

EXTENSIVE CAPTURE: THE HARMONIZATION OF INTERNATIONAL INDUSTRIAL REGULATION

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ABSTRACT

This research project tries to show that a unified discourse and a single global policy for liberalization and competition cuts across the economic and legal theory of transnational regulations of industry. The tension mediated by the concepts of harmonization, meaning that one regulation/standard is better than multiple regulations/standards, and the theory of international liberalization, meaning deregulation is better than regulation, brings many doubts about the phenomenon of international industrial regulation. The core of this project is to restate the problem of regulatory capture at a transnational level and show how it is possible, and profitable, for large

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corporations to capture transnational regulators with multilateral regulation or deregulation processes.

Key words: International industrial regulation, international law, soft law, hard law, harmonization, industrial organization, law and economics.

CAPTURA EXTENSA: LA ARMONIZACIÓN DE LA REGULACION INDUSTRIAL INTERNACIONAL

RESUMEN

Este proyecto de investigación intenta demostrar que un discurso unificado y una única política global para la liberalización de los mercados y el incremento de la competencia corta la teoría económica y legal la regulación transnacional de la industria. La tensión mediada por los conceptos de la armonización, significando que una única regulación/estándar es mejor que regulaciones/estándares múltiples, y la teoría de la liberalización internacional de los mercados, significando que la desregulación es mejor que la regulación, causa muchas dudas sobre el fenómeno de la regulación industrial internacional. El núcleo de este proyecto es exponer como es posible modificar el análisis del problema de la captura del regulador en un nivel transnacional y demostrar cómo es posible, y provechoso, para las grandes corporaciones capturar reguladores transnacionales con procesos multilaterales de regulación o desregulación.

Palabras clave: Regulación industrial internacional, derecho internacional, soft law, hard law, armonización, organización industrial, análisis económico del derecho.

INTRODUCTION*

The present of International Economic Law is the legal system of international trade and the WTO. The future, however, is the transnational regulation of industry. Certainly, since the 1980s, regulations of different industries have had a transnational impact. Regulation of financial markets and certain environmental regulation, among others, are examples of this phenomenon, which rapidly expanded to several other areas of industrial regulation after it attracted the attention of legal and economic scholarship¹. Despite their interest, however, only a few scholars have been critically concerned about one of the most important theoretical constructions behind the expansion of industrial regulation: regulation harmonization. Harmonization has been studied in the economic literature, mostly related to financial, stock markets and antitrust regulation, leading usually to conclusions highlighting the advantages of harmonization² for liberalization, free trade and competition³. Nevertheless, despite of the evident tension in concomitant discourses for liberalization and regulation⁴, it is unbelievable how, when

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1 A simple search in *J-Store* (Business, Finance, Law, Political Science and Public Policy) of the words “regulation” & “harmonization” in title, abstract and text body showed 23 articles from 1887 to 1945, 127 from 1946 to 1965, 406 from 1966 to 1985, and 794 from 1986 to 2002. In this last period, from 1986 to 1990 there were 152 articles, 256 from 1991 to 1995, 289 from 1996 to 2000, and 156 from 2000 to 2001. The expansion of literature after 1985 indicates some correlation between the promotion of “world liberalization” by the US and UK government and the subsequent increase interest in harmonization and globalization.

2 Some authors say that it is certainly more convenient to be able to use the same mobile phone in different countries, buy a wireless Internet link that can be sold all over the world, it will generate more profits and presumably more jobs.

3 See ROBERT PAHRE, *Leading Questions: How Hegemony Affects The International Political Economy*, U. Mich., Press., 1999.

4 See *infra* text pages 2 and 2. Also see BETH SIMMONS *Capital Markets Regulation*. 55 Int. Organization. 589, 615-20 (2001) (showing why the harmonization debate has

referring to transnational regulation scholars seem to forget asking if harmonization is a result of capture⁵.

The goal in this research project is to show that a unified discourse and a single global policy for liberalization and competition cuts across the economic and legal theory of transnational regulations of industry, and this inherent tension reveals regulatory capture. The evident tension is mediated by the concept of harmonization, meaning that one regulation/standard is better than multiple regulations/standards, and the theory of international liberalization, meaning deregulation is better than regulation. The concept of harmonization is mediating such tension since it is discriminately regarded as beneficial for certain markets but prejudicial for other markets, and this inconsistency is just an effect of capture. The core of my project is to restate the problem of regulatory capture at a transnational level and show how it is possible and profitable for large corporations to capture transnational regulators with multilateral regulations or deregulations. The premise is that internationalization of regulation gives capture an extensive effect and makes it more profitable for large corporations.

What makes capture profitable is not the advertised positive effect of harmonization in competition and market efficiencies but its incidence to enhance control over national regulators, national regulation and international commercial regulation. Thus, the project is trying to find a framework to explain why harmonization, as a legal concept, is advertised and promoted as a way to improve the positive effects of liberalization and competition, legitimizing just one model

been misleading and proposing a method to approach to the problem of harmonization in financial markets).

- 5 The word *capture* here has several meanings in the literature. Here it follows HANSON'S, YOSIFON'S, BENFORADO'S and CHEN'S work. Capture goes beyond the stiglerian meaning -as capture of the regulator due to the action of pressure groups- and goes to a new appreciation called deep capture -capture of the regulation by capturing knowledge structures, social cognition, and behavior. We will explain what is the meaning of capture and the importance of the concept of capture for structuralism and critical realism.

of industrial regulation and delegitimizing the possibilities of regulatory alternatives and regulatory competition.

To explain the relevance for the legal and economic literature and the necessity of a realistic approach to the International Economic Law of Industrial Regulation⁶, the project will be divided in two parts, excluding introduction and conclusions. First, we explain the basis and goals of the dissertation, including the methodology to approach to the problem and its relevance for legal and economics scholarship; second, we will show how the questions presented are novel for scholarship in the field.

