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         zum Europäischen und Internationalen Kartellrecht  
         Munich Series  
         on European and International Antitrust Law

Wolfgang Fikentscher

**Culture, Law and Economics**  
Three Berkeley Lectures



**Münchener Schriften  
zum Europäischen und Internationalen Kartellrecht  
Munich Series  
on European and International Antitrust Law**

Herausgegeben von / edited by  
PROFESSOR DR. JOSEF DREXL

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for  
Knut Borchardt  
and  
Robert D. Cooter



“I have worked for freedom...”

Sarah Winnemucca

Quoted from Gae Whitney Canfield.  
Sarah Winnemucca of the Northern Paiute.  
1983. Norman: University of Oklahoma Press, p. 231



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# Foreword

## I.

This study is about sustainable freedom: cultural, legal, and economical; freedom from, and freedom to. In this context, sustainability means: safe from self-demolition. For freedom includes the freedom to destroy itself by simple exercise: A nation, a tribe, or any other institution is free to forsake its own culture, for instance, by submitting to assimilation by misdirected globalization. In a democracy, the voters are able to elect the dictator. In economics, liberalism tends to restrain competition, and comparable free behavior, by national and multi-national monopolies and cartels. This well-known phenomenon of self-defeat by exercise is called the liberal paradox.<sup>1</sup> The more the world becomes a unit, the more the liberal paradox is becoming a threat to freedom because, by definition, competitive relief from outside decreases. Avoiding the liberal paradox makes liberalism sustainable, and this task is primarily assigned to the law. A biological parallel is the awareness and avoidance of self-destruction of nature by heeding environmental sustainability, legally prescribed.

The purpose of the following pages is to demonstrate that in tackling the task of controlling the liberal paradox, culture, law and economics raise closely related issues, and make use of similar methods. The main focus will be on economics. The economic possibilities of escaping the liberal paradox will be related the tools of the law, and derived from cultural–anthropological discoveries. The general political framework this book is aiming at a legally protected, paradox-free, and in this sense human freedom, both *from* economic imposition, and *to* a culturally self-determined way of life.

## II.

But who is concerned with establishing sustainable liberalism, and who is mandated to work for this goal? Is it the World Trade Organization or any other UN agency? In December, 1999, the Ministerial Conference of the World Trade Organization (WTO) was convened in Seattle, Washington. After a few days of protests by environmentalists, members of non-

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<sup>1</sup> Karl R. Popper, *The Open Society and Its Enemies*, Vol. I, 1945, 3<sup>rd</sup> ed. London 1957: Routledge and Kegan Paul; for an economic perspective, see Wolfgang Fikentscher, *Freiheit als Aufgabe – Freedom as a Task*, Tübingen 1997: Mohr Siebeck, 113 ff. (with references). See also the more detailed discussion in the Introduction, *infra*, text accompanying notes 38, 59, and 61, and text near notes 80 and 382.

governmental organizations and diffuse groups of antiglobalizationists, it ended in complete disaster. Not even an emergency program for the conference was envisaged.

Never before did a meeting of one of the main agencies or bodies of the United Nations (UN) or of the World Economic Summit (“The Big Seven” or “Eight”) or other international body, in spite of occasional strong protests by interest groups at former occasions, leave its conference place and agenda in such a state of helplessness and dissolution. Little has changed since then, except that critics and outright foes of globalization have gained in organizational strength and determination. There is hardly any sizeable conference on world economics that is not confronted with strong and remarkably vocal public opposition. Washington, D.C. (spring 2000), Munich (summer 2000), Nice (summer 2000), Genoa (summer 2001), Davos (winter 2001 and spring 2003), Evian (May 2003) and Saloniki (June 2003) were the some visible examples. They will not be the last. Especially, the 2003 Davos debacle was indicative of the development that now the general state of UN helplessness has also spilled over to private business. Cancún (September 2003) ended in disaster. At Saloniki and Rome (both 2003), the protests aimed at European constitution-making, too. Only Doha (2001) was spared. Many other public conferences on the organization of international business relations were disturbed or wrecked.

There must be deeper reasons for this failure of liberal politics. A profound and widely felt discontent with the activities and philosophies of the world’s foremost economic agencies, in particular the WTO, but also the IMF, WIPO, UNCTAD, UNDP, OECD, and so on, may be one of these reasons. But saying this means only substituting one question with another. The underlying problem remains: How do the nations and their citizens want the world to be run economically and culturally?

In an interview with the German weekly “Focus,” Greenpeace director and member of the European Parliament José Maria Mendiluce was asked about his opinion of the disastrous outcome of the third WTO Ministerial Conference at Seattle.<sup>2</sup> His answer was: “Seattle means the end of the arrogant neo-liberal barbarism that wanted to turn the planet into a kind of stock corporation in which we all would serve as mere merchandise.”

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<sup>2</sup> “Focus” No. 2/2000, 188 (the translation from German is mine). The protests at Seattle were followed by major political demonstrations on April 16 and 17, 2000 in Washington, D.C., against the World Bank and the IMF. Rolf J. Langhammer, *Die Welthandelsordnung nach Seattle* (The world trade order after Seattle), Konrad-Adenauer-Stiftung (KAS), *Auslandsinformationen* (Foreign information) 2/2000, 22-36, asks whether “regular chaos” will become the rule for such conferences.

What comes next on the agenda of world trade and its economic, political, and legal organization? World trade will not end by the Seattle, Genoa and Davos failures, and the need to have some regulative mechanisms in world trade will survive. In Seattle, most observers had expected hard discussions about agricultural subsidies between the US and the European countries, and disputes between the industrialized world and the developing nations concerning environmental and social claims (child labor, safety standards, etc.). These debates were not even begun as the protests left their imprint. Their background was seemingly not well understood in “Western” business quarters.

Obviously, the demonstrations were directed against an alleged exclusionary way of understanding the economy as such. A general discontent with neo-classical economic mainstream caused the revolts, only at the surface hidden in “Third World” political demands such as debt release and revised terms of trade.

The Seattle, Munich, Genoa, Davos, Evian, Cancún, Saloniki, and Rome shocks did not occur totally unexpectedly. There had been warning voices, not so much pointing to protesting crowds, but against the spirit in which notably the WTO has carried out its earlier business. The essence of the warnings was the questionable and in fact untenable way in which the WTO and the IMF relied and still rely on dated models of neoclassical economy, instead of paying attention to newer microeconomic theories and to the visible diversity of economic forms and concepts currently in use in the various parts, nations, ethnic groups, and cultures of the world.<sup>3</sup> Up to this day, the WTO

<sup>3</sup> Earlier work: Wolfgang Fikentscher, *Wirtschaftliche Gerechtigkeit und kulturelle Gerechtigkeit: Vom Sinn der Kulturvergleichung in Anthropologie, Wirtschaft und Recht* (Economic justice and cultural justice: Of the meaning of culture comparison in anthropology, economy and law). Heidelberg Forum No. 98. Heidelberg 1997: C.F. Müller/Hüthig; idem, *Competition, Culture, and Economic (De-) Regulation*, in: Hanns Ullrich (ed.), *Comparative Competition Law: Approaching an International System of Antitrust Law*, Proceedings of the Workshop, Bruges, College of Europe, July 3-5, 1997, organized in cooperation with Wolfgang Fikentscher & Ulrich Immenga, Baden-Baden 1998: Nomos, 77-91; idem, *Zur internationalen Entwicklung des Wettbewerbsrechts (Beschränkungs- und Lauterkeitsrecht): Wirtschaftsfreiheit und Wirtschaftskultur* (On the international development of competition law (antitrust and unfair trade practices law): Economic Freedom and Economic Culture). in: Gerhard Schrickler & Frauke Henning-Bodewig (eds.), *Neuordnung des Wettbewerbsrechts (New Order of Competition Law)*, 11<sup>th</sup> Ringberg Symposium of the Max Planck Institute for Foreign and International Patent, Copyright, and Competition Law, June 14-18, 1997, Schloss Ringberg, Tegernsee, Baden-Baden 1998/1999: Wiley, 46-68; idem, *Grundprobleme eines verfassten Weltmarktes (Basic issues of a constituted world market)*. in: Japanisch-Deutsches Zentrum Berlin (JDZB), *Symposium Neue Weltwirtschaftsordnung (Symposium New World Economic Order)*.

and comparable organization lack a sufficient understanding of economic culture, let alone of economic-cultural pluralism. The main reason for this defective understanding seems to be that the WTO and the others in charge mistake traditional neoclassical economy for world economy.

