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Market Anthropology and Global Trade

Wolfgang Fikentscher\*

\*Fikentscher@jura.uni-muenchen.de

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# Market Anthropology and Global Trade

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## **Abstract**

In economic anthropology, the concept of 'market' needs a more detailed elaboration. The traditional distinction between barter and price markets does not suffice. One of the identifiable forms of market in anthropology is the individualized, "subjective" market which is defined by the question: "What is my (!) market?". It is characterized by competitive tension between economic rivals, not just by a good and an area. Using this concept of the market in the subjective sense, some aspects of globalized economy look different from hitherto held propositions. One of these aspects is a global competition law. An earlier draft proposal of an international antitrust code will be discussed and related to the concept of the subjective market as well as to the "convention method" of regulating crossborder legal issues in intellectual property law (the Paris and Berne Conventions).

# Market Anthropology and Global Trade

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Wolfgang Fikentscher\*

## I.

In economic anthropology, several modes of allocating goods to persons are being distinguished. This is a very general way of explaining how and why scarce goods may reach those who are in need of them. The four kinds of such assignment of goods to persons in anthropology are *distribution*, *reciprocity*, *redistribution*, and “*market*”.

Distribution means the simple handout of a resource, for example hunted deer in a band of hunters and gatherers (anthropology books that only describe “exchanges” often do not mention distribution because it no exchange). Reciprocity designates an exchange by which one receives something, and the other returns something, for example in a barter trade. Redistribution takes a higher organization, for example by a chieftain or king, who first collects from his subjects, and then distributes the collected items to himself, his army, and his needy subjects. Finally, market is said to be the institution in which a lot of people meet and barter or trade for some kind of money.

This traditional picture of modes of allocation in economic anthropology is in need of further elaboration, in particular with regard to the concept of

\* em. Prof. Dr. jur. (München); ausw. Mitglied des MPI für Patent-, Urheber- und Wettbewerbsrecht, München. Ich danke Herrn Dr. Christopher Heath für kritische Durchsicht des Manuskripts.

the market. There are many more kinds of market than anthropology anticipates thus far. The only accepted distinction as yet is between barter and price markets.

Another distinction one should add here is the one between objective and subjective markets. An objective market is a market viewed from bird's eye. For example the Taiwanese market, or the European market, each for a certain merchandise which is being traded in that territory. A market in the objective sense is defined by a good, let us say computer hardware, and a geographic area, for instance Taiwan. Most microeconomics books do not mention a time frame for that market. This is correct because modern microeconomics tend to disregard time. *Objective markets are not necessarily competitive.* For example, a marble factory at Hualien is not necessarily a competitor of a marble dig in Australia because marble is too heavy to be transported that far at economically acceptable terms. Still, both the Hualien and the Australian marble producers are active on the Far Eastern marble market, and the world marble market, both taken in an objective sense. There is a European bread market, but nobody ships bread from one end of Europe to the other; it would perish. Objective markets are good for statistics,

development policies, “industrial policy”, and many issues that are called “trade” as distinct from competition (trade regulation is different from competition law).

A subjective market is not viewed from a bird’s eye perspective, but from the view of a participant, a subject, regularly a merchant or a consumer, who asks the question: What is *my* market? If one asks a merchant: “What is *your* market”, she or he will answer: “I am exposed to the competition of at least ten firms, and it’s stiff competition.” At closer sight, the persons active on a subjective market are defined by adding the answer to two questions: For whom am I *with my offers* – an alternative; and: who is competing with me in trying to attract demand. In other words, the subjective market is defined by competitive tension. For this, a good, an area, *and a time frame* are important determinants, but they are not sufficient. The test is competition, not just good, area, and time. Those three determinants can only be indicators.

A second distinction between types of markets that anthropology does not yet make but should make is the one between short *-range barter or price markets* without extended credit relations – that is, markets “at arm’s length” – on the hand, and long *-range credit and trust markets* on the other. Anthropologically, long-range credit and trust markets are relatively “young phenomena”. As far as we know, the earliest date back to the Greek commonwealth (“*koiné*”) around 500 B.C.E. That period of time is often called by historians *and*

philosopher the “axial age” because of the many changes in religion, morals, law and economy between 750 and 400 B.C.E. Long -range trust markets before this time are not known.

On the other hand, not every post -axial-age market is a long -distance trust market. There are post -axial-age markets “at arm’s length”, such as the typical bazaars in Arabian countries under the rules of Islamic shari’a.

