Globalization and its limits

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Chapter 10: Globalization and its limits: The Making of International Regulation

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10.1 INTRODUCTION

Recent developments, particularly in Europe, make it difficult to ignore the debate around globalisation. Mergers, acquisitions and alliances are rapidly bringing about the reconstruction of many industries over and beyond national boundaries. Economic activities and transactions cross over national borders, making transnational mechanisms of governance increasingly likely and necessary. Some have argued that global pressures are leading, on a world-wide level, to the increasing convergence of governance and organisational structures and of business knowledge or practices (Chandler 1990, Ohmae 1995, Scott *et al*. 1994, Alvarez 1998). There is ample evidence, though, that local or national institutional arrangements still play a significant part when it comes to shaping economic structures and constraining economic behaviour (Whitley and Kristensen 1996, Hollingsworth and Boyer 1997). Whether these institutional path dependencies do really imply the increasing divergence of national business systems in spite of global competition (Whitley 1999, Sorge or Kristensen and Zeitlin this volume) or whether they create the conditions for a

hybridisation of global pressures (Lane this volume) is still a matter for debate. In any case, though, it seems that the most pressing and interesting questions do lay at the point of intersection and interaction between transnational trends on the one hand, national or local actors and institutions on the other (Arias and Guillén 1998, Djelic 1998, Morgan introduction to this volume).

This chapter approaches the issue of regulation from such a perspective. Regulation – or the setting of standards (Morgan introduction to this volume) – is an important mechanism for the co-ordination of economic activity. The definition, interpretation and implementation of regulation have traditionally been, at least in the age of the nation-state, the sole prerogatives of local and in particular national state authorities (McCraw 1984, Weiss 1988). However, since the end of the Second World War, the trend has been for regulation to take on a transnational dimension. Still, little is known about the making of regulation in the international environment or about the way transnational regulatory standards are then implemented, whether in supranational, national or subnational arenas. The objective of this chapter is to go some way towards filling this gap.

We focus in turn on competition regulation and on the regulation of CFC products as two examples of standards with a transnational if not global impact. Rather than taking these regulatory standards for granted and assessing their impact on the behaviour of economic

actors, we define them as our dependent variables. What we want to understand, through our empirical cases, is the way in which transnational regulation has been and is constructed, diffused, interpreted and implemented. With this objective in mind, we engage in a double exercise in deconstruction, looking for conditions, actors and mechanisms explaining the emergence, diffusion and institutionalisation of transnational regulatory standards with respect to competitive behaviour or CFC production. We pay particular attention to the interplay between transnational and national spheres, pointing to a highly contested process in both cases although with quite different characteristics. In the end, the comparison allows us to draw more general conclusions about the contribution of transnational regulation to structural and behavioural convergence. It allows us to reflect, in other words, on the process of globalisation and on its limits.

10.2 A HYBRID NEO-INSTITUTIONAL FRAMEWORK

The broad claim that economic activity and interactions are embedded in wider sets of environmental or institutional constraints is a good starting point to approach the issue of regulation. Regulation as the formalised expression of standards and norms is indeed hard to disentangle from the contexts of its construction, diffusion, interpretation and implementation. This, though, tells us little if anything at all. Important questions remain, bearing on the nature, scale or scope of that institutional context, on the extent to which it allows action and is likely to undergo change (Djelic 1998). Existing variants of neo-

institutionalism differ quite significantly in fact on all those dimensions (Clemens and Cook 1999). As they stand, none of these variants is able to grasp on its own the full complexity of the issue at hand, particularly with respect to the interplay between transnational and national spheres. We propose as a consequence a combination or crossbreeding of two of those variants that are labelled respectively 'phenomenological' and 'historical' neo-institutionalisms (Djelic 1999).

Phenomenological neo-institutionalism (DiMaggio and Powell 1983, Scott *et al*. 1994) defines institutions as sets of cultural rules and norms. The latter have had a tendency, particularly throughout the second part of the twentieth century, to become more and more similar across national boundaries – rationalisation describing the overall evolution. In this research tradition, national economies and their constituent parts are defined as emergent social constructions embedded in larger institutional environments understood as sets of cultural rules and norms. Homogenisation of institutional environments across national boundaries logically drives worldwide isomorphism in structural arrangements and behavioural scripts, including – but not only – in the economic and business realm. Historical neo-institutionalism, on the other hand, emphasizes the strength and historical significance of cultural and structural rules defined at the national level (Dobbin 1994, Fligstein 1990, Campbell, Hollingsworth and Lindberg eds. 1991, Hollingsworth and Boyer 1997, Whitley 1999). Historically, the argument goes, different sets of beliefs or structural

arrangements have been stabilised and institutionalised at the level of each nation, often through the key role of state actors or political institutions, creating the context for different logics of action and multiple 'rationalities'. Ultimately, national systems of economic organisation are shaped by those stable and long-standing rules and structural legacies.

If we are going to focus on the interplay between the transnational and the national – and not on one sphere or the other – it seems that a theoretical cross-breeding between these two variants of neo-institutionalism would indeed make sense. 'Phenomenological' neo-institutionalism is an interesting lens to look at the structuration of a transnational world, its workings and mechanisms. Questions, on the other hand, about the origins of such a structuration process, about its local impact and about the possible associated process of 'translation' or reinterpretation at the national or sub-national level, fit much better with the 'historical' variant of neo-institutionalism.

Using such a hybrid theoretical framework, we also insist upon an historical perspective and analysis. This allows us, for both sets of regulation, to delve more into the questions of the origins and to look at processes, in particular when it comes to diffusion. This also allows us to point, beyond institutional constraints, to the role of actors – whether organisations, networks or individuals. This leads us to ask, finally, about the extent of local adaptation or reinterpretation in each case and about the likelihood of full-scale convergence.