I. CAPTURE AND HARMONIZATION

The minimum theoretical background to understand the set of hypothesis and the methodologies to address the problem of capture in international regulation is based on showing how to (re)take power⁷ seriously for studying capture in International Economic Law⁸. Concomitantly, we will explain why the analysis of power, in structuralism and social psychology, provides an alternative approach to study the problem of capture and harmonization in transnational industrial regulation and, thus, arid perspective of the dynamics of power in the international economic law of industry regulation.

6 See PABLO MÁRQUEZ y ALFONSO MIRANDA, “Intervención pública, regulación administrativa y economía: elementos para definir los objetivos de la regulación”, *Vniversitas*, Ciencias Jurídicas (indexada), n° 108, págs. 71-118, Bogotá, 2004.

7 See JON HANSON & DAVID YOSIFON, *The Situation: an Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*. 152, *U. PA. L. REV.* 129, 134-39 (2003) (arguing that mainstream *law and economics* has not developed an economic analysis of the rise of *law and economics* as a school of thought and the possible inner tensions on it).

8 See *Id.* at 193-98, 212-30.

A. WHERE ECONOMICS AND REGULATION MEET POWER

Structural philosophy⁹ and social psychology have been more conscious than neo-classical economics of the dynamics of power in the interaction of human beings¹⁰. Indeed, the structure of institutions and the architecture of human relations are governed by power¹¹. This analysis is relevant for this project since it deals with

“how... [the] mechanisms of power... have begun to become economically advantageous and politically useful”¹².

The latter is the main concern of FOUCAULT’s structural philosophy, which, using genealogy¹³ shows the (cor)relation between power, law and truth¹⁴. FOUCAULT’s main problem is the *why* of the *how* of power¹⁵; this is the mechanisms related to the formal delimitation of

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- 9 Structuralism refers, broadly, to the genealogy and structure of meaning in several *epistemes*. Here we are not referring to the work of Saussure and others but the work of Michel FOUCAULT. We are cataloguing FOUCAULT as structuralist despite of his rejection to catalogue his work as structural. However, his early work, which is the one I will use, is structural and there is no other reason but passion to reject it as a part of XX century structuralism.
- 10 For an analysis from an architectural and surveillance perspectives, see: PABLO MÁRQUEZ. *El ojo ve, el poder mira: La arquitectura para la vigilancia y el final de la privacidad*, colección: Investigaciones, JAVEGRAF: Bogotá, 2004.
- 11 See Michel Foucault, *The Subject and Power*, 8, 4 *Critical Inquiry*, 777, 777-79 Harvester, 1982.
- 12 Id. at 547a
- 13 Genealogy is defined as a form of knowledge that works by isolating the components and structures of a political mechanism tracing it back its roots. See Hubert L. Dreyfus & Paul Rabinow, *Michel Foucault: beyond structuralism and hermeneutics* 119, U. Chicago Press, 1982.
- 14 Michel Foucault, *The history of sexuality: an introduction*, Penguin, 1978, (showing how slight manipulations of science and the legal system lead to the modern construction of sexual identity); *Society must be defended: lectures at the Collège de France, 1975-76*, 23-42 (Mauro Bertani & Alessandro Fontana, eds., 2003) (exposing the genealogy of war and racism, and how the same discourse structure is evident in the new forms of racism).
- 15 See *supra* note 11, and *infra* notes 16 and 20.

power and the effect that truth produces and transmits. His question, relevant for our analysis of capture, is:

“what rules of right are implemented by the relations of power in the production of discourses of truth?” —or— “what type of power is susceptible of producing discourses of truth that in a society [as ours]... are endowed with [legitimizing]...effect?”¹⁶.

Indeed, in the case of industrial regulation, this power comes from knowledge produced, sponsored and legitimized by transnational corporations that is transformed in national and transnational regulation by harmonization. As FOUCAULT concludes, the relation between power, truth and law is definitively economical since they

“must produce truth as we must produce wealth”, —and— “...must produce truth in order to produce wealth”¹⁷.

Truth and power produce law, because

“we are... *subjected* to truth in the sense in which it is truth that ... [legitimizes] the laws...”¹⁸.

In addition, FOUCAULT reads power as something “employed and exercised” that works in a positive net-externality where individuals act as “vehicles”¹⁹, in our case regulators can act as vehicles and ends of regulation. In synthesis, power is understood as a practice, an exercise, executed through knowledge and the law. The law, thus, works just as a technology of *normalization*²⁰.

16 MICHEL FOUCAULT, *Power, Right, Truth, in Contemporary Political Philosophy*, COLLIN GORDON, (ed.) 543a, 1998, *originally published, in Power/Knowledge*, COLIN GORDON (ed.) 92-108, Harvester, 1980.

17 Id. at 543b.

18 Id. at 543b [Italics out of original text].

19 Id. at 546a

20 The concept of normalization is essential in FOUCAULT’s thought and in the so called, *FOUCAULT effect* in social and political sciences. The word “normal” refers to the categorization of people, cultures, legal systems, etcetera, as opposed to forms

Social psychology and social cognition, on the same hand, provide evidence to the latter statements. Knowledge structures, through categories, schemas and scripts determine

“how we understand the limitless information with we are... confronted”²¹, and therefore, they shape the way we give order to the “world”²².

These findings are aligned with the criticism set by FOUCAULT’s structural philosophy, as social psychology proves that humans tend to rely in knowledge structures to process information and, most importantly, to draw conclusions about factual situations²³.

These knowledge structures, as shown by HANSON and CHEN²⁴ in the case of *Law and Economics*, determine the cognitive processes

considered “abnormal”. Definitely, it is the result of incentives to standardize and achieve conformity with determined norms/rules/regulation. Normalization is the product of governmentality, this is the mentality of self govern or choose. FOUCAULT’s work goes around this issue, the problem of normalization/standardizations through norms and rules. See MICHEL FOUCAULT, *Discipline and punish: the birth of the prison*, Penguin, 1977 (showing how normalization could be achieved with technologies, as prison and surveillance, mediated by the law); see *supra* note 13 (arguing that the construction of sexual identity was a function of political and economic forces that lead to a set of rules that shaped what is a *normal* sexual behavior); see *supra* note 11 (showing FOUCAULT’s reconsideration of power as a matter of technologies of power and not as a matter of power itself); see *supra* note 14, at 1-42, 65-86 (answering how is that truth came to function as an arm [of power]).