Thus, for the purposes of economic anthropology (but with far -reaching effects beyond) we discover three new pairs of market concepts: objective and subjective markets, pre - and post -axial-age markets, and short -range (barter and price) markets and long -range credit and trust markets.

Against this anthropological background, it is possible to define the free market system of the West, usually traced to the teachings of the Scottish philosopher Adam Smith (1723 -1790). This so -called free market in the sense of Western economic teaching is a post -axial-age, subjective, long -range trust market. Compared with the possibilities offered by economic anthropology, Adam Smith’s, that is, “our” Western free market system, is something rather special. Anthropology knows many more forms which we cannot discuss here, but which also deserve their legal protection, because they exist in this world.

For antitrust policy and law, this means a lot. Antitrust refers to subjective markets because it wants to protect competition. Antitrust on long-range credit markets ought to look different from antitrust on barter and short-range price markets. On objective markets, and on non-market forms of allocation of scarce goods, other legal instruments of protection are in place.

Why is this of interest? If one scrutinizes markets anthropologically, many objections against globalisation become moot. Opposition against globalisation will remain vivid as long as the distinction between subjective and objective markets is not made. Antitrust policy and law should establish, maintain, and restore competition on subjective markets. On objective markets, there is no competition test, and statistics or structural policies are in demand.

If a culture cherishes its own form of a market, or of another (non-market) form of economic allocation of these scarce goods, as a rule it deserves attention and respect. On the whole, if subjective markets are the focus of consideration, antitrust law has to do with much smaller and non-global units.<sup>1</sup> Rivalry is required, actual or potential, not just a merchandise and a territory.

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<sup>1</sup>For details of this consequence, see Wolfgang Fikentscher, *Mehrzielige Marktwirtschaft auf subjektiven Märkten: Wider das Europa- und das Weltmarktargument*, Festschrift Ernst-Joachim Mestmäcker, Baden-Baden 1996: Nomos, 567–578.

Moreover, since anthropology teaches us that there are other forms of allocating scarce goods to those who need them, outside of markets, competition cannot be the only yardstick of economic justice to be applied in an indiscriminate manner. Allocation outside of markets can be effectuated, for example, by distribution, (non-market) reciprocity, or redistribution. Thus, anthropology makes us understand the economies of collective goods. For example, if a delegate from Mongolia to the International Monetary Fund says: "We need our pasture as a collective good for the cattle of all of us and insofar as we want to engage in a distributive economy", this pasture should not be privatized and subjected to private property and thus to competition. As yet, the IMF has shown little understanding for this kind of argument.

We see that the distinction between forms of allocation of scarce goods in terms of economic anthropology helps us to solve important economic and legal issues. In antitrust, the distinction between objective and subjective markets narrows down the relevant markets. In economic law in general, this distinction gives us a clear separation of trade-related and competition-related issues. We can now distinguish between property-plus-competition defined markets on the one hand, and non-market economies pertaining to collective goods on the other. For the central concept of antitrust laws, the restraint of competition, the requirement of rivalry eliminates the separate test of



“appreciability” (sensibilité, Spürbarkeit); since where there was rivalry *before* the restraint, and no or less rivalry is *after* the restraint, there is always the necessary appreciability because rivalry is something competitors (and hence their suppliers or buyers) feel. By the same token, if the legal policy underlying antitrust law is to prevent unjustified cartel, exclusionary distribution and monopoly rents, on subjective markets (not on objective ones), the proof of a restraint of competition triggers the assumption of a violation of the antitrust laws, putting the burden of proof for the reasonableness of the restraint upon the *defendant*. This is not so under the antitrust rules which the European Commission in its “Whitebook” is now being proposing as the future EU antitrust law. The simple reason for it is basic mistake is that the European Commission does not make a difference between subjective and objective markets: on a *subjective* market, a restraint of trade *must* be presumed illegal.

For neoclassical and neoliberal microeconomics, the introduction of the concept of the subjective market has another impact of general importance. As we have seen, the market definition in microeconomics is built upon the two requirements of a good and a territory. Correctly, time is neglected because modern microeconomics disregards the factor time. The subjective market, defined by competitive rivalry, occurs for a good, in a territory, and during a period of time. Therefore, the theory of the subjective market reintroduces the factor time into microeconomics.