10.3 COMPETITION: TURNING LOCAL STANDARDS INTO GLOBAL ONES

In our contemporary world, rules of competition appear to transcend national boundaries. Over the past fifty years or so, around fifty countries have adopted similar sets of principles that set limits to anti-competitive practices and, in particular, regulate cartels and loose agreements. Under the labels ‘antitrust’ or ‘antimonopoly’, these principles justify and frame the intervention of national or cross-national agencies in charge of regulating competition. The American Federal Trade Commission (FTC) or the European Commission might reach different conclusions on a given case. Their overall philosophy, though, is not too far apart. Neither is it in contradiction with the general principles that shape the understanding of competition regulation characteristic of the World Trade Organisation (WTO).

A foray into history shows that similarity, here, is not a chance happening. Nor has it been driven by a pure logic of efficiency or by the presumed ‘natural laws’ of the market economy. We point to a direct thread linking the numerous versions of antitrust or anti-monopoly standards, policies and procedures to the 1890 American Sherman Antitrust Act. Without prejudging of the legitimacy, in economic and efficiency terms, of antitrust or anti-monopoly standards, we argue that these standards are neither universal nor neutral. What we find is that a particular understanding of competition regulation, that originally emerged in the

United States under unique institutional and historical conditions, came to be diffused and transferred during the twentieth century on a nearly global scale.

The transfer took place in two main stages. The first stage started immediately after the end of the Second World War. Competition regulation principles were then exported from the United States into Western European countries as well as into the emerging set of cross-national institutions such as the GATT, the European Coal and Steel Community or the European Economic Community. The second stage came after 1989 with the opening and radical transformation of former communist countries. The logic behind the transfer was, in both periods, at least as much political and geopolitical as it was economic. Unsurprisingly, the process was not smooth. On the ground, it ran up against pre-existing legacies and it often encountered resistance and obstacles. This accounts in part for local differences in the interpretation and implementation of antitrust or anti-monopoly principles.

10.3.1 Context: the construction of an American antitrust tradition

In the United States, discussions on a legislation to regulate interfirm cooperation and competition started in a period of significant economic turbulence. During the years following the Civil War, American firms had to face major disruptions in their environments, to which they reacted by searching for order and control through collusion and cooperation. Loose arrangements or agreements, cartels or pools multiplied at the time, creating significant

concern within civil society about their increasing power (McCraw 1984, Chandler 1990, Fligstein 1990). The Populist movement played upon the fear of farmers and small independent business owners, calling for a regulation of competitive practices and a breaking up of the most disruptive aggregates.

While the pressure stemming from this constituency was instrumental in bringing the 'trust' issue on the agenda of Congress, some Congressmen had their own, more ideological, reasons to push for competition regulation at the federal level (Thorelli 1954). At the end of the nineteenth century, American conservatism was a mixture of classical economics and social Darwinism (Hawkins 1997). Competition, in this ideological framework, was a key value and the sole guarantee of a healthy economy and society. The initial intent of many Congressmen was thus to preserve and impose 'full and free competition' within the federation of American states (Thorelli 1954). The curbing of cartels or trusts, called for by farmers and small business owners, would be a mere side effect of this more general fight for competition and freedom.

10.3.1.1 The Sherman Act

The Sherman Antitrust Act, finally enacted in 1890, fell somewhat short of this ambitious intent. Section I declared illegal 'every contract, combination in the form of trust or otherwise, or conspiracy' but only as long as they were '*in restraint of trade or commerce'*

(Thorelli 1954). While inclusion of the 'commerce clause' – as the above excerpt came to be known – and the limits it set to the law did not reflect the original intent of Congressmen, it had not come about by chance. This rewording reflected a number of institutional legacies and constraints weighing on the legislator. In particular, the federal origin of the Sherman Act set limits to its scope and potential reach. The very nature of American political institutions and the existence of two levels of jurisdiction, federal and state, constrained the legislative freedom of Congress. Congress could only work within the boundaries of its competencies – federal level legislation, interstate or foreign relationships. It could not deal with anti-competitive behaviour taking place within the borders of a given state. One of the first antitrust cases, US vs E.C.Knight (1895), clearly illustrated and in fact institutionalised the impact of the 'commerce clause' on the American antitrust tradition.

10.3.1.2 US vs E.C. Knight or the impact of the 'commerce clause'

In 1892, the Federal Government filed suit against the 'sugar trust', on grounds of monopoly and attempt to monopolise. Having merged five formerly independent companies, the 'sugar trust' controlled more than 90% of the sugar refining capacity of the United States. In January 1895, the Supreme Court dismissed the case. Justices had made a distinction between manufacturing and production on the one hand, interstate and foreign commerce on the other. Since all production sites of the sugar trust were located within one state, the Sherman

Antitrust Act, the Supreme Court argued, could not apply. Competency lay with state judiciaries.

US vs E.C.Knight became a building case for the American antitrust tradition and the particular reading of the Sherman Act then made by the Supreme Court was to be used in many cases to follow. With respect to cartels or loose agreements, which often crossed over state boundaries, the Sherman Act was read as a prohibition law. These forms of collusion became per se ‘unreasonable restraints of trade’. On the other hand, tight combinations and mergers that implied legal incorporation within one state could escape prosecution and were thus generally deemed ‘reasonable’. Only extreme forms of concentration that created outright monopolies with a clear impact on trade were to be prohibited (Taft 1911). Emerging from early Supreme Court readings, this interpretation was to have significant and unexpected consequences for the American economy.

Following upon the decision in the E.C.Knight case, corporate lawyers were soon encouraging their clients to merge rather than cooperate informally, thus launching the first and most dramatic merger wave in American industrial history (Thorelli 1954, Sklar 1988, Fligstein 1990). The ensuing reconstruction of the American economic landscape along oligopolistic and corporate lines was thus, and ironically, the partially unintended and contingent consequence of a legislation that had originally been enacted under pressure from

advocates of small-scale, competitive capitalism (Thorelli 1954, Fligstein 1990, Roy 1997). The American antitrust tradition that was born through this process was quite unique, shaped as it was by peculiar historical legacies and institutional constraints. Somewhat later in the century, its impact would come to be felt in many other countries as well as in the space in between, where cross-national transactions were taking place.