### III.

This book grew, through intermittent stages, during the last five years. Between October 1998 and March 1999, I gave three formal lectures at the University of California School of Law at Berkeley that dealt with the cultural issues of world economics, based on my recent microeconomic-anthropological research. In these presentations, I tried to establish a theory of global trade which does justice to reality and economic cultural variety. In preparing my lectures, I did not specifically aim at the Seattle WTO Conference in December 1999 or other conferences or meetings. Of course, their agenda influenced direction and intensity of my research. The theories that underlie the three Berkeley lectures follow from studies in the international law and economics of competition, and in the anthropology of economics.<sup>4</sup>

The observable failures of UN world political economy and the ensuing frustration in many quarters of the economic world, developed and developing,

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Veröffentlichungen des Japanisch-Deutschen Zentrums Berlin No. 34. 1997 (with Josef Drexler); idem, Antitrust, Market Conceptualization and the World Trade Organization: The Convention Approach, in: Roger Zäch (ed.). Towards WTO Competition Rules – Key Issues and Comments on the WTO Report (1998) on Trade and Competition, Proceedings of the Seminar, Zürich University, July 8-10, 1999, organized in cooperation with Marino Baldi, Wolfgang Fikentscher, Ulrich Immenga and Hanns Ullrich, Zürich & The Hague 1999: Staempfli Verlag AG & Kluwer Law International, 69-90; idem, A Transnational Antitrust Convention and the Recent European Antitrust Proposals: Exercises in Economic Anthropology, in: Clifford A. Jones & Mitsuo Matsushita (eds.), Competition Policy in the Global Trading System, The Hague, London & New York 2002: Kluwer, Chapter 18 (341-386).

<sup>4</sup> Titles, places and dates of the three unpublished Berkeley lectures are: “Global Free and Fair Trade: The Anthropologically-legally Constituted Market Economy,” Faculty Workshop on Transnational Law and Legal Theory, September 28 to October 23, 1998, organized and moderated by Professors Robert D. Cooter, James Gordley, and Ugo Mattei, presented on October 2, 1998; “Economic Anthropology and Market Theory: Are There ‘Subjective Markets?’” Lunch Talk at the Jurisprudence in Society and Politics Program (Boalt Hall), Professor Robert Kagan, moderator, presented on February 1, 1999; “Market Anthropology and the International Legal Order,” Faculty Lecture Series, Professor Christopher Kutz, moderator, presented on March 11, 1999. Earlier versions were presented at University of California at Davis School of Law and Arizona State University School of Law (both in spring 1997). For other related preceding work and publications, see notes 3, 5, 6, and 10.

may justify the publication of the three lectures, in a combined and extended version as a book. Neither the lectures themselves nor the book target the policy, normative activity, and practice of the WTO alone. Going beyond mere organizational topics such as the existence and the work of the WTO or related organizations, the book is about the legal and economical conditions of (what may be called) economic justice in a multicultural world. The book starts from the vantage point of economic anthropology in Part One, proceeds to a reassessment of microeconomic market theory in Part Two, and ventures a reappraisal of the economies of collective goods in Part Three. Part Four returns to the agents of world political economy, among them the WTO, and tries to redefine their tasks, responsibilities, possibilities and limitations against the background of the results found in the first three parts.

#### IV.

Cultural anthropology is the social science that studies human existence and conduct in situations concerning knowledge, belief, art, morals, law, custom, and other mentally reflected themes.<sup>5</sup> If the theme concerns economics, the academic sphere and context is economic anthropology. The field studies, which gave rise to the discussion of traditional market theory in Part Two and to the evaluations of collective-goods economies in Part Three, were made between 1986 and today in thirty-two North American Indian nations, among them the twenty Pueblos in New Mexico and Arizona,<sup>6</sup> and in three aboriginal tribes in Taiwan, ROC (Paiwan, Rukai, and Atayal).

These studies in tribal economics were used to test common assumptions and concepts of traditional economics, especially with reference to “the market,”

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<sup>5</sup> See Wolfgang Fikentscher & Kai Fikentscher, *Kulturanthropologie – Ansätze zu einer erneuten Standortbestimmung* (Cultural anthropology: approaches to a renewed positioning within the sciences), in: Wolfgang Fikentscher (ed.), *Begegnung und Konflikt – Eine kulturanthropologische Bestandsaufnahme* (Contact and conflict: a cultural-anthropological stock-taking), Bavarian Academy of Sciences, Phil.- Hist. Class, Proceedings, New Series Vol. 120, Munich 2001, 9-32, 11 ff.; Wolfgang Fikentscher, *Modes of Thought: A Study in the Anthropology of Law and Religion*. Tübingen 1995: Mohr Siebeck, 23 and 95; the historical source is Edward Burnett Tylor, *Anthropology: An Introduction to the Study of Man and Civilisation*, London 1881, 1.

<sup>6</sup> Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 46 *American Journal of Comparative Law* 287-330 (Part I) and 509-580 (Part II) (1998); Wolfgang Fikentscher, *Vom Recht der Paiwan und Rukai – ein Forschungsbericht über die Altvölker Taiwans* (Of the law of the Paiwan and Rukai: A fieldwork report on indigenous nations of Taiwan), *Jahrbuch der Gesellschaft von Freunden und Förderern der Universität München*, 1994, 18-20.

compared to reality. In this respect, this book is in line and agreement with new trends in economic research. Lately, the Swedish Academy of Sciences remarked in a public statement that until recently, economics was widely regarded as a non-experimental science that had to rely on observation of real-world economies rather than controlled laboratory experiments. It added that research in economics has taken off in new directions, e.g., to the empirical testing and modification of traditional postulates in economics, in particular those of unbounded rationality, pure self-interest, and complete self-control, and that this recent research has its roots in two distinct, but converging, traditions: theoretical and empirical studies of human decision-making in cognitive psychology, and tests of predictions from economic theory by way of laboratory experiments as a tool in empirical economic analysis, especially in the study of alternative market mechanisms.<sup>7</sup>

The laboratory method is an important new approach to the science of economics. However, there is a third approach besides “arm chair economics” and the “laboratory method,” namely, ethnographic studies of non-Western real-world economies.

In this sense, the laboratory, utilized for writing this book, are tribal and other non-European economies, and the method applied in these “laboratories of life” is ethnographic and anthropological research. Important as the use of true labs may be for psychological studies of economic behavior, focusing on economic decision-making for the testing of economical theories: It should not be overlooked that these economic theories are part and parcel of “our Western,” that is, Greek/Judaic/Christian think-ways, or “modes of thought.” This is no less true wherever the religious background of the Greek Tragic Mind, and of the Judaic and Christian ways of looking at this world, have yielded to a secular handling of the once religious concepts, such as individuation of personhood, replacement of family metaphors by membership-defined organizations for the interpretation of human cooperation, and mutual “long-term” reliance. These secular cultural attributes are forming “our” real-world economies in the sense of the Stockholm text just cited, not more.

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<sup>7</sup> Karl Sigmund, Ernst Fehr & Martin A. Nowak, *The Economics of Fair Play*, *Scientific American*, January 2002, 83-87, with references; Vernon Smith, *Handeln in zwei Welten: Interaktion auf Märkten und im persönlichen Austausch (Acting in Two Worlds: Interaction on Markets and in Personal Exchange)*, *Neue Zürcher Zeitung*, No. 183, International Edition, of August 10, 2001, 11; cf., also *Kungl. Vetenskapsakademien (The Royal Swedish Academy of Sciences)*, Information Department, P.O. Box 50005, SE-104 05 Stockholm, Sweden, “Foundations of Behavioral and Experimental Economics: Daniel Kahneman and Vernon Smith, *Advanced Information on the Prize in Economic Sciences 2002*,” December 17, 2002, 1.

However, also the economist should acknowledge that there are non-Western cultures, and hence non-Western economies, claiming their own concepts of value, risk, agent, trust and reliance, etc. Moreover, “our own” Western economy may differ from, or share elements with, those non-Western ones that we have neglected to study and are made aware of when we look, for example, at the functioning of markets (see Part Two, below) or the role of collective goods (see Part Three, below).