The concept of the subjective market has been deduced from economic anthropology. Economic anthropology is usually regarded as a sub-field of sociocultural anthropology, and sociocultural anthropology as a field of cultural anthropology.<sup>2</sup> At a closer look, this is only half of the truth. Objective markets can be classified this way. But subjective markets include competitive *behaviour*. Behavioural studies, in anthropology, belong to ethology (Verhaltensforschung), and thus to biological (or physical) anthropology. Thus, subjective markets require a combined study of cultural and biological factors, whereas objective markets solely resort to cultural anthropology.

## II.

How does the Draft International Antitrust Code (DIAC), a private proposal for solving the needs of a worldwide economic law, and aiming at economic justice for all participants, try to answer the anthropological demands of the various cultures and culture-specific forms of markets mentioned before.

The DIAC offers a pragmatic concept of competition for the use in a WTO or WIPO convention agreement (and any convention should start from such a concept). This pragmatic competition concept markedly differs from the

perfect competition model addressed in the WTO Annual Report 1997, vol. 1, which is misleading and no longer up-to-date, and would seriously impede rivalry-defined competition. As we have seen, what the books call “market” in reality takes several forms:

First, there is the distinction between objective “anonymous” markets as statistical entities defined by good, area, and time, however without competitive rivalry, on the one hand, and non-anonymous, competitive, and therefore “subjective” markets on the other. A subjective market is the aggregate of a market participant’s perspectives of its alternatives for supply or demand.

Secondly, there is the distinction between pre-axial markets characterised by short-range exchange relations such as barter markets or bazaars, and post-axial markets shaped by the post-axial modes of thought, of which some but not all – according to the prevailing mode of thought – are characterised by far-range exchange relations including credit claims, trust relations, and membership rights and duties.

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<sup>2</sup>See, for example, Wolfgang Fikentscher, *Modes of Thought: A Study in the Anthropology of Law and Religion*, Tuebingen 1995: Mohr Siebeck, 92; also for the relationship to ethology.

This results in six possibilities. However in practice, pre-axial age subjective markets, post-axial age objective markets, and post-axial age subjective trust markets are the economically more important combinations.

How do these three important combinations relate to the modern world economy as conceived by the World Trade Organization of 1994? By its papers and reports, from an anthropological perspective it can easily be demonstrated that the WTO errs in identifying world economy with only one of the preceding three combinations, namely, with the post-axial age objective market as its concept of economy. All the more so, since it can be shown that grave consequences flow from this mistake. The market economy as envisaged by the WTO is not what empirically is "out there" in the economic reality. The same must be said of World Bank and IMF, as evidenced by notorious development blunders. The DIAC tries to be open for all kinds of economies.

The subjective market is the market as seen from the point of view of a participant of the market. As mentioned before, the opposite concept is the objective market, defined by a good, a territory, and a time frame but without competition as a constituent factor (for instance, the European bread market). Objective markets are good for statistics, and politics; they deal with issues such as development test vs. competition test; trade-related aspects; innovation; industrial policy; and trade issues.

The theory of the subjective market has another far-reaching consequence which has not yet been discussed. <sup>3</sup>All books on micro-economics describe the dichotomy of perfect competition and monopoly. Perfect competition is defined, in micro-economics, as the activity on a market which is characterized by homogeneous products, unlimited information, unlimited reaction speed, and infinitesimally small sellers and buyers who are too small to engage in strategic behaviour.

Perfect competition denies strategic behaviour among market participants. On perfectly competitive markets, there is by definition no rivalry between the market participants as competition is practically stifled to zero. Therefore, perfect competition is a way to define the absence of competition. The mistake has its roots in the fact that the theory of perfect competition envisages objective markets, instead of focusing on subjective markets and their strategy-producing alternatives.

For this reason, for anti-trust and unfair trade practices law purposes, the common distinction between perfect competition and monopoly as the two extremes of market behaviour is so flawed. The correct dichotomy is rivalry - defined competition on subjective markets on the one hand, and monopoly

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<sup>3</sup>See Part I, last paragraphs.

and perfect competition as two forms of non-rivalry defined market behaviour on the other. Needless to say that in addition to the consequences described above, the concept of the subjective market challenges many basic and firmly held micro- and macro-economic assumptions.

Thus, a comparison of what we call a free market system, including the possibilities of engaging in economic activities, under anthropological scrutiny leads to the conclusion that the free market system is a culture-specific, namely western, and if applied worldwide, ethnocentric notion. Only fragments of anthropological variability are being taken up and included in what we often call "the economy".