10.3.2 Transfer and the main actors

The widespread impact of American antitrust principles was the consequence of a large-scale and cross-national process of transfer. The two main stages of this process had that in common that they corresponded in history to periods of American geopolitical strength. In 1945, the USA had achieved unprecedented weight, both geopolitical and economic. In the years that followed, former allies and enemies alike, in the Western sphere, became dependent upon the superpower for survival and revival means. In 1989, communist promises were fully exposed as a sham. The American dream was left relatively uncontested and the USA remained as the only world superpower.

In both periods, power on one side and dependence on the other led to the temptation of homogenisation. There was an attempt to lay the foundations of a new economic and political world order in 1945 and an attempt to expand them in 1989. The transformation of economic and social structures was seen as the surest way to anchor weak and dependent countries on

the side of ‘peace and democracy’ (Hoffman 1951, Hogan 1985). In both periods, American models and actors played a significant role.

10.3.2.1 American missionaries

In the post Second World War period, American public agencies in charge of foreign affairs set themselves an ambitious goal. The State Department in Washington, the American Military Government in Germany or the Economic Cooperation Administration, the agency running the Marshall Plan, saw it as their mission to fight in Europe the ‘communist party line’ thanks to the ‘American production line’ (Hoffman 1951). This meant a radical structural transformation of European economies and industries and the redefinition, in particular, of trade patterns on the old continent using the American economic space as the model of reference (Hoffman 1951, Van der Pijl 1984, Hogan 1985, Djelic 1998). A small group of progressive American businessmen, active in Washington since the New Deal, was particularly involved in this project. In their desire to give the rest of the free world ‘an opportunity to learn of the principles and advantages of free enterprise’, these American missionaries singled out as one of their core priorities the transfer to partner countries of American competition legislation (Hoffman 1951, Hogan 1985, Djelic 1998). They saw the American antitrust tradition as both a key element of the American model and as a potentially powerful tool of its transfer to other countries.

After 1989, American involvement in the transformation of Eastern European countries was less visible although quite real. Here again, the *rationale* was that economic prosperity and a democratisation of economic structures were the preconditions to political stability and peace. And a democratisation of economic structures seemed to imply the transfer of antitrust and anti-monopoly policy (Pittman 1996). This time, a key actor on the American side was the Antitrust Division in the US Department of Justice. Russell Pittman, then Chief of the Competition Policy Section of the Antitrust Division was, together with other American experts, closely involved in the drafting of Eastern European anti-monopoly acts (Joskow and Tsukanova 1995, Pittman 1996).

10.3.2.2 European Modernisers

The transfer had the support, at all stages, of small groups within national communities. American missionaries worked together with local actors to push along their ambitious objectives. In Germany, the main local counterpart was Ludwig Erhard, Minister of Economic Affairs and then Chancellor. In the context of European negotiations, the network around the Frenchman Jean Monnet turned out to be key. In Russia, Igor Gaidar was instrumental. Interestingly, these small groups were quite marginal in their own country. Their real influence depended upon the control they had on key positions of institutional power, on their ability to preserve this control over time and on the support granted to them by foreign and in particular American actors.

10.3.3 Stages of transfer and negotiations

The first stage of the transfer process, after 1945, had two sides to it. On the one hand, American missionaries worked at the national level, imposing the American model of competition regulation or fostering its voluntary adoption in dependent countries. The case of Germany is presented below as an example of that strategy. On the other hand, Americans initiated or encouraged the setting up of cross-national institutions that would become powerful relays of the American tradition of competition regulation. The European Coal and Steel Community (ECSC) was negotiated in this context. The second stage of transfer followed the fall of the Berlin Wall and is illustrated below by the Russian case.

10.3.3.1 The case of Germany – from coercion to imitation

In 1945, Allied forces assimilated the horrors of the Nazi regime with the peculiar structure of German industry. Parallels were drawn, in particular, between political authoritarianism and state-coordinated cartelisation of the industry (Martin 1950). When West Germany became, in 1947, a key bulwark in the fight against communism, Western occupying powers thus defined it as their task to bring about not only a democratisation of the political regime but also a radical transformation of the German economic and industrial structure. The overwhelming power of the USA in the western alliance meant that the economic model would be American and an important feature of that model was the peculiar definition of

competition regulation embodied in the antitrust tradition (Berghahn 1986, Schwartz 1991, Djelic 1998).

In 1947, the American Military Government imposed a decartelisation and deconcentration law with effect in what would become the Federal Republic of Germany. This law could easily be traced to the American antitrust tradition (Damm 1958, Taylor 1979, Djelic 1998). With respect to restrictive practices, cartels, combines or trusts, it was a prohibition law but it said little about size or concentration of production. While intent on transferring to Germany the characteristically American fight against cartels and restrictive practices, American occupation authorities also advocated in fact for the German industry an oligopolistic structure. The expectation was that American inspired competition regulation would lead in Germany – as it had done in the USA – to the emergence of oligopolies in most sectors, with firms large enough to allow economies of scale and scope. Americans were of the mind that 'oligopolies, when policed by the vigorous enforcement of antitrust and anticartel laws as in the United States, yield pretty good results' (OMGUS, Bd18).

At the same time, American missionaries were quite aware that radical transformations of that sort would only outlast the period of acute geopolitical dependence if Germans themselves actively appropriated them. In March 1948, American occupation authorities thus asked German agencies to prepare and submit a trade practice law dealing with the problem

of agreements and cartels. This law, it was agreed, once accepted by German and Allied authorities, would replace the 1947 legislation. It took ten years for the Germans to finally agree on a bill and the Federal Law against Restraints of Competition was only enacted in July 1957.

The final version of the German law was on the whole quite congruent with American antitrust tradition. Cartels and loose agreements were identified as unreasonable combinations in restraint of trade and outlawed per se. However, the German legislator provided for a number of exceptions. The Cartel Office (*Bundeskartelamt*) created in 1958 and modelled on the American Federal Trade Commission was granted and would come to exert a certain amount of leeway through enforcement of the law and monitoring of the exceptions (Damm 1958).

