities. It is founded on a proposition that global competition law is best seen as encompassed not in a single ideal type, but in a multiplicity of ideal types – in the wide diversity of roles and functionalities that markets and market competition actually have in human society. Peter Hall and David Soskice have shown us that there are many capitalisms, not just one.<sup>3</sup> This being the case, the same would hold true for capitalism's way of structuring and regulating market competition. The future of global competition law does not lie in a particular 'sovereignty' but in pluralism.

<sup>1</sup> David J. Gerber, *Global Competition Law: Law, Markets and Globalization* (Oxford University Press, 2010).

<sup>2</sup> R. Ian McEwin, *Competition Law in Southeast Asia* (Cambridge University Press, forthcoming).

<sup>3</sup> Peter A. Hall and David Soskice. 'An Introduction to Varieties of Capitalism', in Peter A. Hall and David Soskice (eds.), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001), pp. 1–70.

For centuries, pluralism was a defining feature of the East and Southeast Asian legal world. It remains woven deeply into many regulatory systems there. As we shall see, it is reflected in Asian capitalism in the same way that the varieties of capitalism found in the North Atlantic reflect the different ways that national legal systems there regulate corporate governance. And it is reflected in the diversity of models that Asian countries use to regulate competition. In this sense, we examine this Asian diversity, this Asian regulation of competition, in order to find insights into our own condition.

This volume is divided into five parts. The first part maps out the various ideas, concepts, and concerns that frame this volume's investigation. The second part then looks more specifically at issues surrounding the core concept relevant to our investigation, that of competition. The next two parts then explore how the regulation of competition in Asia plays out against this more global concept. Part III looks at competition regulation in the representative Asian countries of Japan, China, and Vietnam. And Part IV then looks at particular cross-cutting experiences in Asian competition regulation, namely the special problems of peripheral environments and issues of public law and regulatory independence. Finally, Part V looks at Asian competition from an evolutionary, dynamic perspective, exploring patterns of change and possible evolutionary trajectories, both internally and from the perspective of a global competition law.

Part I sets out the issues and conceptual frameworks that will inform our investigation. In Chapter 1, Michael Dowdle introduces us to the particular topics and issues that this volume seeks to explore. As discussed above, this volume explores the relationship between Asian capitalism and its way of regulating competition (its 'competition law') and the global movement towards a global competition law. In order to conduct such an exploration, we need first to understand what is Asia in the context of Asian capitalism, what are the defining features of Asian capitalism, and why Asian capitalism's particular regulation of competition provides an especially promising lens for interrogating the emerging transnational movement towards a global competition law. This is the focus of Chapter 1.

Chapter 1 also explains the concept and phenomenon of what this volume terms 'regulatory geography', which brings the legal-theoretical construct of 'global competition law' into communication with the economic-geographical construct of 'Asian capitalism'. The idea of regulatory geography stems from a recognition that asymmetries in spatial

distributions of economic and cultural capacities, as detailed for example in the disciplines of economic geography and cultural geography, generate corresponding spatial asymmetries in regulatory needs and capacities. Dowdle shows how this means that global competition law, as it is presently conceived, is not uniformly viable across geographic space in the way that it assumes itself to be. He then applies this resulting regulatory geography of competition law to 'Asian capitalism', generating in the process a speculative and preliminary 'mapping' of Asian competition regulation that details possible spatial patternings of diversities in regulatory issues and needs, which include diversities that are internal to Asian capitalism itself, and diversities that might distinguish Asian capitalism as a whole from North Atlantic varieties of capitalism.

Whereas Dowdle looks at how global competition law is likely to impact Asia, David Gerber, in Chapter 2, examines how Asia is likely to affect global competition law. As he describes, at its heart global competition law is a project of global convergence in national competition law regimes. Gerber explores what effect Asian experience with competition, much of it very recent, might have on this desired dynamic of convergence. When viewed from the perspective of formal law, Asia's recent experiences do appear convergent in the way in which global competition law projects. But, as he shows, underneath this formal surface lies a fair number of historical, economic, and social dynamics that render some of this apparent convergence illusory. Ultimately, he concludes that in order for this convergence to proceed, global competition law will probably have to evolve so as to better accommodate at least some of the challenges and issues of Asian capitalism, just as Asian capitalism is evolving so as to accommodate the agenda of global competition law.

The volume will return to re-examine the issues and hypotheses raised in this first part in its final chapter, but before doing so, these hypotheses and the value of the analytic frameworks that gave rise to them need to be interrogated through the lens of actual practice. This is done through the studies that make up the remaining four parts of the volume.