Americans sometimes are inclined to think that in these days "the free market system" is on its way to pervade the whole world, and many Europeans share this view. May be this is so, and should even be welcomed as a step towards world-wide democracy and equal chances for everyone. But there is also evidence that other cultures are afraid of this. The Muslim World cannot agree to explicit advertising, the Siberians in their great majority fear democracy more than anything else because it leads to the economic destruction of their habitat, North American Indians wonder at the 'frenzy' (panicking as they call it) that comes with the economy-oriented lifestyle of the "Anglos", and many traditional societies fear exploitation and assimilation.

Obviously, there are anthropologically economic variations in this world. Consequently, in order to avoid an ethnocentric western world under the auspices of WTO and World Bank System, other types of economy, and other total economies, must be given appropriate standing in WTO and World Bank System, such as

- non-competitive distribution strategies,
- systems of redistribution,
- pre-axial age subjective markets (e.g. barter or other short-range exchange), and
- markets with different categories of marketable property, anthropologically speaking, with different economic spheres.
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### III.

What are the additional features of the DIAC in relation to the insights from economic anthropology gained before?

Basically, there are four legal ways of dealing with cross-border issues: (1) Uniform law, (2) harmonized law, (3) the convention approach, and (4) conflicts-of-law (“choice-of-law”). These are the most commonly applied normative settings for solving cases which involve more than one legal system.

- (1) Uniform law is the most complete and the least frequently achieved approach; an example is the Geneva uniform bills of exchange and check law of 1930. The abortive Havana Charter of 1948 aimed at a uniform antitrust law, the UNCTAD Restrictive Business Practices Code of 1980 is uniform antitrust “soft law” (non-binding).
  
- (2) Harmonized law is less than uniform. It narrows the distinctions between national laws while leaving minute differences to national legislatures. EC directives lead to harmonised national legislation. The American Law Institute prepares harmonised state law.
  
- (3) Convention law has an even less harmonizing effect. Convention law allows to implement national laws for solving cross-border cases while avoiding heavy inroads to claims of national sovereignty. The Paris Convention for the Protection of Industrial Property of 1883 and the Revised Berne Convention for the Protection of Copyrights are the two leading examples (the U.S. is a member since 1887 and 1989). These conventions for the protection of “intellectual property” make use of the following principles:
  - a) application of national law to cross-border cases;
  - b) national treatment of foreigners inside the country where protection is sought (to avoid domestic discrimination);



- c) minimum standards representing common approaches or commitments of protection to correct “consensus wrongs” in a non-discriminating manner outside the country where protection is sought (to avoid a significant discrimination between the member states); a list of minimum standards will be given – in context with other results – in the summary; <sup>4</sup>
  - d) the “union principle” which permits contemporaneous membership in successive revisions of the convention (to permit flexibility and varying degrees of progress in the regulation of concern without loosening national membership); and
  - e) the absence of a most-favoured-nation (MFN) clause (to permit the application of the union principle, *supra*), and the establishment of bilateral agreements which often contain experiments in improvements of protection).
- (4) The fourth possibility of dealing with cross-border cases is the conflicts-of-law approach. It is often called “choice-of-law approach” because in contract law the parties are in principle permitted to opt for a national law to deal with a cross-border case. But in many cross-border cases, there is no such freedom. Rather, many conflict rules of national law require mandatory application. Antitrust cases concern inequitable behaviour, comparable to torts. In general, remedies against unfair trade practices are tort actions. The nexus between a

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<sup>4</sup>See IV, under 4., below.

tort case and the applicable national law is the place of the wrong (*forum delicti commissi*). In essence, the place -of-the-wrong rule is mandatory.

The place of the wrong may be inside or outside of the country where the antitrust or unfair trade practice offence has been committed. If it is inside the country, national law applies. If it is located outside the country where the action is brought, *foreign law* (antitrust, or unfair trade practice torts law) applies and is being adjudicated by national courts rather than the law of the forum.

This difficult situation is aggravated by the fact that the conflict -of-law rules may not only lead to the application of foreign national substantive law but also to national conflicts -of-law rules. The latter is rather the rule than the exception. Then, the issues of *renvoi* and third -law application must be decided.

Thus, resorting to the conflicts -of-law approach usually leads to the call for an international harmonisation of the national conflicts -of-law rules. At this point, the experts tend to favour the harmonisation of the substantive laws of these countries interested in regulating their cross -border issues, rather than harmonising their conflicts -of-law rules.

It was precisely this quagmire that caused the interested nations to conclude the Paris and the Berne Conventions, a low-level substantive (and not conflicts-of-laws oriented) harmonisation approach (“minimum standards”), in the field of intellectual property protection.