10.3.3.2 Towards the definition of cross-national standards: European competition regulation

While the United States were encouraging or imposing the adoption by individual nations of their antitrust tradition, they were also pressing for initiatives with a cross-national dimension. In Western Europe, the French led the way by proposing in May 1950 a plan for pooling European coal and steel industries. Jean Monnet and the French Planning Council were behind the proposal. To alleviate American fears that this project might lead to the

emergence of a European wide cartel, Monnet insisted that the goal was to create a competitive space to stimulate an increase in production and productivity (Monnet 1976, Djelic 1998). And in fact, a small group of American experts were hard at work in the background, preparing antitrust provisions for the future coal and steel community. Robert Ball, a long-term friend of Jean Monnet was one of them. But the key figure was Robert Bowie, legal counsel to the High Commission in Germany, who was also closely involved in the drafting of the German anticartel act. A former Harvard Law School professor, Robert Bowie was an antitrust specialist. He came down to Paris in June 1950 and wrote the provisions that would become articles 60 and 61 of the ECSC treaty (Monnet 1976).

Article 60 dealt with cartels and loose agreements, prohibiting them in principle. However, the European enforcement agency, the High Authority, was granted a certain amount of leeway to authorise, in times of crisis, a number of exceptions. Article 61 of the ECSC treaty dealt with abuses of market power due to concentration. In line with American antitrust tradition, only ‘unreasonable’ concentrations were prohibited. Concentrations and mergers that could be shown to lead to increased efficiency and productivity without representing a threat to competition could be authorised. Articles 60 and 61 of the ECSC treaty have a particular historical significance because they were transferred to the 1957 Rome treaty. As articles 85 and 86, they thus have become the foundation of competition regulation on the Western European market and in today’s European Union (Monnet 1976).

10.3.3.3 Multisided negotiations: the case of Russia

On March 22, 1991, an antimonopoly law was adopted by the Russian parliament. The 'Law on Competition and Limitation of Monopoly Activities in Goods Markets' had been in the making for a little less than a year. A Federal 'Committee on Antimonopoly Policy and Support of New Economic Structures' (GKAP) and 80 local antimonopoly committees (AMCs) were created on the model of American and European regulatory agencies and put in charge of enforcement. American but also OECD and European experts had been involved in the process. Quite early on in fact, a debate had emerged as to whether Russia should model its anti-monopoly act on the American original or on the European version. In the end, the latter strategy prevailed and a close look at the Russian law shows that it takes after the European Economic Community version of competition legislation rather than directly after the American original (Pittman 1995). Allowing for exceptions, the European version of antitrust seemed less stringent and extreme than the American original. The very idea of competition and competition regulation being so radically foreign, in the early 1990s, to Russian economic traditions, the preference for a less extreme version made sense. To both foreign advisors and the Russian legislator, it increased the chances that such legislation would be accepted and implemented (Joskow and Tsukanova 1995, Pittman 1996).

In line with both American and European versions of antitrust, the Russian antimonopoly law did not identify market dominance or firm size per se as a problem. Only an abuse of dominant position could be prosecuted. With respect to cartels and loose agreements, on the other hand, the Russian law differed from both American and European acts. Cartels and loose agreements were not forbidden per se and the Russian law was not a prohibition act. The Russian legislator built upon the European version of antitrust, integrating into the text of the law the possibility for exceptions. Only abusive agreements and cartels were as a consequence deemed illegal and those were defined as cartels and agreements that 'have or might have as their result a material limitation of competition'. The Russian law, furthermore, allows that 'in exceptional instances', even those abusive agreements or cartels might be deemed 'lawful, if the economic subject proves that his actions facilitated or will facilitate the satiation of goods markets, the improvement of consumer properties of goods, and an increase in their competitiveness, particularly on the foreign market' (GKAP 1991).

10.3.4 Constraints and limits

An historical perspective thus points to a common thread – a common 'genetic code' – linking different versions of competition regulation. These different versions can be traced to an American antitrust tradition, which was transferred to other parts of the world during the twentieth century. Beyond common origins, though, local versions of antitrust exhibit a number of important differences. These differences can be explained by the fact that the

transfer has been a contested process. They also reflect local institutional constraints that have had an impact, in particular, on implementation.

10.3.4.1 Legacies, obstacles and resistance

The project of transferring on a large-scale the peculiar American understanding of competition regulation was not, historically, an easy process. It had to face, at each stage, pre-existing legacies, obstacles and resistance. Whether in Germany, Europe or Russia, the most violent reactions initially came from local business communities. In Germany, a powerful and organised opposition slowed down considerably negotiations around a German anticartel act. In fact, to prevent these negotiations from failing altogether, Americans had to keep up pressure for nearly ten years and to provide significant resources, in particular legal counsel. The resistance of business communities to a foreign understanding of competition also created difficulties for ECSC negotiations. This time again American pressure proved instrumental in preventing the negotiations from falling apart (Damm 1958, Djelic 1998). In the early 1990s, the emergent Russian business community was also the main obstacle to the adoption of American-inspired competition regulation principles.

The consequence of resistance and obstacles was that the transfer has implied partial reinterpretation and local translation. At each stage of the transfer, foreign advisors and local legislators have had to adapt the original tradition to local conditions and constraints. The

American Sherman Act was a prohibition law when it came to cartels and loose agreements, outlawing all of them. In its dealings with mergers and tight combinations, it was an abuse law allowing most of them except in cases of abusive or monopolistic market power. The German anti-cartel law was in principle still a prohibition law but it reflected a difficult drafting process and in the end it was a compromise. Under pressure from the German business community, the legislator had allowed a number of exceptions. Under certain conditions, some cartels were treated as ‘reasonable restraints of trade’ that could be tolerated and even fostered. Both the European and Russian versions of antitrust have retained the principle of allowing for exceptions and, as a consequence, they have become in practice abuse laws not only in their dealings with mergers or tight combinations but also in their dealings with cartels or loose agreements.