The advantage of the anthropological study of real-world economic cultures over the laboratory approach consists in the feasibility of detecting other ways of thinking about economy, ways that are distant to “our” Western mind. Even the most ingenious lab experimenter will have a hard time theoretically designing what evaluation epistemologically means to a Muslim, what using a national commons means to a Mongol or a North American Indian, or what having and marketing property means to a Chinese under Marxist-Confucian rule. Yet, these non-Western understandings of the economy exist and are important to an economically globalized world.

Thus, tribal and non-Western economies are observable real-world economies. Globalization monitors us to pay attention to their wisdom. Their essence and working are foreign to us, so foreign that they are indeed comparable to discoveries to be made in those psychological laboratories. The work of the true laboratory experimenter has much in common with the ethnographic studies of the proverbial participant observer in tribal and non-Western economies. The difference is that the experimenter makes up his issues in decision theory and will ask students and other test persons to find results. The economic ethnographer and anthropologist aims at immersion in tribal and other thought-modally real economic life and will have conversations with people who live in real worlds.

This is no less important than pursuing non-experimental science relying on observations of economies of Western type on the one hand, or running psychological lab experiments in economics on the other (the Stockholm dichotomy). Working with, and talking to, participants of non-Western economic cultures to find out rules of economic behavior is also satisfying and revealing.

Comparing our law with other laws brings about a wealth of insight into this our law. Comparing our economy with other economies works just the same, but it is practiced or theorized. Comparing means using certain mental tools and methods. Several of them will be mentioned in the following text. Also, comparing means that there must commonalities between what is being compared. Looking for commonalities in order to find access to chosen objects of study may be a matter of chance, experience, interest, or predilection.

Until now, competition theory was much under the spell of price theory, because competition theory wanted to be as precise as price theory, if possible. Price theory owes its precision to the accepted neglect of the factor of time. Price theory is able to neglect the factor of space, too, space understood as vicinity, locality, region, or continent. Competition theory is in need of both, time and space. It is in need of an emancipation from price theory. For instance, in competition, short-term efficiency may contradict medium- or long-term efficiency, and the idea of risk that is involved in competition is a trait that plays a different role in different geographic localities, regions, continents; more precisely, in different cultures. The evaluation of competitive situations includes historical and culture-comparative understanding. Otherwise meaningful judgments about competition are impossible. This book sets out to restore the factors time and space to competition theory in order to make competition theory correspond to the exigencies of globalization and development. After historical contributions to market theories by Douglass C. North, Knut Borchardt, Ekkehard Schlicht and others, the following lines attempt at adding anthropology to the mix.

V.

The idea of using market theory in general and antitrust and its methodology in particular as instruments for the study of foreign cultures, and thus combining anthropological culture comparison and the law of international economics, was – after many years of economic–legal and anthropological research and teaching – first proposed in my *Abschiedsvorlesung* (farewell lecture on the occasion of retirement from my faculty) on *Wirtschaftliche Gerechtigkeit und kulturelle Gerechtigkeit* (Economic Justice and Cultural Justice), delivered before the Law School of the University of Munich on June 14, 1996.<sup>8</sup> I want to resume this method in the following chapters because I think it is one useful approach among others. I am greatly indebted to my hosts of other lectures that preceded this book, and to the audiences and colleagues for critiquing my views. As a result of these discussions, five articles followed in which I warned against the rigid and old-fashioned neoclassic and, in addition, culturally insensitive approach of the WTO to world trade, an approach for which the WTO was soon to be punished in Seattle and other places.<sup>9</sup> An earlier version of the lecture which underlies Part One of this book was published under the title “Market Anthropology and International Legal Order” in

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<sup>8</sup> See supra note 3 (first title).

<sup>9</sup> See rest of note 3, supra.

the Festschrift for Richard Buxbaum on the occasion of his seventieth birthday.<sup>10</sup>

I particularly thank the University of California School of Law and its former Dean, Professor Herma Hill Kay, for the hospitality granted to me as a visiting professor, and for repeatedly giving me the chance to present my ideas to the academic audience of this great and unique school. I am also grateful to my colleagues at Berkeley – most of all to Robert D. Cooter – for their critical and helpful suggestions. Needless to say, all omissions and errors are mine. To the fellows and collaborators of the Gruter Institute for Law and Behavioral Research, Portola Valley, California, go my sincere thanks for encouragement, assistance, and the opportunity for interdisciplinary exchange of ideas. This study has been written in the strictly empirical manner the Gruter Institute is dedicated to. On August 2, 2003, the founder and first President of the Gruter Institute, Dr. Margaret Gruter, S.J.M., died, so she could not see this book appear, the coming into being of which she had accompanied with interest and advice.

There were times when a preface contained thanks due to the secretary who had typed the manuscript with patience and kind understanding for the constant changes and “improvements” by the author. These times are gone and forgotten. Today, you do it yourself, that is, the author struggles not only with

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<sup>10</sup> Market Anthropology and International Legal Order, in: Theodor Baums, Klaus J. Hopt and Norbert Horn (eds.), *Corporations, Capital Markets and Business in the Law*, FS Richard Buxbaum, Lancaster 2000: Kluwer Academic Publishers, 157-76. More lectures on this subject followed in which I wanted to test my ideas with other audiences and trace various aspects of the subject matter, e.g., *Market Behavior and Global Competition*, Gruter Institute for Law and Behavioral Research Squaw Valley Conference 2000; *A Transnational Antitrust Convention and the Recent European Antitrust Proposals*, in: Jones & Matsushita (eds.), see supra note 3, 341-386; *Closing Lecture: Market Anthropology and Global Trade*, in: ISSP, Academia Sinica & Max Planck Institute (eds.), *Second International Conference on European and East Asian Intellectual Property Rights “Patents, Technology Transfer and Antitrust,”* Taipei, Taiwan R.o.C. 2000, VIII, 1-15; *Market Anthropology and Global Trade*, in: Christopher Heath & Kung-chung Liu (eds.), *Legal Rules on Technology Transfer in East Asia*, The Hague, London & New York 2002, 3-44; *Die Rolle des Marktes in der Wirtschaftsanthropologie und das globale Wirtschaftsrecht (The role of the market in economic anthropology and the global economic law)*, in: Wolfgang Reinhard & Justin Stagl (eds.), *Wirtschaftsanthropologie (Economic anthropology)*, *Historische Anthropologie Band 8* (to appear Freiburg 2004); see also the report by Christian Kelders, *Für einen nachhaltigen Liberalismus: Wolfgang Fikentscher über anthropologische Aspekte der Marktwirtschaft/Effiziente Gemeingüter-Produktion (For a sustainable liberalism: Wolfgang Fikentscher on anthropological aspects of the market economy/efficient production of collective goods)*, *Süddeutsche Ztg.* of February 18, 2003, 18.

his good and not-so-good ideas, but also with the technicalities to produce the book on paper. Here I want to say my warmest thanks to Jeanette Sayre and Alan Christie Swain of Boalt Hall, Berkeley, for kind, patient, and effective assistance given to a sometimes desperate professor who booked more defeats than victories in this daily time-consuming battle against the computer and its never-ending secrets and surprise effects.

I am also grateful to the publishers, Staempfli Publishers Ltd., Berne, for producing and marketing the book, and to the editor of the Max Planck Institute for Intellectual Property, Competition and Tax Law, Munich Series on European and International Antitrust Law, Professor Dr. Josef Drexl. Special thanks go to Allison Felmy, who formatted the book to the standards of the publishers and eliminated scores of mistakes and misprints. Oliver Mackenrodt contributed valuable assistance in locating hard-to-find materials.

This book is dedicated to two longstanding friends, both leading authors in the science of economics, Robert D. Cooter, Berkeley, and Knut Borchardt, Munich. At countless occasions, I had the privilege to discuss with them questions of the interface between economics, law, and culture comparison.