21 See RON CHEN & JON HANSON, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 1-2 (2004).

22 See *supra* note 7.

23 RONALD CHEN & JON D. HANSON, *Categorically Biased: The Influence of Knowledge Structures on the Law and Legal Theory*. 77 S. CAL. L. REV. 1103, 1125, 1217-18 (2004).

24 See *Id.* (Showing how social psychology has offered a brad understanding of how individuals use categories, schemas and scripts to make sense of the world and showing the lack of attention that legal scholarship has given to this area of social science). See *Id.* at 1145-66 (explaining the categorization process and the effects of categorization in human cognition). See *Id.* at 1228-39 (showing the difficulties of controlling bias and debiasing cognition and the value of situational forces in such process), at 1243-44 (showing how situational forces –seen and unseen- have a strong effect on cognition and lead to a dispositional perspective of the world). See

of human behavior through categories and schemas defined in the different *epistemes* (knowledge structures)²⁵.

In addition, behavioralism has provided a great deal of evidence on human behavior and the effect of power and situational forces²⁶.

HANSON and YOSIFON show how the literature in behavioral studies has revealed that our dispositional character is as deep that even in circumstances where situational factors are visible, countable and acknowledged, we tend to be prone to disposition²⁷ despite that situations are largely controlling. The authors are suggesting for legal theory that individuals do not act with total freedom as it has been assumed in most the economic models explaining human behavior, and this is applicable to regulators, policy makers and scholars. Rather, humans tend to choose moved by exogenous forces, making the assumptions of legal economist questionable²⁸.

Why these notions of *power* are useful and constitute an alternative for the analysis of economics and its relation with the international law and policy of industrial regulation harmonization? Certainly, understanding *power* as a matter of the technologies of power and *why* and *how* the use of *truth*—knowledge structures as mainstream industrial organization theory— and law—in this case industrial

also *infra* note 28, at 1654-75 (showing how/why humans are attribute behavior to personal choice and its relation with situational motives). In addition, social psychology has shown that several motives lead us to self-affirm and protect our acquired schemas. See ZIVA KUNDA, *Making sense of people, social cognition*, 1991; JOHN ANDERSON, *Cognitive Psychology and its implications*, 3ed., 1990.

- 25 See also: PABLO MÁRQUEZ, *Anotaciones sobre análisis económico del derecho*, vol. I, CEJA, 2005.
- 26 See *supra* note 7 149-179 (summarizing the most important literature on behaviorism and the problem of situation and attribution error). See also, HANSON, JON & DAVID YOSIFON, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L. J. 1, 2004.
- 27 See *Id.* at 157-159; see also LEE ROSS & RICHARD NISBETT, *The person and the situation* 127, 1991.
- 28 This point is studied in HANSON, BENFORADO and YOSIFON's article *Broken Scales*, where they offer an explanation of two phenomena, first, why the problem of obesity in the United States is usually addressed as a problem of choice and

regulation—, as mechanisms of discipline and *normalization*²⁹ provide a critical explanation to the dynamics of international economic law as a system of discipline mediated by capture³⁰.

All this literature is important for this research and constitutes the original thoughts in this approach since it contributes to a new understanding of why it is important to think about capture of regulators involved in International Law policymaking that make them prone to support and attach to those schemas of liberalization/harmonization that are “economically advantageous and politically useful”³¹ for large corporations.

Certainly, capture, understood as the processes and technologies to align regulators goals and cognition with those favorable to third parties, allows large commercial interest to promote and invest in the production of law via knowledge structures. And social psychology and structural philosophy contribute to shown that scholars, policymakers, lawyers, legislatures, judges and others

“are influenced by those schemas and scripts that shape our knowledge structures”³²

and, the product of their work is just the product of the interests assumed, received and perceived by the dynamic trilogy of power, truth and law³³ that leads to the *normalization* of cognition.

Thus, the effect of knowledge structures/truth is cognitive and legal, since they provide legitimization, scientific and juridical, to the

self-government and why it is not a problem of choice but a problem of situational forces manipulated to induce consumer behavior. See ADAM BENFORADO, JON HANSON & DAVID YOSIFON, *Broken Scales: Obesity and Justice in America*, 53 EMORY L. J. 1645, 2004.

29 See *supra* note 14 at 45.

30 As is used in *supra* note 7.

31 See *supra* note 21.

32 See *supra* note 21 at 74.

33 See *Id.*, 1-72.

goals of regulation, giving an order to events, and a script to derive conclusions about the aim of the law and the legal system³⁴.

As “the invisibility and blinding effect”³⁵ of schemas give an advantage to those with the capacity/ability to create and produce dominant knowledge and give to it the status of truth³⁶ and, hence, the ability to turn it into legal institutions. This is the main presumption of the critical realist perspective that we are using to challenge and set limits to the assumption that harmonization is a mechanism to achieve freedom, markets liberalization and, thus, prosperity³⁷ when it is in constant tension.

B. CAPTURE, HARMONIZED INDUSTRIAL REGULATION AND LIBERALIZATION

The discourse of harmonization is in the core of a barely unidentified field; this is the field of International Industrial Regulation, in International Economic Law³⁸. As we said in our hypothesis, this policy of standardization and harmonization of regulation is the product of capture³⁹. Few scholars have highlighted such capture in several ways⁴⁰ but what seems the way to reveal such

34 And mainstream *Law and Economics*, as a discipline, has also been studied as an epistemic tool of legitimization of the protection of certain interests in the legal system. See *supra* note 21 at 134-39 and 23 at 1122-25, 1243-51.