Part II looks at the political economic dynamics that structure, inform, and constrain the regulatory aspirations of global competition law. Imelda Maher first examines the institutional structure and foci of that law, focusing in particular on the networked structure that it is adopting on a more global level, and the agencification that it is adopting at the national level. These two institutional developments derive from the same phenomenon, a desire to isolate competition regulation from politics. Domestically, this isolation is promoted through the use of

independent regulatory agencies. Globally, it is promoted through the establishment of regulatory networks that allow these agencies to communicate and co-ordinate with each other directly, without having to pass through formal state-to-state protocols that are designed for the pursuit of global politics. Maher concludes by showing how this effort to separate competition from politics has proved to be problematic even in the contexts of the North Atlantic states, where the institutionalization of this separation has been most robustly explored and pursued. This separation and its problematics will be further explored specifically in the context of Asia by Tony Prosser in Chapter 10.

In Chapter 4, Ngai-Ling Sum uses a cultural political economy approach to explore the evolving ideological frameworks that global competition law uses to drive its convergences. Here, the story becomes more complicated, as the international community has over the years been forced to adopt a number of different justifications for the global adoption of particular laws and structures for regulating competition. Originally, this ideology focused on the global good of free trade. But with the collapse of the Doha Round of international trade negotiations among the membership of the World Trade Organization (WTO), it evolved into an ideological focus on economic development. More recently, the global competition community seems to have given up the search for an ideological underpinning, and has instead turned simply to presenting itself as an expert in economic regulation, whose regulatory prescriptions, proffered primarily in the particular formularies known as 'best practices', are recommended simply on the basis of the advocating agency's claim to have superior knowledge of the issue.

Bob Jessop's chapter that follows helps to explain the ideological instability detailed by Sum. Jessop shows us that underneath and concealed by the unified conceptual front presented by global competition law is an extraordinarily complex melange of competing and often contradictory concerns, interests, goals, and understandings. Jessop shows how market competition actually encompasses and is shaped by a huge diversity of often competing social, political, and economic dynamics, and that neither competition law nor the orthodox, neoliberal understanding from which it derives – of what it is and how it is that market competition contributes to social welfare – get anywhere close to adequately capturing these dynamics, and often ends up blinding itself to crucial contradictions within its particular world view – such as the internal tension between competition and 'competitiveness', or between competition and innovation. Jessop concludes that, given this complexity,



standard Weberian conceptions of regulation may not be up to the task, and that competition regulation may require more heterarchical forms of regulation, sometimes known as meta-governance. The volume returns to this issue in its concluding chapter.

In Parts III and IV we look at how competition regulation actually plays out in various countries and with regard to particular issues in Asia. Part III focuses on particular countries. These include Japan, a representative core economy (as per Dowdle's mapping in Chapter 1), China, Asia's principal intermediate economy, and Vietnam, a more peripheral economy. These will be followed, in Part IV, by chapters looking specifically at how Asian competition regulation manifests itself in economically peripheral environments, and at the interplay in numerous Asian countries between politics and competition policy, as particularly expressed in the notion of regulatory independence.

In Chapter 6, in his investigation of Japanese engagement with competition regulation, Simon Vande Walle documents Japan's well-recognized ambivalence towards North Atlantic – and particularly American – models. Basically, he finds that, when the economy is doing well, Japan tends to embrace a more managed form of competition that is in conflict with standard global competition law understandings of how competition should be regulated (and towards what ends). But when the economy stagnates, as it has done particularly over the past two decades, Japan has tended to find the orthodox, North Atlantic regulatory perspective from which global competition law derives more attractive. In demonstrating this, he shows that conventional portrayals of Japan's economic-regulatory experiences as either confirming or disproving the universal applicability of the neoliberal presumptions that inform global competition law are too simplistic. Japan both embraces and rejects this model in different ways and at different times.

In Chapter 7, Wentong Zheng introduces us to China's competition regulation regime. China's efforts to regulate competition through law (as opposed to simply through the party-state bureaucracy) is of relatively recent vintage, and it remains to be seen how many of its positive, legislative articulations will play out in practice. Like that of Japan, China's approach to competition regulation is distinctly fragmented. But whereas Japan's fragmentation articulates itself temporally, through cyclical changes in legislative approach, China's fragmentation is coeval, articulating itself in the framing legislation itself. It is a fragmentation in which different sectors of the economy are subject, sometimes formally,