Riederau am Ammersee, April 2004

Wolfgang Fikentscher

## Abbreviations

A.D.	<i>Anno Domini</i>
A.H.	After Hegira (= 622 A.D.)
al.	alinea, paragraph
a.s.	<i>aleyhi's-selam</i> , arab.: Peace Be With Him (to be said when speaking of the Prophet)
B.C.E.	Before Common (or Christian) Era
EC	European Community
ECJ	European Court of Justice at Luxembourg
e.g.	<i>exempli gratia</i> , for example
et al.	and other authors
EU	European Union
f.	and following page
ff.	and following pages
FS	<i>Festschrift</i> (Essays in Honor of)
GATT	General Agreement on Tariffs and Trade (precursor to WTO)
GS	<i>Gedächtnisschrift</i> (Essays in Memory of)
idem	by the same author
IMF	International Monetary Fund
ICN	International Competition Network
JITE	Journal of Institutional and Theoretical Economics, Tübingen, Germany
loc. cit.	<i>locus citatus</i> , same citation as above
MAI	Draft Multilateral Agreement on Investments
OMC	Organisation mondiale de commerce (= WTO, WHO), Genève, Suisse
OMPI	Organisation mondiale de propriété intellectuelle, Genève/Suisse
op. cit.	in same publication
Sec.	Section
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development at Geneva, Switzerland
UN	United Nations Organization at New York, USA
WIPO	World Intellectual Property Organization at Geneva, Switzerland
WHO	Welthandelsorganisation, Genf/Schweiz (= WTO, OMC)
WTO	World Trade Organization at Geneva, Switzerland (= OMC, WHO)
Zeus	Zeitschrift für Europarechtliche Studien (Saarbrücken, Germany)
Ztg.	Zeitung (= newspaper)

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## A Remark on Footnotes and References

Because the majority of citations and quotes refer to German literature, it often seemed advisable to translate the titles of German books and articles into the English language (in brackets after the title). These translations are my own, and addressed to the readers of this book. They may not always find the consent of the cited authors or their publishers. I apologize for eventual miscues.

As a rule, works that are frequently referred to are cited only once in full. In later citations, these works are cited by the author's name and year only. There are exceptions to this rule when the context indicates that the meaning of a quotation would become clearer by repeating the full citation, for example when the title of a book or an article itself contributes to the understanding of what the quoted author wants to say. In addition, the References at the end of the book may be consulted for details.

The References follow US American usage. However, for reasons of uniformity in the footnotes, books as well as German journals are cited in the German style, British and American journals in theirs, French journals in theirs, etc.

## Introduction

1. Different cultures. – 2. Outline of the book. – 3. Terminology. – 4. The relatedness of economic and cultural imposition: the issue. – 5. Modernization and “Europe’s Special Path.” – 6. Why ask anthropology? – 7. Answers from economic authorities. – 8. The stance of the WTO. – 9. Economic realism. – 10. Risk and efficiency. – 11. Culture and antitrust. – 12. Freedom paradox and cultural respect.

Looking for standards of law for a sustainably liberal global economy implies paying regard to existing cultural diversity. This is plausible because there is more than one culture (as defined in the Foreword) to be found on this globe, and economy is part of a culture. The opinion that there is, or should be, only one type of economy that fits the whole world carries for its validity the burden of proof. The proof is still pending.

1. The understanding of this cultural diversity of economies may positively be drawn from anthropology. If one starts from the obvious premise that there are *different cultures* in this world, and from the equally obvious insight that economic attitudes and activities are parts of a given culture, the question arises how people in this world can live together economically.

Linguistics provides a parallel question: If language is a part of a given culture, how can people make themselves understood by members of a different culture? Interpreters are required to bridge the linguistic gap, or one has to learn the other language. Laws are similar. If law is part of a given culture, how does it deal with cultural foreignness? Comparative law may contribute to the knowledge of other laws, and the rules of conflict of law decide which law has to be observed in transborder cases.

A topic of this book is *economic* culture conflict. Since economy is largely a matter of resources and the powers to freely and fairly use them, the central issue of this book can also be described as anthropological antitrust and fair-trade requirements. The control of power is one of the basic culture-defining properties of humankind. Therefore, this central issue invites to envisage an anthropologically well-reasoned power control in cultural, economic, and environmental respect. Living together in varying economic cultures requires a legal control of power in order to guarantee economic freedom and protection against unfair economic behavior.

2. The formal *outline* of the book needs a word of explanation. In order to identify the necessary standards, the four parts of the book proceed from a critical restatement of economic anthropology in general and market anthro-

pology in particular (Part One), to elaborating – as a particularly noticeable subfield – upon the ethnographically observable distinction between objective and individual markets (Part Two)<sup>11</sup> and an equally observable distinction between individual and collective goods (Part Three), to some issues of an economic-policy-based, legally constituted global economy (Part Four).

Thus, the study tries to produce results in four areas which at first glance do not seem to be too closely related: economic anthropology, market theory, collective-goods theory, and international trade and competition law. However, it is hoped that evidence can be offered that the fourth area – world trade law – can learn from the second and third areas – improved market and collective-goods theories –, and both the second and the third areas from the first – economic anthropology. More precisely, in Part One, the concept of the market will be anthropologically “deconstructed,” Part Two tries to reconstruct market concepts which are anthropologically and economically tenable, Part Three will compare and contrast markets and non-market systems of collective goods (both within a free economy), and Part Four attempts to draw consequences for the activities and responsibilities of UN agencies. Thus,

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<sup>11</sup> The distinction between objective and individual (in German: *subjektive*) markets grew slowly. The concept of the individual market was first used, but not distinguished from the objective market, in Knut Borchardt & Wolfgang Fikentscher, *Wettbewerb, Wettbewerbsbeschränkung, Marktbeherrschung* (Competition, restraint of competition, market domination), Stuttgart 1957: Enke; see notes 102 and 201, *infra*. The distinction was made, for purposes of competition law, in Wolfgang Fikentscher, *Wirtschaftsrecht, Bd. II: Deutsches Wirtschaftsrecht* (Economic law, Vol. 2: German economic law), Munich 1983: C.H. Beck, 202-210; as a political-economic program, it was proposed in idem, “Mehrzielige Marktwirtschaft auf subjektiven Märkten: Wider das Europa- und das Weltmarktargument” (Multidirectional market economy for subjective markets: contra the Europe- and the global-market argument), FS Ernst-Joachim Mestmäcker, Baden-Baden 1996: Nomos, 567-578. In the English language, the term “individual market” seems to be preferable to the term “subjective market” because of a difference of associations and connotations concerning the expression “subjective”: while an English speaker would for instance say: “The subject of my speech today is going to be...,” a German presenter would probably use the phrase: “*Das Objekt (der Gegenstand) meiner Darlegungen heute ist ...*” Thus, the English usage of the word “subject” comes close to what in German is called the “object.” Hence, the expression “subjective market” as the opposite of “objective market” is confusing, so that *subjektiver Markt* will in this book generally be rendered by the term “individual market.” At times both terms, subjective market and individual market, will be used synonymously. The concept of the individual market and its distinction from the market in the objective sense, being acclaimed in encouraging letters to the author as a door-opener to a new market and competition theory, with an impact on economic theory in general, seems to be in need of a restatement and broader explication with the help of economic anthropology.

indications will be presented that anthropological universals may deliver new insights into microeconomic market and non-market conceptualities. As a matter of course, these conceptualities have something to tell about the incipient activities of the WTO (and its predecessor until 1994, GATT) and similar organizations.

3. When, in this sequence, ideas are presented which concern globalized economies (the plural is part of this book's strategy) and their anthropological conditions, a few *terminological remarks* are in order: (1) "Global" and "globalized" do not refer, in the ensuing context, to a phenomenon that is necessarily actually worldwide; rather these words intend to indicate a point of view *toward* globality, so that less-than-global data can be included in the discussion if they only relate to global contexts or intentions. This is important because individual markets are often not global, whereas objective markets are. (2) The anthropological starting point demands that the term "economies" include market and non-market economies, and market and non-market behavior for economic ends. (3) The designation "anthropology" is used in the broad sense, and therefore includes cultural and biological (especially behavioral) anthropology.<sup>12</sup> (4) Finally, when there is use of the expression "conditions" of anthropological nature, the term implies the shaping and *gestalt*-giving of economic empirical data, traits, observations, and statements from the point of view of ethnic (including national) or situational settings.<sup>13</sup>

<sup>12</sup> For details, see Fikentscher, *Modes of Thought*, 96.