35 See RON CHEN & JON HANSON, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 *Mich. L. Rev.* 1, 1-2, 2004.

36 See FOUCAULT, note 11 and 16.

37 See note 21 at 66. See also reading list, section 1, subsection, A & B.

38 A *Google Scholar* search of international & industrial & regulation did not match any articles, and the same result was provided by *J-Store* (Economics, Finance, Law, Political Science, and General). A search of the words “global industrial regulation” did not match any result in *Google Scholar* but matched one result in *J-Stor*, an article by Eun Sup LEE, *Efficient regulation of the insurance industry to cope with global trends of deregulation and liberalization* (13 *Bond L. Rev.* 46-63, June 2001) (arguing, among other issues, that a uniform regulation of insurance industry not deregulation would lead to a more efficient risk dispersion and lower insurance costs).

39 In the meaning used by CHEN & HANSON, *supra* note 35.

40 See *Id.*

problem is to find tensions between the global policy for an international industrial regulation the economic and legal discourse of the advantages of harmonization. These tensions constitute the relationships between capture and harmonization that I want to investigate.

The academic discourses of transnational regulation and governance heavily rely on economic theory showing the social benefits of harmonization of regulation⁴¹. Indeed, the academic reasoning goes as follows: First, global markets require liberalization;

41 See also RAJ BHALA, *International Trade Law: Theory and Practice*, (2d ed. 2001); Joanne Gowa and EDWARD Mansfield. 1993. "Power Politics and International Trade." *American Political Science Review* 87:2, pp. 408-420; SUSAN STRANGE, *Territory, State, Authority and Economy: a new realist ontology of Global Political Economy* In *The new realism : perspectives on multilateralism and world order* (Ed. ROBERT W. COX, 1996); Martin Wolf, *Why Globalization Works*, Chapters 1 & 2, (Yale Press, 2005).

RUAIRI BRUGHA and ANTHONY B. ZWI, *Regulation in the context of global health markets, in Health policy in a globalizing world*, (ed.) KELLEY LEE, KENT BUSE, and SUZANNE FUSTUKIAN, Cambridge University Press, Cambridge, 2002; JOHN BRAITHWAITE, PETER DRAHOS, *Global business regulation*, Cambridge, UK: New York, NY, US : Cambridge University Press, 2000; DANIEL C. ESTY and Damien Geradin. *Regulatory competition and the global coordination of labour standards, in Regulatory competition and economic integration: comparative perspectives*, (ed.) DANIEL C. ESTY and DAMIEN GERADIN, Oxford; New York: Oxford University Press, 2001. Antitrust goes global: what future for transatlantic cooperation?; SIMON J. EVENETT, ALEXANDER LEHMANN, BENN STEIL, (eds.) London: Royal Institute of International Affairs; Washington, D.C.: Brookings Institution Press, c2000; EDWARD M. GRAHAM, *Substantive convergence and procedural dissonance in merger review, in Antitrust goes global: what future for transatlantic cooperation?* SIMON J. EVENETT, ALEXANDER LEHMANN, BENN STEIL, (eds.), London: Royal Institute of International Affairs; Washington, D.C.: Brookings Institution Press, c2000; MATTLI, WALTER, *Global private governance for voluntary standards setting: national organizational legacies and international institutional biases*. CENTER FOR BUSINESS AND GOVERNMENT, JOHN F. KENNEDY SCHOOL OF GOVERNMENT, HARVARD UNIVERSITY, 2001; CHARLES A. JAMES, *INTERNATIONAL ANTITRUST IN THE 21ST CENTURY: COOPERATION AND CONVERGENCE*, U.S. DEPARTMENT OF JUSTICE, OECD GLOBAL FORUM ON COMPETITION, PARIS, FRANCE, OCTOBER 17, 2001, [HTTP://WWW.OECD.ORG/DATAOEC/62/57/2438935.PDF](http://www.oecd.org/dataoecd/62/57/2438935.pdf) LAST VIEWED MARCH 28, 2006; MAKAN DELRAHIM *INTERNATIONAL ANTITRUST AND INTELLECTUAL PROPERTY: CHALLENGES ON THE ROAD TO CONVERGENCE*, DEPUTY ASSISTANT ATTORNEY GENERAL, PRESENTED AT THE AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, CONFERENCE ON ANTITRUST & INTELLECTUAL PROPERTY: THE COURTS, THE ENFORCERS, AND THE BUSINESS WORLD SAN FRANCISCO, CALIFORNIA, MAY 21, 2004, IN, [HTTP://WWW.USDOJ.GOV/ATR/PUBLIC/SPEECHES/205629.HTM](http://www.usdoj.gov/atr/public/speeches/205629.htm), LAST VIEWED MARCH 28.

liberalization increases transnational competition; more transnational competition induces firms to take more risks; and thus there is need of harmonized sophisticated transnational regulation. Second, harmonization of regulation leads to improvements in the control of transnational industrial activity because, according to the economic literature, neither regulatory competition nor coordination of national policies⁴² conducted to optimal control of industrial activity⁴³.

These conclusions highlight the advantages of regulation and harmonization —one regulation fits all economies—, but do not provide an explanation of the tension between the goals of globalization —essentially free markets are good and regulation bad—and the macroscript of harmonization—a single transnational regulation is better than multiple regulations—. The strong interest for favoring harmonization in a global economy, despite the tension between a model of liberalization and a model of regulation, gives indicia to ask the question of capture of transnational regulators⁴⁴.