10.3.4.2 The problem of implementation

Beyond the text of the law and its evolution at each stage of the transfer, it is also important to consider the problem of implementation. The Sherman Antitrust Act already left a lot of space for interpretation. The role of the Supreme Court and enforcement agencies in shaping the act through its implementation have been quite significant. This space for interpretation through implementation remained at all stages of the transfer process, which turned an American tradition into a ‘universal’ regulation. The German Cartel Office or the European High Authority had a certain discretion in their interpretation and use of the various clauses

of exceptions allowing the constitution of cartels in times of crisis or in certain core industries (Berghahn 1986, Maxeiner 1986). In the Russian case, definitions and concepts were sufficiently vague that regulatory agencies and judicial courts were bound to have a significant influence with respect to implementation. Circumstances for exemption were in particular so broadly defined that implementation became key.

Similarities in the text and in the contents of the law are therefore not enough to point to a universal antimonopoly legislation. Important questions are those of implementation and enforcement. The nature and characteristics of the institutions in charge of interpreting the act and of enforcing it are important variables. The agenda, value structure and set of resources of the groups managing to gain control over these institutions are also naturally important. In the case of Western Europe, the transfer of the American antitrust tradition after the end of the Second World War had come together with a large scale and institutionalised training and technical assistance program. The objective had been to familiarise with or even socialise into the antitrust tradition those Europeans who would be in charge of interpreting, implementing and enforcing the antitrust acts. This particular dimension of the transfer process has not taken place so far, at least to the same extent, in Russia. The lack of a systematic and large scale technical assistance program and the absence of long term and institutionalised links between Western and Russian regulatory agencies are clearly decreasing further the

likelihood that the Russian law will be implemented and enforced in the tradition originally defined in the United States.

10.4. CFC REGULATION: NEGOTIATING A GLOBAL FRAMEWORK

We now turn to our second case of international regulation, which exemplifies quite a different pattern of emergence and diffusion. In contrast to competition regulation, the regulatory framework for ozone layer protection is not easily traceable to a purely national tradition. Rather, common standards emerged in this case from a process of cross-national negotiation and in response to a global issue.

In 1974, two scientists from the University of California accused chlorofluorocarbons (CFCs), a set of chemical compounds, of dangerously depleting the stratospheric ozone layer. The ozone layer protects the earth against UV rays and its depletion could present important dangers for humans, including greater risks of cancer. Increasing evidence supporting the hypothesis ultimately led to the Montreal international protocol, in 1987. The protocol set up an almost global prohibition of CFCs with a dramatic impact for the CFC industry. In this section, we describe and deconstruct the process that has led to such a broad regulation. We ask about key actors and conditions pushing it along. We also look into constraints, in particular at the national level, that set clear limits to a global homogenisation of CFC

regulation (for an extensive analysis and for methodological information, see Bensedrine 1997).

10.4.1 The negotiation process and its main stages

In an immediate response to the 1974 accusations, the USA, Canada, Germany, and Sweden started regulating CFCs, limiting in particular their use in aerosols. Then, in April 1977, the American administration organised a conference with the aim of encouraging all CFC producing countries to prohibit CFCs in aerosols. At this stage, the American administration seemed to favour national regulations in order to avoid a lengthy and difficult process of international negotiation. In December 1978, representatives from 14 countries met again, this time in Munich. Americans gave an overview of their recently enacted national legislation prohibiting CFCs in aerosols. By this meeting, the official American position had evolved significantly and American representatives in fact appeared to encourage a 'unified global approach'. Only a small group of countries aligned themselves on this position. Together with the United States, Canada, Sweden, Norway, Denmark, Holland, and West Germany came to constitute the core of what would later be called 'the Toronto group'. In a 1980 conference hosted by Norway, representatives from these countries called for an immediate reduction in the use of CFCs. In contrast, the European Community remained, as an entity, quite opposed to the elaboration of an international framework, although it decided at the time on partial CFC prohibition in aerosols.

The first half of the 1980s was less busy. The de-regulatory program of the Reagan administration combined with the persisting lack of strong evidence regarding ozone layer depletion to slow things down. There was a widespread perception, furthermore, that prohibiting CFCs in aerosols was enough. However, the discovery in 1985 of the ozone hole sparked renewed activity with respect to CFC regulation. Officials from the American Environmental Protection Agency (EPA) again took steps to bring about an international agreement. The American ozone diplomacy became in fact, at that time, more active than ever (Benedick 1991). EPA officials and American diplomats worked together with the United Nations Environment Programme (UNEP) and American agencies such as the NASA or the National Oceanic and Atmospheric Agency (NOAA) to organise a series of national and international workshops and scientific meetings on the ozone layer issue. Intensifying their relationships with countries from the Toronto group, American officials and embassies put pressure on those countries such as France or Great Britain that did not push for regulation. Using the US Information Agency network, Americans also launched an extensive media campaign to alert public opinions in Europe and Japan. American officials and scientists were sent all over the world to give speeches, press conferences, radio and television interviews. Coverage of the issue by national media was thus quite significant. Highest-level officials such as EPA Administrator Lee Thomas, Secretary of State Shultz or President Reagan himself relayed this campaign through their personal contacts with key

foreign decision-makers. At the 1987 Summit of the seven major industrial democracies, President Reagan succeeded in making ‘protection of the ozone layer the first priority among environmental issues requiring common action’ (Benedick 1991).

The direct consequence of these efforts was the Montreal Protocol. Signed in 1987, the protocol set a 1999 target for partial CFC prohibition on a global scale. Soon, though, the anticipated reduction in CFC production appeared insufficient, particularly in light of new scientific knowledge. Green pressure groups together with official representatives of countries from the ‘Toronto Group’ stepped up pressure by calling for stricter regulation. The result was a revision of the Montreal Protocol in 1990, which now requested total CFC prohibition on a global scale. Another revision in 1992 not only called for an acceleration of the process but also announced a plan to prohibit HCFCs, the first generation of CFC substitutes.