<sup>13</sup> For the distinction between ethnic and *situational* anthropology, see, e.g., John Borneman, *Settling Accounts: Violence, Justice, and Accountability in Eastern Europe*, Princeton, NJ: Princeton University Press: 1996; this comparative study of the role and impact of public apologies does not focus on the traditional material of anthropology, which is taken from ethnic groups, but rather investigates non-ethnic general human *situations* with the tools and formulation of questions taken from anthropology; methodologically comparable anthropological studies have been performed on poker games, gas stations along Route 66, cancer clinics, hospices, and everyday culture of Russian housewives. The essence of anthropology, the comparison of cultures, is present also in these new non-ethnic approaches. However, since there is still no convincing name for this non-ethnic anthropology ("non-ethnic" is merely a negative description, and "institutional" rather an anthropological field-method than a subject of research), the term "situational" is introduced here for want of a better term. Both ethnic and situational anthropology are discussed, in the present book, in their broad meanings as approaches in *sociocultural anthropology*, not merely related to *culture personality* (a sub-field of cultural anthropology) in the sense of, e.g., "comparative legal cultures," or "comparative economic cultures." See as an example of the latter approach a study on the culture personality of a profession: Lawrence Friedman Meir & Harry N. Scheiber (eds.), *Legal Culture and the Legal Profession*, Boulder, CO 1996: Westview. The relationship between anthropological studies in culture personality and sociological studies in culture comparison needs

Is what is intended here a composition (*Zusammensicht*) of culture and economics or of cultures and economies? The answer is that both are on the agenda. The second will serve as a step on the way to discuss the first.

4. Hence, though mainly devoted to theory, this book does not avoid *practical problems*. In fact, it takes as starting points practical issues that continue to come to the fore in daily news reports. Some of them may be mentioned here to illustrate what the theory, to be developed later in the text, aims at coping with. The appropriate way to list some of these examples may be the interrogative form:

Is it true that Chechnian soil is rich in oil? If yes, the Russian claim to “keep Russia together” and therefore to be right in waging the Chechnian war, could be influenced by economic motives. But are the Chechnians right in claiming “their oil” for themselves? Is any nation, ethnic group, tribe or clan entitled to the mining of the minerals in that geographic area where their members happen to live? Conversely, is such a group, simply by virtue of living there, entitled to fence off the large-scale dumping of toxic waste? What does the concept of “property” mean in this context?

Similar questions may be asked concerning the ownership and marketing of Iraqi oil, the Nigerian environment endangered by the search for oil by Western concerns, the issue of alleged puppet governments held out by multinational corporations, the rain forest endangered by clear-cutting for cattle-farming, the rights of the Miskito Indians of Nicaragua to their own forest and mineral resources, Tibetan religious culture in a country of extreme climatic and economic conditions, Kosovo wine, Zuni jewelry, Acoma pottery, the living conditions of Canadian First People and Chinese farmers in view of harnessing rivers for having power plants, mud slides and soil erosion by deforestation by “lumber barons” on the reservations of the aboriginal tribes in Southern Taiwan, the water consumed by coal mining and coal transportation in or near Hopi, Australian “terra nullius” to be restituted by court decision from white settlers to the aborigines, soft coal surface mining on the territory of East German Spreewald Sorbs (consisting of two Slavic ethnic groups), overfishing and overgrazing issues, the disneyfication of regional arts and crafts, Hollywood block booking versus the protection of national movie industries, for example by French law, the elimination of local entrepreneurship by way of tying arrangements that favor international corpora-

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clarification but cannot be discussed here; a preliminary attempt: Wolfgang Fikentscher & Kai Fikentscher, *supra* note 5, 26-28, 30-32. Nor can linguistic anthropology be given the attention it deserves; see Dell Hymes 1972 and 1983.

tions in East Germany over local producers after the fall of the Berlin wall,<sup>14</sup> and elsewhere.

The pattern is the same in many places, raising the question: Why not let humans who have their home in a certain national, ethnic, or religious environment retain *their* culture and a *fair share* of their mineral, artisanal, or other “ethnic income” (the term coined in a parallel to “national income”)? The law of unfair trade practices protects appellations of origin and indications of source, such as “Champagne,” in favor of producers from that area. Why not protect territorial ownership of minerals?

The common core of these issues is the quest for a legal regime that is able to control economic *and* cultural imposition. This would mean using the law of free and fair competition (i.e., antitrust and unfair trade practices law) for the protection of cultures and, inversely, cultural rights of self-determination as an instrument of antitrust and fair trading. Policy means and goals work in both directions.

If a street gang of unruly youngsters is beating up a person, passers-by are expected to intervene and at least call the police. Thus, somehow we feel that the weaker party needs protection. In law, there are safeguards against monopolistic abuses. Democracy is built upon a system of checks and balances in order to prevent unfettered exercise of power.

But why is this so? Is there a natural barrier against somebody or something becoming too strong? Over two thousand years ago, the Greek historian and philosopher Thucydides discussed this question on a theoretical level in his so-called Melian dialogue.<sup>15</sup> The Athenians had conquered the island of Melos, and negotiations took place between the victors and defeated. The Athenian negotiators made the point that a weak party has no rights against the party that had proved to be stronger. The Melians claimed a rudimentary international law (as we would say today) granting standing and inalienable rights also to the defeated and therefore weaker side. According to Thucydides, Athens “won” the dispute, denying the Melians any such rights. For the Athenians, might was right. Thucydides, a citizen of Athens, gives no personal comments. But he indicates his disapproval of the Athenian stance. The next (and last) chapter of his historical treatment of his time describes the

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<sup>14</sup> Wolfgang Fikentscher, “Wirkungsforschung zum Recht: Folgen von Gerichtsentscheidungen – am Beispiel von extraterritorialem Wettbewerbsrecht” (Research on the effects of law: Consequences of court decisions – exemplified by extraterritorial antitrust case law), in: Hagen Hof & Martin Schulte (eds.), *Wirkungsforschung zum Recht III* (Efficiency Research in Law III), Baden-Baden 2001: Nomos, 53-60.

<sup>15</sup> Thucydides, *Historiae*, Regognovit Brevique adnotatione Critica Instruxit Henricus Stewart Jones, Apparatum Criticum Correxerit et auxit Johannes Enoch Powell, Tomus Prior, Oxonii 1963.

disaster Athens suffered through the Sicilian expedition. Commentators see an intended connection between the reports contained in the two last chapters of the *historiae*: Thucydides' hidden teaching is that, in human society, power needs to be controlled by law.

The following discussions in this study try to restate the issue of the Melian dialogue for the globalized economy. Bronislaw Malinowski, in his classic *Crime and Custom* (1926), attributed to law the task of hemming in and controlling "natural propensities."<sup>16</sup> The chapters here to follow are about economic and societal propensities. Thus, the practical examples show a frequent relationship of cultural and economic power imbalances. My hunch is that the instruments to be invoked to control power of either sort are to be based on similar philosophies. Both instruments and philosophies will be addressed. Mention should be made of some related issues not to be treated in this book:

5. Of course, there have been many *political attempts to cope with economic developments* that were deemed detrimental. In evaluating these attempts, much depends on what may be regarded favorable and its opposite. It is a truism that economic development came to different parts of the world at different times.

(a) One of these judgments of favor concerns *modernity*. It is possible to envisage the way the industrialized West managed to develop its own economic qualities as "modern." Many would sustain this position. For this, they would point to economic liberty, personal responsibility for one's own economic standing, the reward given to those who do most for narrowing the gap between prices and cost by engaging in vivid competition, the elimination of hunger and life-threatening poverty in most parts of the world, combating the disgracing alienation between workers and their work by their being forced to do meaningless labor under the totalitarian doctrine of use value, and to many other achievements of the free market economy.

By identifying these achievements as modern, "modernization" becomes an economic goal to be cast into reality in less happy parts of the world. Modernization as one attempt to deal with unfavorable economic developments has at least to be mentioned here. For reasons of space and time, it cannot be discussed in detail, nor submitted to substantiated critique.<sup>17</sup>

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<sup>16</sup> Bronislaw Malinowski, *Crime and Custom in Savage Society*, London 1926 (reprint 1947): Routledge & Kegan Paul, 64; the full quote runs: "The fundamental function of law is to curb certain natural propensities, to hem in and control human instincts and to impose a non-spontaneous, compulsory behaviour – in other words, to ensure a type of co-operation which is based on mutual concessions and sacrifices for a common end."