42 SEE ALSO BOB JESSOP, 1997, CAPITALISM AND ITS FUTURE: REMARKS ON REGULATION, GOVERNMENT AND GOVERNANCE, *REVIEW OF INTERNATIONAL POLITICAL ECONOMY*, 4 (3), AUTUMN, 561-81; KIZZA, JOSEPH MIGGA & JEFFERSON, N.C. CIVILIZING THE INTERNET: GLOBAL CONCERNS AND EFFORTS TOWARD regulation. (Kizza: McFarland, c1998); CHARLES GOODHART, DAVID LLEWELLYN, PHILIP HARMANN, STEVEN R WEISBROD & LILIANA ROJAS-SUÁREZ, *Financial Regulation: Why, How and Where Now?*, Routledge, 2003; DANIEL C., ESTY and DAMIEN GERADIN, *Regulatory competition and the global coordination of labour standards*, in *Regulatory competition and economic integration: comparative perspectives*, (ed.) DANIEL C. ESTY and DAMIEN GERADIN, Oxford; New York: Oxford University Press, 2001; *Competition policy in the global economy: modalities for co-operation* (ed.) LEONARD WAVERMAN, WILLIAM S. COMANOR, and AKIRA GOTO, 1997; Ogus, *Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law*, 2 ICLQ 48, 410, 1999.

43 I agree with the latter statement but not with the conclusion which leads to favor global harmonization as the best mechanism to control industrial and corporate behavior.

44 SIMMONS gives a game theoretical model to explaining why dominant regulators think strategically, since they know that how other regulators will react to its regulation. In addition show how the regulatory pressures that US regulators have over world agencies is so huge that has the potentiality to change significantly the context of regulation in the rest of the world. See BETH SIMMONS, *The International Politics of Harmonization: The Case of Capital Markets Regulation*. 55 Int. Organization. 589, 615-20, 2001.

Unfortunately, several questions like is international regulatory harmonization moving up to more rigorous standards or down toward greater laxity, control the debate, but the question if harmonization is moved by political or market pressures, or questions about the different uses of the advantages of harmonization in different markets, or the role of international institutions, international regulators and dominant producers, and the reception of regulation through harmonization, have not been raised yet.

To further evidence our hypothesis and its tensions, we are going to study how convergence, international law and international standardization⁴⁵ have a strong tendency to propose or impose harmonization of regulation on its different stages. The methodology we will use is to analyze the inner tensions in these policies. As a matter of fact, comparing harmonized regulations and its goals indicate the contradictions that the metatheory of *global regulatory governance* with the *normalized regulation* of certain industries. We expect to prove that the growth of the economics of harmonization of regulation is linked with transnational corporate interest to extend the gains of regulatory/deregulatory production in hegemonic countries. Legal economists in international economic law began to support it as the new best option for international regulation and development of industry in a globalized world but such support comes from those advocating for the extension of liberalization, which usually are big corporations.

Several questions arise related to the legal specific discourses of harmonization. Why there is a differentiated discourse of harmonization for certain industry regulation as antitrust, intellectual property and financial markets but it is not applicable for other regulation as environmental and labor? Does convergence of antitrust laws increase industry concentration? Do capital adequacy standards enhance large financial corporations' power in the international

45 These different but attached discourses are the law as convergence —spontaneous international harmonized order—, and multilateral regulatory policy via international treaties —*hard law* and international regulatory *standards*— *soft law*.

financial markets? Does a single regime of intellectual property promote general or just intellectual property producers growth? Does global corporate governance increases the power of corporate boards and managers over stockholders in internationalized stock markets?

We have exposed why there is enough evidence to assume that it is possible to show how capture is a tool to understand the recent phenomena of *harmonization of industrial regulation*. The aforementioned architecture of the concept of harmonization shows that an extensive capture of regulation/regulators is in play, and the increasing idea of a selective global legal harmonization has a key role in the escalating size of transnational corporations. Indeed, it is not that harmonized legal systems require big corporations, but that big corporations require harmonized legal systems.

II. GLOBAL INDUSTRIAL POLICY AND REGULATION: OXYMORONIC COEXISTENCE

Why this discourse becomes interesting for a study of a barely unidentified field in international economic law, this is the international industrial regulation? The answer is not simple. As I stated in the first paragraphs, the international economic policy of standardization of industrial regulation is the product of false impressions that lead to an illusion. The theory has highlighted such illusion in several ways⁴⁶, but what seems to be more interesting is how it is possible to find a correlated tension between several free trade policies, most of the analysis of a global policy for an international industrial regulation, the discourse in economic and legal theory about the benefits of harmonized or normalized regulation, and the sustained increase in industrial concentrations.

The main point is the tension in the meta-theory free-markets and the theory standardized industrial regulation. Indeed, the coexistence

46 Books criticizing globalization, Kennedy's syllabus..

of markets and freedom is and *ordoliberal*⁴⁷ idea⁴⁸ where the role of the State is simply to organize markets and not direct or plan them, since such intervention goes against freedom. Here, we can emphasize a theoretical tension between the Austrian or libertarian model, where freedom and institutions are not to be designed, but should arise through cooperation⁴⁹. Thus, the neoclassical faith in institutional design and the libertarian idea of a spontaneous order show the first tension in the discourse of these models. If freedom leads to self regulation, why markets must be regulated?

On the other hand, the discourses of global regulations seem to rely on the economic theory showing the social benefits of harmonization. As we have highlighted, there is enough evidence to distrust of the theoretical constructions and the knowledge structures and schemas that have aroused from the contemporary economic discourse. Not only its highly dispositional constructions, but also its lack of attention to its possible bias leads to distrust on the results of such theoretical constructions⁵⁰.

III. EVIDENCING INNER CONTRADICTIONS: LEGAL CONVERGENCE, SOFT LAW AND HARD LAW

To evidence the latter statements, we will study three of the different theoretical meanings given to the word *law* in International Economic Law and how they have a meaning in a global regulatory policy. These are the *law as convergence*—spontaneous international harmonized order—, and multilateral regulatory policy via international treaties —*hard law* and international regulatory

47 *Ordo-liberalism* assumes that the State is a designer. As designer, the State creates all the institutional circumstances to maintain a healthy level to foster competition according to market principles.