At first sight, such an acceleration and extension of CFC regulation made perfect sense. The nature of the problem – ozone layer depletion – was global and the environmental and human risks associated with it were of great consequences. In reality, though, this evolution was neither easy nor smooth. It took a lot of energy on the part of a rather small group of actors to push along and finally bring about an international prohibition of CFCs.

10.4.2 Main actors and conditions

While identification of the main actors is relatively easy, weighing their respective influence seems much more difficult. A few proactive countries, the 'Toronto Group', and their administrations were instrumental in steering the process along. Amongst these countries, the role of the United States was particularly significant. A more detailed analysis reveals, though, that the process was not negotiated only at the level of governmental agencies. The importance of scientists, media, NGOs and International Institutions in pushing the issue through debate as well as direct and indirect political pressure should not be underestimated. Interestingly, key manufacturers also turned out, at certain points in time, to play an active role.

Scientists provided governments, NGOs and international institutions with information and evidence on ozone layer depletion. Their research results, though, would not have been so compelling without the large budgets granted by national and international institutions but also by industry trade associations. International institutions also played an important role by providing a forum where governments could negotiate on a transnational level. National environmental administrations and scientific organisations put significant pressure on governments to take the issue seriously. Their action was strongly reinforced and supplemented by that of environmental NGOs and media supports. In the background, multiple interactions led to the creation of a dense network of individual actors holding key

positions of power. This network of actors and institutions triggered, upheld and accelerated the momentum towards the making of a global regulation. There were multiple motives at play, though, ranging from environmental protection to the preservation of economic interests or the political will to take the lead on an international issue.

10.4.2.1 The American lead

While we have underscored the multiplicity of actors involved, it is also clear that at different key moments the United States exercised leadership with important consequences. American scientists were the first to propose, in 1974, the ozone layer depletion hypothesis. Immediately, American media seized upon it, playing a significant part in its early diffusion. As soon as November 1974, the powerful American-based green pressure group, Natural Resources Defence Council (NRDC), reacted by filing petitions with three American government agencies – the Consumer Product Safety Commission (CPSC), the Food and Drug Administration (FDA) and the Environmental Protection Agency (EPA). The aim, already, was a prohibition of CFCs. In May 1975, it started suing the CPSC because it had not moved on the issue.

American public authorities and governmental agencies were thus the first to experience strong pressure from NGOs and the media. As a consequence, American authorities could not ignore the issue and congressional hearings were repeatedly held on the matter. At the same

time, media supports and pressure groups had alerted directly American consumers. As a result, products containing CFCs tended to remain unsold on store shelves. Quite early on, leading American aerosol manufacturers thus started considering converting their American factories to CFC substitutes. This situation led the US to enact a national legislation prohibiting CFCs in aerosols as early as 1978. Then, in 1980, the Environmental Protection Agency administrator announced her intent to extend CFC regulation to all uses when the Europeans were still discussing about a possible recommendation and the Japanese had only just set up a commission to review the situation.

While on the surface things calmed down somewhat during the early 1980s, the issue was in fact still bubbling. The NRDC launched a new judiciary action against the EPA in November 1984. A potential outcome of the litigation was for the EPA to be obliged by the courts to regulate CFCs, no matter what foreign countries were doing. During the proceedings, a new EPA Administrator was appointed in January 1985. The new Administrator, Lee Thomas, immediately announced that ozone depletion was ‘a big issue’ and he defined a ‘timetable to move forward’. The discovery, this same year, of the ozone hole made the issue even ‘bigger’ and started off another chain reaction, Americans taking the lead once again. The EPA pushed the NRDC and the Alliance for Responsible CFC policy – an ad hoc American trade association – to enter negotiations. Discussions led in January 1986 to an agreement on a ‘Stratospheric Ozone Protection Plan’.

Another important step was made soon after that, when the American firm DuPont, a major producer of CFCs, declared that it would give its support to the prohibition of CFCs if the American government vowed to work towards a global market for substitutes. As soon as enough assurance had been given, DuPont started to encourage other firms to support the process, acting through the seat it held at the board of the Alliance for Responsible CFC Policy. Soon enough, members of the Alliance were converted and the latter came to claim its support for an international regulation. Hence, the American lead in the process of negotiating an international regulation of CFCs can largely be explained by the peculiar nature of American political and legal institutions. Although economic interests and industry support proved important in the end, they were themselves very much the consequence of the institutional context. This context created favourable conditions for NGOs, individuals or civil society groups to take action against or sue Agencies or private companies when they suspected them of not implementing policies that were in their interests.

10.4.2.2 The European adhesion

Only by the mid-1980s was Europe as an entity ready to accept the idea of an international regulation of CFCs. Conditions had changed dramatically as a consequence of the discovery of the ozone hole but also under the pressure of NGOs, international institutions, foreign governments and American agencies. Moreover, an international scientific and ‘epistemic

community' (Haas, 1991) had formed in the early 1980s, gaining strong influence on key decision-makers in a number of countries. This change in conditions had first an impact in Belgium, leading that country to rally the pro-regulatory camp. This had a particularly significant impact because Belgium would assume the presidency of the European Community during the first half of 1987, which proved to be a key period in the negotiation process. Then came the change of heart of Great Britain. In this case, economic motives played an important part. The official support of the British government for an international regulation of CFCs was only declared after ICI, the national biggest CFC producer, had lifted its opposition. France then remained in an uncomfortable diplomatic position that soon proved to be unsustainable. The French adhesion finally opened the way, in 1987, to an international binding agreement.

10.4.3 Constraints and limits

In spite of strong American involvement and, in time, European support, regulating CFCs was far from an easy task. Protecting the ozone layer would have significant consequences in many industries in all parts of the world. CFCs were used in hundreds of different products (refrigerators, air conditioners, aerosols, fire extinguishers, plastic foams for example) that were manufactured by dozens of thousands of firms all over the world. Furthermore, market prospects for CFCs were still quite significant since it appeared that they could be used to produce a solvent for the booming electronics and precision mechanics industries.