<sup>17</sup> "Modernization" was a frequently used term in foreign aid (or "development aid") politics in the 1970s and 1980s, along with the activities of multi- (or trans-)national

An adequate treatment of the modernization issue would have to cover at least four areas: (1) The history of the identification of modernization necessities including crisis research, and the success and failure stories within that history; (2) a list of the most important modernization proposals in West-East, West-South, and South-South relations; (3) the long and special story of United Nations modernization projects including IMF and World Bank activities; and the few historical “success stories” (if they may be called so with considerable reservation), for example Hawaii and Oman.<sup>18</sup>

Development aid and a description of the general path transition countries took after the bankruptcy of the socialist camp in 1990 are subjects related to modernization, and likewise not to be treated in this context.<sup>19</sup> Writings in

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corporations. For some (critical) remarks see, e.g., Wolfgang Fikentscher (with Hans-Peter Kunz-Hallstein, Christian Kleiner, Friederike Pentzlin & Wolfgang Straub), *The Draft International Code of Conduct on the Transfer of Technology: A Study in Third World Development*. IIC Studies No. 4, Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, Weinheim 1980: Verlag VCH.; and idem, *Modes of Thought*, 467 f., 493 f.; the literature is rich, for an introduction with further references, see, e.g., Helmut Buchholt, Erhardt U. Heidt & Georg Stauth (ed.), *Modernität zwischen Differenzierung und Globalisierung: Kulturelle, wirtschaftliche und politische Transformationsprozesse in der sich globalisierenden Moderne (Modernity between differentiation and globalization)*, Vol. I, Münster i.W., Hamburg & London 1996; on the general background: Angle Merry, *Law, Culture, and Cultural Appropriation*, 10 *Yale J. of Law and Humanities*, 575 (1998); Daniel Chirot, *Culture and Modernization in Times of Globalization*, *Institute for Human Sciences Newsletter (Vienna)* 74, fall 2001 No. 4, 26-29 (a plea for modernization and against both Samuel Huntington’s clash of civilizations and – allegedly – anti-modernist multiculturalism. Multiculturalism as part of modernity is a proposal made in this book).

<sup>18</sup> For a survey on development and modernization theories, see Albert O. Hirschman, *The Strategy of Economic Development*, New Haven, CT 1958: Yale University Press; idem, *Development Projects Observed*, Washington, D.C. 1967: Brookings Institution.

<sup>19</sup> See, e.g., Wolfgang Fikentscher, “Legal and Political Problems of the Transition to a Free Market System in Eastern Europe,” in: FS Arved Deringer, Baden-Baden 1993: *Nomos*, 472-85; idem, “Probleme bei der Überleitung von einer sozialistischen Zentralverwaltungswirtschaft in eine umweltsoziale Marktwirtschaft” (Issues arising from the transition from a centralized economic administration to an environmentally-conscious social market economy), in: FS Peter Lerche, Munich 1993: C.H. Beck, 893-911; idem, “From a Centrally Planned Government System to a Rule-of-Law Democracy: Legal, Economic, and Anthropological Considerations,” in: Bruce Smith & G.M. Danilenko (eds.), *The Rule of Law, Human Nature, and the New Russia*, Washington, D.C. & Portola Valley, CA 1994: The Brookings Institution and Gruter Institute for Law and Behavioral Research, 24-42; idem & Alice Broichmann, “Democracy: A Primer,” *Law and State, A Biannual Collection of Recent German Con-*

these fields abound, some descriptive, some postulational, some pointing to meritorious activities, some with an undertone of breast-beating.<sup>20</sup>

(b) Nor can the following discussion pay due attention to the role of the multinational corporations that profoundly changed the economic picture of the world.<sup>21</sup>

(c) Again, a special subject in this area of attempts at clarification of international economic imbalances is what has become known as the “*Europäischer Sonderweg*” (“Europe’s Special Path”). This complex issue raises the questions concerning the European and North-American split from general economic and political development in the fifteenth and sixteenth centuries that led to global economic and political dominance, with its peak in the colonial period.<sup>22</sup> No fewer than five different approaches to an explanation of “Europe’s Special Path” can be traced in economic literature: a game-theoretical,<sup>23</sup> a psychological-religious,<sup>24</sup> an institutional,<sup>25</sup> a historical,<sup>26</sup> and a legal approach.<sup>27</sup>

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tributions to These Fields, Tübingen 1994: Institute for Scientific Cooperation, 49/50 (1994), 125-146 and Law and State 51 (1995), 115-116.

<sup>20</sup> An example of the last category: David E. Sange, World Bank Beats Breast For Failures in Indonesia, New York Times International, No. 51,430, of February 11, 1999, A 14.

<sup>21</sup> On attempts at international legal controls of multinational firms in the framework of the code movement during the New Economic International Order period, see Wolfgang Fikentscher, United Nations Codes of Conduct: New Paths in International Law, 30 American Journal of Comparative Law 577-604 (1982) (references).

<sup>22</sup> See Eric Lionel Jones, *The European Miracle*, 1981, 2<sup>nd</sup> ed. 1987; at the Center for Human Sciences (Humanwissenschaftliches Zentrum) of the University of Munich, Thomas O. Hoellmann is heading a project on “Europe’s Special Path.” A theory of cultural diversification, instead of Europe’s “pulling ahead,” is developed in Wolfgang Fikentscher, *Methoden des Rechts in vergleichender Darstellung* (Comparative methods of law), Vol. 1, Tübingen 1975: Mohr Siebeck; Max Weber’s theory on the Calvinistic roots of Western capitalism offers another explanation; see Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, New York 1958, repr. 1976 (transl. by Talcott Parsons, introd. by Anthony Giddens; German orig. 1904/05); in yet a different direction: Hernando de Soto (see note 67); on his theory, see Chapter 1 Subchapter 2; more materials in Fikentscher, *Methoden des Rechts*, Vol. 1, Chapter 2, and Vol. 4 (1977), Chapters 30-34; idem, *Modes of Thought*, Chapter 6.

<sup>23</sup> O. E. Williamson, *The Economic Institutions of Capitalism*, New York 1985: Free Press; M. Casson, *Economics of Business Culture: Game Theory, Transaction Costs and Economic Performance*, Oxford 1991: Clarendon; the game-theoretical approach is convincingly rejected by Ekkehard Schlicht, *On Custom in the Economy*, Oxford 1998: Clarendon, 129 ff., 158: games are unhistorical. In addition, an anthropological counter-argument would be that games are about risk, and risk awareness is extremely culture-specific).

These and other attempts at explaining the present disparate economic state of the world have not been overlooked. However, they cannot be given more than brief mention, here and in different places, with cursory reference to selected writings for detailed study. Meritorious as all these approaches are, seen from their respective point of departure, they all have their limitations based upon the fact that they talk about economic culture and cultures but do not have their starting point in the science of culture: Without exception, as far as can be seen, they do not approach the subject matter of divergent economic cultures with the tools of anthropology. This justifies the present attempt to do so.

6. *Anthropology* is a social science engaged in the study of both cultural comparative evolution and evolutionary adaptation.<sup>28</sup> Thus, it has to find a way to compare cultures (in the plural) in principle without judging them as to their contributions to human culture (in the singular). The anthropologist has to start with a general credit to be given to other cultures. If the anthropologist later, in the course of comparative work, finds results which lead him to criticize certain cultural traits, for example as being totalitarian or otherwise inhuman and therefore of doubtful use as models to be followed, or to be rejected altogether, this credit is withdrawn – but reasons have to be given for this.<sup>29</sup>

<sup>24</sup> See the reference to Max Weber's work on Calvinist ethics in note 22, supra; comparable to this is the "mental model" approach by Douglass C. North & A. T. Denzau, *Shared Mental Models: Ideologies and Institutions*, 47 *Kyklos* 3-31 (1994). For the difference between North's approach via "mental models" and my own "modes of thought," see Chapter 2, Subchapter 3, infra.

<sup>25</sup> Douglass C. North, *Institutions, Institutional Change and Economic Performance*, Cambridge 1990: Cambridge University Press; idem, *Institutions and Credible Commitments*, 149 *J. of Institutional and Theoretical Economics (JITE)* 11-13 (1993), an article that builds a bridge between the older institutional and the newer "mental" approach as cited in note 20, supra.

<sup>26</sup> Ekkehard Schlicht, op.cit. (supra note 23) whose approach through the concept of custom comes, of course, close to my anthropological approach in this book, however does not use the anthropological methodology.