48 MICHEL FOUCAULT, *Résumé des cours*, 1970-1982, 119, Julliard, 1989, cited by Id. at 57.

49 See LUDWIG VON MISES, *Human Action*, 2003, Mises Institute, 2004; Friedrich Hayek, *Road to Serfdom*, 1993.

50 See supra note 23 and accompanying text.

standards—soft law. As it is evident, these three phenomena imply an immense amount of industrial regulation, the objective, in each case, will be study one among several problems. Hence, in *convergence*, we will study the nowadays called *global antitrust law*; second, in *hard law* we will study the internationalization of intellectual property rights true international treaties and third, in *soft law*, we will study the case the capital accords in financial markets.

The methodology we will use to study the inherent contradictions in this policy and the harmonized regulations and its effect—markets concentration—. We want to reveal and scrutinize the common meta-theory of the global regulation policy inherent in *Austrian economics* and *neo-classical economics*⁵¹. Then, show the macro-theory of each of the examples—economics of industrial organization and regulation—. After that, analyze the micro-script. And, following such study, we will highlight the tensions and non-theoretical effects of such regulation in international and national markets. Evidence of such phenomenon will be theoretical, showing the contradictions between the discourses and the regulation, and empirical, showing the effect with economic data⁵² and econometric analysis.

A. CONVERGENCE AND GLOBAL ANTITRUST LAW

Convergence has been an interesting suggestion in *law and economics* literature⁵³ from a long time but, suspiciously, the convergence

51 Principally explained by R. BORK, *The Antitrust Paradox* 90-91, 107-115, 1978, (asserting that antitrust laws promote wealth-maximization at the sacrifice of consumer welfare).

52 I cannot continue without highlighting the problem with data: who to rely on data provided?

53 See LARRY CATÁ BACKER, *Harmonizing law in an era of globalization: convergence, divergence and resistance*, Carolina Press, 2005; RICHARD POSNER, *Economic Analysis of Law*, 8 ed. 1998, (supporting that the common law is more efficient than the civil law and therefore, the legal systems will converge to the common law institutional system); See MARK J. ROE, *Chaos and Evolution in Law and Economics*, 109 *Harvard L. Rev.*, 641, 1996, (evaluating the classical paradigm of evolution of institutions and efficiency, and including chaos theory and mostly path dependency).

discourse⁵⁴ is regularly proposed by tending to *expand common law regimes*⁵⁵. In competition policy *convergence* refers to reaching

“consistency in antitrust law, policy, processes and economic theory across jurisdictional lines”⁵⁶.

The reasons are several for the recurrence of a transnational policy and the global antitrust law has increased in the last years⁵⁷, but most policymakers and legal economists argue for consistency in procedures, fairness in legal application and reduction of transaction costs⁵⁸.

Some International Organizations have recommended the initiation of national efforts to implement a set of best practices in order to achieve those ends, increase social wealth and guarantee consumer

54 EDWARD T. SWAINE, *The Local Law of Global Antitrust*, 43 WILLIAM & MARY L. REV. 627, 641-46, 2001. WILLIAM E. KOVACIC, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOK. J. INT'L L. 403, 403-08 (1997) (describing creation of competition policy systems as element of law reform in transition economies). TIMOTHY J. MURIS, *Competition Agencies in a Market-Based Global Economy* (Brussels, Belgium, July 23, 2002) (Prepared remarks at the Annual Lecture of the European Foreign Affairs Review), available at <http://www.ftc.gov/speeches/muris/020723/brussels>. EDUARD M GRAHAM & J. DAVID RICHARDSON, *Competition Policies for the Global Economy*, 1997.

55 The production of economic theory and legal theory are usually led by common law countries. See CHRISTOPH KERN, *Between Formalization and Simplification of Justice*, 2007 on file with the author.

56 See EINER ELHAUGE & DAMIEN GERADIN, *Global Antitrust Law And Economics 2* (unpublished manuscript -on file with the authors).

57 As well as the number of mergers of big transnational corporations as Miller and Bavaria, Procter and Gable and Gillette, among many other.

58 See EDWARD T. SWAINE, *The Local Law of Global Antitrust*, 43 WILLIAM & MARY L. REV. 627, 641-46 (2001). WILLIAM E. KOVACIC, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOK. J. INT'L L. 403, 403-08 (1997) (describing creation of competition policy systems as element of law reform in transition economies). TIMOTHY J. MURIS, *Competition Agencies in a Market-Based Global Economy* (Brussels, Belgium, July 23, 2002) (Prepared remarks at the Annual Lecture of the European Foreign Affairs Review), available at, <http://www.ftc.gov/speeches/muris/020723/brussels>.

sovereignty⁵⁹. Some scholars have suggested that such process of convergence has started⁶⁰ in the competition policy of the UE and the US since the biggest market transactions have been developed among corporations based in such geographical locations. But, according to other authors, this aspired convergence will only increase corporate power and will make national industrial policies just a chimera of the past⁶¹.

The questions are: Is harmonization of antitrust regulation a profit maximizing mechanism or a cost minimizing instrument? Is harmonization a shared industrial interest that could lead to cost minimization of corporate growth? (Or is harmonization a way to reduce the costs of concentration and market power?) As we said before, capture is a technology of power and economics has provided a barely un-criticized knowledge structure that acknowledges that the “realities of economics are common among nations” and scholars cannot ignore that

“part of a *global community* and that ideas generated on one continent cannot safely be cabined and ignored on the others”⁶².

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- 59 Organization for Economic Co-Operation and Development [OECD]. *Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations* (2005), OECD, *Recommendation of the Council concerning merger review* (2005); OECD, *Recommendation of the Council concerning structural separation in regulated industries* (2001); OECD, *Recommendation of the Council concerning effective action against hard core cartels* (1998); OECD, *Recommendation of the Council concerning co-operation between member countries on anticompetitive practices affecting international trade* (1995).
- 60 ELEANOR M. FOX, *US and EU Competition Law: A Comparison, in Global Competition Policy* (ed.), J. DAVID RICHARDSON and EDWARD M. GRAHAM (1997). See EINER ELHAUGE & DAMIEN GERADIN, *global antitrust law and economics* (unpublished manuscript -on file with the authors).
- 61 See DOUGLAS E. ROSENTHAL & PHENDON NICOLAIDES, *Harmonizing Antitrust: the less effective way to promote international competition, in Global Competition Policy*, (ed.) J. DAVID RICHARDSON and EDWARD M. GRAHAM, 1997.
- 62 EINER ELHAUGE & DAMIEN GERADIN, *Global antitrust law and economics 2* (unpublished manuscript -on file with the authors).