The Draft International Antitrust Code (DIAC) offers such low-level harmonisation minimum standards of substantive law, while leaving detailed and “custom-tailored” regulation to national legislature. It thereby aims at safeguarding national traditions and economic cultures by use of general clauses such as the Anglo-American common law principle of the rule of reason. Anti-dumping is a practice extending into unfair trade practices law.

The DIAC is intended to demonstrate the possibility of applying the convention approach to antitrust matters. Unfair trade practices rules, in particular anti-dumping rules, can be added. In its various sections, a menu to choose from is offered.

For preparing a transnational competition law, a cooperation between WIPO and WTO would be helpful in drafting an international code. WIPO could contribute its experience in the administration of the Paris and the Revised Berne Convention. WTO could undertake the code’s actual implementation, relying on its procedural machinery including its panel jurisdiction. Existing institutional mechanisms between WIPO and WTO could be used. It is

noteworthy that the recently published WIPO Model on Unfair Practices Rules does not tackle unfair pricing such as monopoly or price discrimination.

The proposed convention treaty on free and fair competition would co-exist along with the already existing and expanding network of bilateral antitrust assistance treaties and agreements. Besides regulating special bilateral issues of competitive trade and merger control policies, these treaties and agreements would serve as precursors and in part as models for the establishment and further development of a multilateral international convention instrument. In the light of the ongoing globalisation of economic relations, to rely solely on bilateralism may prove to be insufficient.

Reference may be made to the antitrust enforcement agreements between the U.S. and the EC, Australia, Canada and Germany.

#### IV.

To summarize:

1. In view of the tasks given to the WTO by the world community a transnational antitrust and fair competition system is indispensable. "Free" and "fair, in this sense, means an non-discriminatory level playing field, covering, inter alia, the anti-dumping law. "Transnational", in this sense,

means a law that is binding on the nation states and also –in contrast to classical international law –entitles and obligates their citizens.

2. This transnational antitrust and fair competitions system should seek its model in the Paris Convention on the international protection of patents and against unfair competition of 1883, and the parallel Revised Berne Convention on the international protection of copyrights of 1886. Most governments are members of both conventions.

3. Under this “convention approach”, the following principles of law prevail:

-national law (not international or “world” laws such as in the abortive Havana Charter),

-national treatment, to prevent transborder discrimination inside of a member state,

-minimum standards for preventing “consensus wrongs”, committed in transborder transactions between the member states,

-the “union principle”, to enable revision conferences, and thereby progress and development, among a limited number of members, while maintaining the membership of all.

-there should be no most-favoured nation clause, in order to leave the road open to bilateral antitrust and fair competition agreements, containing special entitlements, obligations, and cooperation in general. "Most-favoured nation" (MFN) would preclude such bilateral "experimenting". It would also preclude the union principle (3, supra) and its revision mechanism. Art. 4 TRIPS which provides for most-favoured nation clauses should be repealed or modified.

4. The minimum standards, intended to prevent the commitment of "consensus wrongs", ought to include:
  - a) a prohibition of horizontal agreements in restraint of trade;
  - b) a prohibition of abusive distribution systems;
  - c) a regulation of restraints of competition based upon intellectual property protection;
  - d) merger control;
  - e) a prohibition of abusive market domination;
  - f) a provision against circumvention of (a) through (e);
  - g) a rule of reason exemption covering (a) through (f) that allows due consideration of culture-specific forms of economy;
  - h) minimum sanctions which would include deconcentration, divestiture or dissolution of past mergers and monopolies;

- i) minimum procedural rules which could be borrowed from the existing and already working panel jurisdiction of the WTO;
  - j) a rule against unfair trade practices under Art. 10bis Paris Convention.
5. The concept of competition should be pragmatic, not theory -burdened. This implies that competition includes rivalry (subjective market), and thus a restraint of competition lessens this rivalry ("material and appreciable restraint of competition"). This also implies that for a transnational antitrust and fair competition law, the model of perfect competition and other non-rivalry defined ("objective market") models are misguided. A market is a market of a firm, a buyer, a supplier, a consumer, etc., under culture -specific conditions.
  6. In all, and in brief, what is needed is a convention, similar to the existing Paris and Berne Conventions for the international protection of intellectual property, for the international protection of competition, and this transnational antitrust and fair competition conventions should be integrated into the existing panel system of the WTO.
  7. To this end, the members of the DIAC -Groups submitted their proposal of an "International Antitrust Code". They suggest that efforts be continued.