<sup>27</sup> Hernando de Soto; see the detailed discussion of his approach in Chapter 1, infra.

<sup>28</sup> For definitions of anthropology see C. P. Kottak, *Cultural Anthropology*, 8<sup>th</sup> ed. (New York: McGraw-Hill, 2000), 2: "(Anthropology is) a holistic science (which) studies the whole of the human condition: past, present, and future: biology, society, language, and culture." Marvin Harris, *Cultural Anthropology*, 4<sup>th</sup> ed. New York 1995: Harper & Row, 2: "(Anthropology) is the study of humankind, of ancient and modern people and their ways of living." Fikentscher, *Modes of Thought*, 75: "Anthropology (...) is the social science which deals with human beings and their societies. It analyzes human behavior within the whole of a given culture."

<sup>29</sup> In this sense, see, e. g., Kottak, op. cit. (2000), 69 ff.

From this credit, an attitude may be gained that may be called *cultural respect*. It will play a role in the chapters to follow. Rules of respect are a topic of behavior-focused anthropology.<sup>30</sup> Whether equal respect is owed to all cultures and therefore among all cultures and their members is a matter of debate. Samuel Huntington speaks of a seemingly unavoidable “clash of civilizations” and does not hide his favors and disfavours.<sup>31</sup> Conrad Phillip Kottak tries to draw a line between an anthropological openness to accept and pay respect to every culture and a necessary rejection of cruel and totalitarian cultures.<sup>32</sup> Ronnie Lipschutz and Beverly Crawford argue that much of so-called intercultural violence is closely linked to globalizing forces and demands for economic liberalization that have weakened states’ capacities, both political and financial, for redistributing resources.<sup>33</sup> According to Ronnie Lipschutz and Beverly Crawford, these distributional issues and their consequential power shifts have been experienced as ethnic and religious discrimination and are often the root of identity politics and violent “cultural” conflicts. These authors’ results are in line with the remarks above about the interface of cultural strife and economic interests.

As indicated before, to facilitate the understanding of this context, this book will draw a line from the anthropological study of markets via the identification of the individual market, and via the definition of the individual as a market partner, and from there the role of the dialogue between these partners

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<sup>30</sup> Hagen Hof, *Rechtsethologie: Recht im Kontext von Verhalten und außerrechtlicher Verhaltensregelung*, Heidelberg: Decker, 1996); idem, *Rules of Respect*, in: Lawrence A. Frolik et al. (eds.), *Law and Evolutionary Biology. Selected Essays in Honor of Margaret Gruter on Her 80<sup>th</sup> Birthday*, Portola Valley, CA, 1999: Gruter Institute for Law and Behavioral Research, 243-256. Behavior-focused anthropology forms a part of the wider category of physical (or: biological) anthropology; studies in human behavior are just as important for cultural anthropology as are cultural data, which underline the necessity to link biological and cultural anthropology. However, the pure natural science aspects of markets cannot be discussed here, see Ronald Noë, Jan A.R.A.M van Hooff & Peter Hammerstein (eds.), *Economics in Nature: Social Dilemmas and Biological Markets*, Cambridge & London 2000; see also Joachim Müller-Jung’s report on the present work of Vernon Smith, Michael Deppe, Peter Kenning, Hilke Plabmann, Harald Kugel, Wolfram Schwindt and others on neuroeconomics, *Frankfurter Allgemeine Ztg.* of November 5, 2003: “Beim Kaufen setzt der Verstand aus” (When you go shopping, you don’t think).

<sup>31</sup> Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order*, New York: Simon & Schuster, 1995.

<sup>32</sup> Kottak (2000), at p. 45 f., on cultural relativism; in a similar direction, Fikentscher, *Modes of Thought*, at 118 f.

<sup>33</sup> Ronnie D. Lipschutz & Beverly Crawford (eds.), *The Myth of “Ethnic Conflict” Politics, Economics, and “Cultural” Violence*, Berkeley, CA: International and Area Studies Publications, University of California, Berkeley, CA, 1998).

and its epistemological requirements to issues of cross-cultural human rights, in particular everyone's right to freely appraise values, as the basis of inter-cultural respect and tolerance.

7. How has a main issue of this book – the impact of anthropological differences on sub-global competition and global trade and their regulatory structuring – been reflected in *economic writing*? Works on economic anthropology do not often mention global aspects, let alone the work of modern international organizations.<sup>34</sup> Books and articles on cultural anthropology sometimes consider contexts of modern economy and refer to economic systems and attitudes such as capitalism, economic liberalism, or socialism.<sup>35</sup> Critics of modern economic forms as guidelines for the activities of the WTO, such as José Garcia Mendiluce, have already been mentioned above. But the question that arises from such anthropological allusions, be they positive or negative, to modern forms of economy alongside other, more traditional forms of local and tribal economies, the question concerning the impact of this coexistence on world trade and its legal organization, is hardly addressed. There are economists who study economic behavior in a laboratory, asking test persons to engage in economic decision making in the framework of carefully prepared sets of questions. Amos Tversky, Daniel Kahneman, Vernon Smith, Kevin McCabe and Axel Ockenfels have become renowned laboratory economists. There is a large laboratory for economic behaviors and structures: *the observable world with its economies*. Economic anthropologists submit to the task of asking questions, as participant observers in interviews and in discussions among experts, in this large lab, and draw consequences

<sup>34</sup> A recent account: Martin Rössler, *Wirtschaftsethnologie: Eine Einführung* (Economic ethnology: an introduction), Berlin 1999: Reimer. A selection of other seminal works on economic anthropology that influenced my research: Jack Goody, *Production and Reproduction: A Comparative Study of the Domestic Domain*, New York 1977: Cambridge University Press; Marvin Harris, *Cows, Pigs, Wars, and Witches: The Riddles of Cultures*, New York 1974: Random House; E. E. LeClair & H.K. Schneider (eds.), *Economic Anthropology: Readings in Theory and Analysis*, New York 1968: Holt, Rinehart & Winston (orig. 1961); Marshall Sahlins, *Stone Age Economics*, Chicago, IL, 1972.: Aldine; Oberg, Kalervo, *The Social Economy of the Tlingit Indians*, Monographs of the American Ethnological Society, Vol. 55, Seattle, WA, 1973: University of Washington Press; Stuart Plattner (ed.), *Economic Anthropology*, Stanford, CA: Stanford University Press, 1989; Eric R. Wolf, *Peasants*, Englewood Cliffs, NJ, 1966: Prentice Hall; Leopold Pospíšil, *Obernberg: A Quantitative Analysis of a Tyrolean Peasant Economy*, New Haven, CT, 1995: HRAF Press. More complete lists of literature in economic anthropology in Wolfgang Fikentscher, in: Hanns Ullrich (ed.), *supra* note 3, at 77 f., and in note 66, *infra*.

<sup>35</sup> Cf. Harris 1995; Kottak 2000; Paul Bohannan, *We, the Alien: An Introduction to Cultural Anthropology*, Prospect Heights, IL. 1992: Waveland.

from the answers. Also sociologists whose interest increasingly focuses on culture sometimes write about comparative economic and legal cultures.<sup>36</sup>

On the other hand, macro- and microeconomic literature rarely looks at anthropology, including economic anthropology. There is a general unawareness of a possible anthropological input into economic theoretical reasoning. This applies both to economic anthropology in general, and more specifically to what – in a parallel to “comparative legal cultures” – could be called “comparative economic cultures.”<sup>37</sup> For the average macro- or microeconomist such things are of limited interest.<sup>38</sup>

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<sup>36</sup> Since the death of Max Weber (1920), sociology tended to reduce cross-cultural sociological research, concentrating instead on more and more higher abstractions from western society. Helmut Schelsky characterized this sociological trend “from people to society to system” as a negative development through which sociologists may have lost sight of the differences between the societies of other, especially non-European descent, Helmut Schelsky, “Systemfunktionaler, anthropologischer und personfunktionaler Ansatz der Rechtssoziologie,” in: R. Lautmann, W. Maihofer and H. Schelsky (eds.), *Die Funktion des Rechts in der modernen Gesellschaft*, *Jahrbuch für Rechtssoziologie und Rechtstheorie* 1 (1970): 37-89; the anthropologists came to succor and did cross-cultural research between 1920 and the nineties of the last century. In the nineties, sociologists – mainly in Europe – rediscovered culturally foreign societies because the abstract visions which they had maintained since the twenties did not seem to fit the modern European needs, for example in former Yugoslavia. A series of studies in “comparative cultures” began to appear, however without much reference to the anthropologists’ work of the last seventy years, see Fikentscher, *Modes of Thought*, 54 f. This renewed comparative interest of sociological studies frequently concerns sociological differences in culturally distinguishable societies, such as the contrast between adversary and investigative court proceedings in Anglo-American and continental legal cultures. From an anthropological point of view, this kind of studies would probably be categorized under that part of cultural anthropology that deals with culture personality. In sociological literature, covert cultural traits are hardly addressed, and the concept as such is little known. This may be the reason why obvious (in anthropology: overt) differences in – for example – legal cultures are frequently comparatively discussed, whereas differences – again for example – in economic, or religious, traditional thinking tend to escape attention. This would at least in part explain why, for the macro- and microeconomists, there is little stimulus coming from the sociological side to deal with diverging socio-economic issues. The failure in Seattle is clearly hinting in this direction.