Deep capture of scholars and deep capture of policymakers seem to go hand by hand⁶³ and this research is aiming to theoretically show how policy and regulation are in an inner tension—highlighting the findings of structuralism and social and behavioral psychology—, and econometrically why goals of policy are not attained by regulation.

B. VOLUNTARY STANDARDIZATION OF MINIMUM CAPITAL REQUIREMENTS IN BANKING

The idea of capital adequacy in banking and financial institutions law has been grounded in the idea of systemic risk—credit, market and operational risk— and public safety⁶⁴. The idea of minimum capital requirements and capital adequacy has gained relevancy in the international regulation and international industrial policy with the extension of markets, the partial liberalization of money flows and cross-border operation of financial institutions. This relevancy has struggled with two opposite propositions about the dynamics and process of industrial regulation, this is harmonization or competition.

Regulatory competition has been an issue in several debates of industries' regulation. Fiscal and financial paradises are the product of such idea and the growth of a few small countries⁶⁵ and many banking corporations has been its product. *Harmonization* of regulation, on the other hand, competes with the idea of competition, since, according to the authors defending such idea, it leads to a fair and easy flow of capitals and public safety⁶⁶.

63 *Supra notes* 7, 21 and 23 and accompanying text.

64 HAL SCOTT, *International Finance* Chapter Seven, 1 (Forthcoming) (On file with the author). See João A. C. Santos, *Bank Capital Regulation in Contemporary Banking Theory: A Review of the Literature*, 10, 2 *Financial Markets, Institutions & Instruments* 41 (May 2001).

65 As Switzerland, Caiman Islands, Panama, etc.

66 See P COOKE, *Capital Bank Adequacy* (1991); THOMAS HELLMANN, KEVIN C. MURDOCK & JOSEPH E. STIGLITZ, *Liberalization, moral hazard in banking, and prudential regulation: Are capital requirements enough?* 90 *American Economic Review* 147, 2000.

However, the Bank of International Settlements worried about cross-national banking supervision, the possibilities of systemic risk and its consequences for the global economy, set up the Committee on Banking and Supervisory Practices (with 10 members), called the Basel Committee⁶⁷ on Banking Supervision. The goal of such committee is to provide a “forum for regular cooperation on banking supervisory matters”⁶⁸ but this forum is more than an advisory and has become in a global regulator and global think tank of capital requirements and capital adequacy. Its members are the Central Banks of the ten richest countries in the World (G10)⁶⁹ and home-base of the world’s biggest financial institutions.

After describing these approaches, several questions arise. Based in the global analysis, the metascript of markets is grounded in the idea of freedom and competition. If it is so, why not to maintain a market approach where only those disciplined financial institutions survive? Why, if the consumer is sovereign, there must be just one regulation concerning to capital regulation? In the answer to these questions we can find the inner tensions in the discourse of international industrial regulation of Banking⁷⁰. Risk seems to be the main concern of scholars and the industry⁷¹, but in certain way what capital adequacy does is increase concentrations and impede competition. Thus, the highly appreciated freedom in the global

67 See JOHN D WAGSTER, *Impact of the 1988 Basel Accord on international banks*, 51 *Journal of Finance* 1321-1346, (1996). P COOKE, *Capital Bank Adequacy*, 1991.

68 About the Basel Committee. *Basel Committee on Banking Supervision. Bank Of International Settlements*, in <http://www.bis.org/bcbs/index.htm>, viewed March 28, 2006.

69 Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Spain, Sweden, Switzerland, United Kingdom and United States.

70 Several scholars have found these tensions. See ROJAS-SUÁREZ, LILIANA, “Can International Capital Standards Strengthen Banks In Emerging Markets?”, Institute for International Economics Working Paper No. 01-10. Available at SSRN: <http://ssrn.com/abstract=300895> or DOI: [10.2139/ssrn.300895](https://doi.org/10.2139/ssrn.300895);

71 See PABLO MARQUEZ, *Cost Benefit Analysis, Statistical Value of Life and Regulation: Prospective Challenges*, *Vniversitas Ciencias Jurídicas* (Indexada), n° 113, Bogotá, 2007 - en prensa.

money flow discourse is in a constant tension with the regulation of capital adequacy, and many other regulations concerning banking and financial services. The reality that I plan to explore here is why and how the harmonization capital adequacy favors international financial institutions minimization of costs, and why there is a strong interest in developing a transnational structure of capital adequacy.

C. INTERNATIONAL INTELLECTUAL PROPERTY LAW

For several years regulation of intellectual property has have a transnational pattern. The arguments for an international of intellectual property regime do not vary much from the traditional arguments for the protection of intellectual property rights; both rely on the advantages of property to incentive free trade and economic growth⁷². These seem to be the same reasons for every single regime of industrial regulation that we have highlighted. Freedom, markets and prosperity—in the words of wealth, growth or profits maximization—are attached as an *ordoliberal* mentality.