10.4.3.1 Obstacles and resistance

While CFCs had multiple applications, CFC production was concentrated among a small number of economically and politically powerful manufacturers such as the American DuPont and Allied-Signal, the French Elf-Atochem, the British ICI or the German Hoechst. Those firms provided altogether 75 % of the world production, leaving the rest of the market to twenty-two smaller producers operating mainly from the other side of the Iron Curtain, as well as in China and India. The agreement reached in 1987 implied that all producers, on a world-wide level, had to be brought to comply with a set of common norms. This would require transatlantic, East-West and South-North cooperation and means to monitor or even impose compliance.

On top of these difficulties, or because of these difficulties, various countries or groups of countries had in turn coalesced during the negotiation process to slow it down or turn it to their advantage. The two most striking episodes of that sort were the strong initial European opposition and the relative American disengagement during the Reagan administration. Although the European Community had decided from the early 1980s on a partial CFC prohibition in aerosols, it remained still for another few years quite opposed to the idea of an international regulation. France, Great Britain and Italy were intent on protecting their national producers and thus rejected the propositions coming from West Germany for a

stricter European regulation of CFCs. As late as September 1986, France and Great Britain persisted in opposing the American regulatory project. These countries were able to block the European decision process because, at that time, decisions within the community required unanimity.

Their opposition could not entirely be explained, though, by the existence of domestic producers. After all, Germany and the US also had many CFC related activities and they nevertheless were much stricter with respect to CFC regulation. Hence a particular country's willingness to join or even to lead the international momentum also depended, as it turned out, on the particular political context at any given time. This is clearly illustrated by the case of the US that radically changed their position in 1981. When President Reagan took office in 1981, the regulatory project of the previous administration was significantly slowed down if not brought to a halt. The newly appointed head of the EPA immediately asserted that the ozone-depletion theory was 'highly controversial' and could not be accepted as a basis for more governmental action. This viewpoint was echoed in Congress and was strongly supported by the industrial lobby that was then created under the label 'Alliance for Responsible CFC Policy'. At the same time, American public opinion was being convinced that the ozone problem had more or less been solved thanks to the aerosol ban. The international process for ozone layer protection had temporarily lost, in that period, its strongest supporter.

It would take new scientific evidence in 1985, pointing to a threat much more serious than anybody had envisioned for attitudes to change. The pressure stemming from the scientific community, public opinion and NGOs as well as a new series of judicial actions against governmental agencies were instrumental in pushing the Americans back into the driving seat.

10.4.3.2 The problem of implementation

The Montreal Protocol in 1987 and its amended versions defined global standards for the regulation of CFCs. However, in spite of the global nature and reach of this Protocol, significant national and regional differences have remained to this day. These differences have been due to divergent interpretations of an initially loosely defined regulation, to the existence of various statutes under the same regulation for different types of countries, to differences between national policy styles, to technological choices, as well as to mere non-compliance problems.

10.4.3.2.1 An initially loosely defined international regulation

While its general direction and objectives were clear, the regulation that emerged from the Montreal Protocol remained rather loose for several years. A number of ‘loopholes’ were

allowed to persist making divergent interpretations possible and quite likely in fact. A key source of ambiguity was the authorization given to low consuming countries from the developing world to increase their per capita annual CFC use ‘in order to meet their basic domestic needs’ during a 10-year period. But the concept of ‘basic domestic needs’ was not precisely defined in the protocol and was therefore open to interpretation. According to some developing-country governments, trade barriers should not affect their exports of products containing CFAs since export revenues could be considered as means to satisfy ‘basic domestic needs’. According to the US special Ambassador, Benedick (1991), negotiators were well aware that these and other issues remained to be solved. However they had ‘made their top priority the setting into motion of an international process’.

10.4.3.2.2 Various statutes under the same regulation

The 1990 London amendments to the Montreal protocol significantly reduced the number of loopholes and the space for interpretation. In particular, parties to the protocol decided that the export of products containing CFCs was inconsistent with the intent of the protocol. Interestingly though, the discussions that took place in London with an aim to tightening the regulation were not always successful in that respect. A clarification of the Montreal protocol sometimes led to a differentiation between categories of countries to which different provisions applied. In particular, both Russia and the developing countries remained under a special regime allowing them to increase their CFC production during respectively 5 and 10

years after these chemicals were prohibited everywhere else. Russia had argued that its 5 years-plan system imposed an equivalent delay in compliance to the protocol. Developing countries had underlined, among others, their marginal part in global CFC consumption, as well as their user industries' inability to afford substitutes. Developing countries also obtained the creation of a Multilateral Fund that would provide them with financial and technical assistance to switch to substitutes. On the one hand, the fund was an instrument of homogenisation and it favoured the global extension of the protocol. On the other, it created a disparity among countries since it increased the cost of the protocol for industrialised countries, while enabling developing countries to join the protocol at a much lower cost than would have been otherwise possible.

Another case of differential treatment under the protocol was illustrated by the special status of the European Economic Community. Originally, the idea was that every member country had to reduce its production and use of CFC. After harsh negotiations with the United States, the European Community finally obtained agreement to be treated as a single consumption unit. Although CFC producers were still constrained by the regulation, this provided European user industries with more operational flexibility. During the Montreal meeting, the Canadian delegation had introduced an ‘industrial rationalisation’ clause that allowed rationalisation only between CFC plants of less than 25,000 tons capacity each. As it turned out, European producers could not take advantage of that clause because the capacity of their

plants was above that threshold. In the following years, European negotiators were thus busy lobbying for a change in the rationalisation clause. The protocol was finally amended in that direction in 1990 and Europe had from that point on the possibility to increase CFC production in some member countries in counterpart to plant shutdowns in other countries. This way, the European Community obtained agreement to be treated as a single production unit while retaining its full voting power – 12 votes at the time.

Hence international heterogeneity did not totally disappear with time. Part of the change was that the source of such heterogeneity switched from divergent interpretations of the protocol or deficiencies in the protocol, to a relatively increased heterogeneity in the protocol itself. This evolution of the international framework seemed mainly due to the need for gathering as much support as possible from countries that were hitherto unhappy with the terms of the protocol.