In fact, as special as intellectual property is, its main justification is based in its effect on growth and its supposedly clear incidence in innovative activity⁷³. Indeed, many authors assure that intellectual

72 See G.J. MOSSINGHOFF, *The importance of intellectual property protection in international trade*, 7 B. C. INT. & COM. L. REV., 235-249 (1984), WILLIAM NORDHAUS, *Invention, Growth, and Welfare: a Theoretical Treatment of Technological Change* 3-7 (1969); Dasgupta, PARTHA S. and JOSEPH E. STIGLITZ, *Industrial Structure and the Nature of Innovative Activity*, 90 *Economic Journal*, 266-93 (1980), REINGANUM, JENNIFER F., *Innovation and Industry Evolution*, 100 QUARTERLY J. OF ECON., 81-99 (1985); GERALD J. MOSSINGHOFF and VIVIAN S. KUO, *World Patent System Circa 20xx, A.D.*, 38 IDEA 529 (1998); D.M. GOULD y W.C. GRUBEN, *The role of IPR in economic growth*, 48 J. Develop. ECON. 323-350. PETER MENELL, *Intellectual Property: General Theories*, in *Encyclopedia Of Law & Economics* (2000); KEITH E. MAKUS, *Lessons From Studying the International Economics of Intellectual Property Rights*, 53 *Vand. L. Rev.* 2219-2239 (2000); SAKAKIBARA MARIKO & LEE BRANSTETTER, *Do Stronger Patents Induce More Innovation? Evidence from the 1988 Japanese Patent Law Reforms*, 32 *Rand J. OF ECON.* 77, 2001.

73 See PABLO MARQUEZ, *Critical Analysis of the Justification and Economic Foundations of the Intellectual Property Rights System*. *Revista Derecho y Sociedad*, Universidad

property enforcement leads to higher product and productivity growth, higher foreign direct investment rates and many other advantages⁷⁴. On the other hand, theoretical and empirical studies⁷⁵ have proven that, not in every case, enforcement of intellectual property rights leads to growth or higher foreign direct investment rates⁷⁶ and on the opposite, internationally, they increase the likelihood to innovate and, following their own assumptions, to growth⁷⁷. In addition, the mere fact that intellectual property is based in a monopolistic privileges structure makes its effects differ from the effects derived from the structure of property based in physical appropriation of goods⁷⁸.

In any case, the debate over the convenience or inconvenience of international intellectual property regimes is over, since almost all the

Católica del Perú. Lima, Perú, n° 25, 2005; EDWARD C. HETTINGER, *Justifying Intellectual Property*, PHIL. & PUB. AFF. (1989); LAWRENCE C. BECKER, *Deserving to Own Intellectual Property*, 68 CHI.-KENT. L. REV. 609 (1993); EJAN MACKAAY, *Economic incentives in markets for information and innovation*, 13 HARV. J. L. & PUB. POL'Y 867, 1990.

74 See *supra* note 72.

75 PABLO MARQUEZ, *Violación a los derechos de propiedad intelectual: un enfoque alternativo aplicado a la piratería de software*, colección: Investigaciones, JAVEGRAF, Bogotá, 2004.

76 TOM PALMER, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J. L. & PUB. POL'Y. 817 (1990); FRANK H. EASTERBROOK, *Intellectual Property Is Still Property*, 13 HARV. J. L. & PUB. POL'Y 108 (1990); EDMUND KITCH, *Taking Stock: The Law and Economics of Intellectual Property Rights: Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 VAND. L. REV. 1727 (2000); SHAVELL STEVEN and TANGUY VAN YPERSELE, *Rewards versus Rights*, 44 J. L. & ECON, 525-547, 2001.

77 MICHAEL A. HELLER & REBECCA S. EISENBERG, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698 (1998); SAKAKIBARA MARIKO & LEE BRANSTETTER, *Do Stronger Patents Induce More Innovation? Evidence from the 1988 Japanese Patent Law Reforms*, 32 RAND J. OF ECON. 77, 2001.

78 See RUTH GANA, *Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property*, 24 DENV. K. INT'L L. & POL'Y 109 (1995); MICHAEL A. HELLER & REBECCA S. EISENBERG, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698 (1998); ROBERT FEINBERG y DONALD ROUSSIANG, *The economic effects of intellectual property right infringements*, 63, 1 J. Business, 79, 1990.

states have subscribed the multilateral treaties⁷⁹ that oblige them to comply and harmonize their intellectual property legislation. And it is not a surprise that such regime follows the structure established in the group of countries that have an intensive production of intellectual property. Why this harmonization was required? Some assert that it makes easier trade and technology transfers⁸⁰ but, why is there such a strong interest, —shared interest—, of international corporations to harmonize legal regimes? Why such industrial regime should be the one already defined in countries as the UK and the US?

IV. CONCLUSION: DISCURSIVE CORRELATIONS AND EVIDENCE

We hope we have exposed why there is sufficient evidence to assume that it is possible to talk about an international regime of industrial regulation. The architecture of such regime could make capture of international regulators easier and the increasing idea of a global legal harmonization plays a key role in the escalating size of corporations in the whole world.

What make interesting and evident the problems and ideas we just highlighted is the theoretical tensions that freedom, markets and regulation have. The inner contradictions in the different industrial regimes lead to just one final effect, higher concentrations. Two questions arise here: is harmonization of a shared industrial interest that leads to prosperity - wealth and growth? Or is harmonization a way to reduce the costs of concentration and market power? In our perspective, legal harmonization is set as a mechanism to increase freedom, smooth international trade and control market power but its result is simply more and easier mechanism to industry concentrations. *Convergence of antitrust laws increase industry concentration;*

79 About the insignificance of international treaties on IPR violation *see*: PABLO MARQUEZ, *Tratados Multilaterales y la Protección a los Derechos de Propiedad Intelectual: Evidencia entre Países*, *International Law* (indexada), n° 5, Bogotá, 2004.

80 G.J. MOSSINGHOFF, *The importance of intellectual property protection in international trade*, 7 B. C. INT. & COM. L. REV., 235-249, 1984.

capital adequacy of financial institutions beget greater market concentrations; the whole idea intellectual property as a mechanism to promote growth, cause concentrations; In addition, the idea of a global corporate governance, increases the likelihood to concentrate and maintain the global structure of corporations. We could go on and on reviewing literature and market effects to show how the contradiction of freedom, markets and regulations are just a chimera, where the law produced by the State, or a league of States, is just an illusion and the knowledge structures behind them are just a normalization technology.

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