10.4.3.2.3 Differences in national policy styles

Another source of divergence came from the interplay between the protocol and the national institutions and policy styles through which it was implemented on the ground. The protocol in fact only imposed a series of deadlines for the phasing-out of CFC production and consumption. Each country was left totally free to develop its own policy to reach the targets set by the protocol. At one extreme, Europe mainly relied on what was called a conventional

approach, which consisted in voluntary agreements between trade associations and governments. At the other extreme, the United States relied on tax policy and legal penalties for non-compliance.

10.4.3.2.4 Technological choices

The concrete implementation of the Montreal Protocol also differed among countries because of different technological choices for the substitution of CFCs. An important difference was related to the focus of some countries on HCFC or HFC substitute technologies, because only the latter was totally ozone friendly (but both had greenhouse effects). Another interesting example was related to the global cosmetic industry. Actually, some national industries have replaced CFCs in deodorant aerosols by other types of propellants that might present safety hazards whereas, partly because of these concerns, other national industries have completely abandoned the aerosol technology in deodorants.

10.4.3.2.5 Non compliance

Another limit to the institutionalisation of an international CFC regulation has come, naturally, from problems of non-compliance. Some countries do not fully comply with the Protocol, while even those that try to comply have to struggle with a large black market. In the mid-1990s both environmentalists and company managers strongly denounced CFC

smuggling and illegal traffic as a key issue that should be dealt with. According to one company official, CFC smuggling was in 1995 the main black market in Florida, after drug dealing. This seemed mainly due to the lack of enforcement of the protocol in some countries such as Russia, enabling the illegal production of CFCs in those countries and their export to Eastern and Western Europe, to the United States and elsewhere. So both companies producing substitutes and environmental organisations have pressured governments to step up their enforcement and litigation activities.

10.5 DISCUSSION

We have focused, in this paper, on transnational regulation as one powerful type of global pressure. Looking in turn at competition regulation and at the regulation of CFCs, we have compared the patterns of emergence, diffusion and institutionalisation of these two sets of norms. Beyond apparently global and universal norms contributing to the world-wide homogenisation of economic conditions, we found processes that were both historically contingent and embedded in peculiar sets of institutional constraints. Probing into the origins of both sets of regulations, asking about the actors and mechanisms of their diffusion or implementation and searching for possible obstacles and resistance, we identified significant differences between our two case studies.

In the case of competition regulation, the beginnings were local. Antitrust emerged in post Civil War United States, in response to a dramatic increase in the power of business cartels and aggregates. The enactment of the Sherman Act and its early interpretation reflected in part an economic logic. They also revealed, though, a multiplicity of political and social interests and their confrontation within the young federation. After 1945, the American antitrust tradition acquired another dimension. The rules of exchange and competition that regulated trade between American states were turned into universal standards, at least within the Western sphere. This process reflected American geopolitical dominance. It was part of the construction, under American leadership, of an institutional framework for transnational trade. With the fall of the Berlin Wall in the late 1980s, the process of diffusion of an American antitrust tradition entered its second stage. By the mid-1990s, around fifty countries in the world had an antitrust or competition legislation that prohibited cartels and set limits to anti-competitive practices.

In the case of CFC regulation, the pattern of emergence and institutionalisation of a world-wide standard was quite different. The process started later, in the early 1970s, and the triggering issue – a large-scale environmental threat – had, by nature, global implications. Regulation in this case was thus from the start negotiated at a cross-national level. The result was a compromise regulation that was then adopted and in the process also partially adapted in the countries that signed the protocol. The process and the emerging common standard

reflected the multiplicity of actors, the diversity of their interests and the balance of their resources. As such, it was far from being driven only by an economic logic. It was also an eminently political debate that was constrained by the institutional framework in which it took place.

Our case studies thus illustrate two quite different patterns with respect to the emergence of cross-national regulation. On the one hand, a national model was diffused, at some point in time, to other countries and to supra-national communities, becoming in the process a global standard. On the other hand, a set of norms negotiated at a multinational level was then locally adopted – and partially adapted – by individual nations, which signed a common protocol. In the case of antitrust, the emergence, early definition and interpretation and the diffusion of the regulation owed a lot to the intervention and initiative of public actors, state agencies and politicians. In the case of CFC regulation, there was a greater diversity of actors and negotiators. The role, in particular, of business groups or representatives and even more of civil society through the organised scientific community, environmental NGOs and the media cannot be underestimated.

While both regulatory frameworks contribute to a partial world-wide homogenisation of economic conditions, our double exercise in deconstruction has shown the process of the emergence, diffusion or interpretation of these international regulations to have been

historically contingent and highly constrained by unique institutional conditions. Contextualisation has made it possible, furthermore, to point to important differences between our two cases of transnational regulation. Beyond those differences, though, we would like to end with what emerged as two important common features. In both stories, we found that the United States played a key role. In the case of competition regulation, they provided the model and fostered its transfer. In the case of CFC regulation, the impact was less direct. Still, the United States led the early process of discussions and negotiations and their varying degree of involvement, throughout the period, drove the ups and downs of international negotiations with a significant impact, ultimately, on the negotiated outcome. Another important conclusion emerging from our two cases is that the making of cross-national regulation says little about its interpretation and implementation on the ground. We show a fair amount of decoupling between global standards and their local implementation. Key filters, in both cases, have been national institutions but also those national communities that opposed and resisted the standards. We found the result to be, with respect to implementation, a hybridisation or local translation of global standards. This, naturally, points to the limits of what is called the process of globalisation. By the mid-1990s, around fifty countries on six continents had an antitrust or competition legislation that regulated cartels and set limits to anticompetitive practices. By May 1999, 168 countries had ratified the initial agreement of the Montreal protocol and a little less subsequent amendments. In spite of this apparent widespread diffusion of common regulatory standards, our results lead

us to question the ultimate likelihood of a full convergence, on a transnational scale, of institutions, structures and organisational behaviours.

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