<sup>37</sup> The works by Rössler, Bohannon, Goody, Harris, and Sahlins, to name some examples, mentioned in note 30, *supra*, and in the References, offer introductions.

<sup>38</sup> This also applies to books and articles expressly devoted to global economic aspects. Some examples: Edward M. Graham and J. David Richardson (eds.), *Global Competition Policy* (Annapolis Junction, MD: Institute for International Economics, 1998); Dani Rodrik, *Has Globalization Gone Too Far?* Annapolis Junction, MD, 1998: Institute for International Economics; there are exceptions represented by economists with

8. An *illustration of this* was given by the director-general of the WTO, Mr. Mike Moore, in an interview given on January 20, 2000, on the reasons for the failure of the WTO Ministerial Conference at Seattle in December 1999.<sup>39</sup> Asked why the WTO had been accused of being a “malign force” in world economics, Mr. Moore briefly identified the agenda of the conference (lowering tariffs, reducing non-tariff barriers in the fields of electronic commerce, genetically processed food, etc.), and the objections of the protesters which were raised against the conference (workers’ rights, environmental issues, US antidumping laws, etc.). Then Mr. Moore dealt at length with what he thought were the reasons why the Seattle conference had failed. He listed three factors: the objection of developing nations to being economically “policed” by developed nations; the insistence of the developing nations on sovereign governments for the protection of their national economic interests; and the general fear of the developing nations of “losing (their) culture.” The next Ministerial Meeting and any new WTO round would require, according to Mr. Moore, longer and more intense detailed preparation. In the interview, no mention was made of any balanced, let alone theoretical, approach at interfacing WTO’s international goals and duties with the addressed cultural apprehensions.<sup>40</sup>

Imagine that Adam Smith were to rise from the hereafter, and the WTO employs him as an expert. Imagine further, Mr. Moore asks him to write another book, this time on “The Wealth of the Globe.” Would Smith write the same as in his “Wealth of Nations” (1776)? Or would he follow his own example when he, after publishing his “Theory of Moral Sentiments” (1759), built his economic theories on moral philosophy? Today, he would have delve into moral philosophy on a worldwide scale, thus into the various cultural “moral

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an anthropological interest, among them Robert D. Cooter. His article on the herding economy of Mongolia (Robert D. Cooter, *Mongolia: Avoiding Tragedy in the World’s Largest Commons*, in: *Law and Evolutionary Biology. Festschrift for Margaret Gruter on Her 80<sup>th</sup> Birthday*, Portola Valley, CA, 1990: Gruter Institute for Law and Behavior, 87-109), contains, along with other messages, also a negative statement: a microeconomic analysis of the dividing line between privatization and the commons does *not* work under the cultural–environmental and cultural conditions of Mongolia. Such negative statements call for theoretical evaluation as tried in this book. Its author regards himself an informant for German ordoliberalism to foreign economic teaching and practice, hence this author’s interest in foreign economic think-ways. The study of German ordoliberalism (= free market economy legally protected against the freedom paradox), its actualization at home and adaptation to foreign economic behavior, have been the focus of my work in law and economics all my life. See Chapter 2, Subchapter 2, *infra*.

<sup>39</sup> “PBS News Hour with Jim Lehrer,” Channel 9, 7-8 p.m. Pacific Standard Time.

<sup>40</sup> However, it seems that for the next “round” of the WTO, tariff questions will be the main concern.

philosophies” – that is, modes of thought of this world. He would most certainly, as a WTO expert, pursue the same path from moral philosophy to economy, as between 1759 and 1776. Then, however, his “Wealth of the Globe” would substantially differ from the “Wealth of Nations.” What would be the differences? The following chapters of this book try to give an answer.

9. One of the reasons why economists seem to be – seemingly unconsciously – so distant from possible anthropological conditioning of economics, may be the state of *realism* in which the present legal-economical development in the US happens to find itself. The realist presence is not favorable to cultural “value judgments.” There seems to be an incessant chain of realisms characteristic of the legal development in the USA. Why this is so is a matter of comparative jurisprudential research which cannot be undertaken here. Put briefly, continental law concentrates on statutes and written laws. Therefore it is in need of a flexible doctrine of legal interpretation. Continental interpretation of the laws has a history of two thousand years and provides ample but controlled criteria of handling laws in a narrowing or, more often, expanding way. The skills of expanding interpretation and analogies are taught to the students of law, and followed by the bar and the judges. Without this, there would be no way of living under the statutory principles and rules of the law. And it is interpreted laws that are being applied.

Quite different from this, Anglo-American law starts from common law practice and basically regards statutes and written acts of parliament as an intruding force into that practice. It is an undeniable fact that statutes and parliamentary laws presently are carving more and more terrain out of the body of the common law.<sup>41</sup> But since Edward Coke in the early seventeenth century settled the dispute between the English Parliament and the Common Law in favor of the latter by assigning to promulgated law the mere task of dealing with “mischiefs,” the mischief doctrine and following from it the doctrine of strict or narrow interpretation of law took firmly hold of the interpretational development to this day. Thus, the field of the law was kept open to judge-made law. It is the precedent or the precedents that strictly interpreted a parliamentary act – and not the act itself – which have to be applied to a new case which arises in a field that has been regulated by parliament.<sup>42</sup> On the

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<sup>41</sup> Cf., recently, Stefan Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent: Eine vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen* (The interpretation of statutes in England and on the Continent: a comparative investigation of the case law and its historical foundations), 2 Vols., Tübingen. Mohr Siebeck, 2002.

<sup>42</sup> For more details of the doctrines of legal interpretation in comparative context, see John H. Barton, James Lowell Gibbs, Jr., Victor Hao Li & John Henry Merryman, *Law in Radically Different Cultures* (St. Paul, MN: West, 1983); Fikentscher, *Methoden des Rechts, 1975-1977*.

Continent, the act will be applied again and again, and precedents may be helpful, but do not represent the law. Thus the art of handling guiding values for a living law, speaking broadly, is left to expansive interpretation and analogy of written texts on the Continent, and to judge-made case law in the Common Law world. On the Continent, legal interpretation received its preliminarily final form by Rudolph von Ihering who, in his book *Law as Means to an End* (1878), taught the lawyers working under the Continental legal systems how to integrate social policy and purpose into the implementation of written law.<sup>43</sup>

This makes the common law practice more open, more volatile, and accordingly more vulnerable to “fashions” in legal policy. Since lawyers have to decide real cases, these fashions necessarily relate to reality. Hence there is, in the common law, a constant need to look out for realisms, more precisely, for specially shaped and accentuated relations to reality. Hence, the history of the common law since the middle of the nineteenth century is a history of its sequence of realisms: Justice Oliver Wendell Holmes’s call to fact-orientation and away from the generality of legal prescripts may be called the first phase of these realisms, and it is a *pro-fact and anti-rule* realism. Roscoe Pound followed suit with his sociological jurisprudence, claiming *societal* realism as the guiding line for the judge-made law. In the late twenties and through the thirties of the last century, the period of Legal Realism (Jerome Frank, Charles E. Clark, Underhill Moore, Karl N. Llewellyn, and others) followed; it took its realism from *psychology* (Jerome Frank), *interest analysis, economics* (Underhill Moore), *ethnology* (Karl N. Llewellyn), procedural “facts” (Charles Clark), and other clusters of fact.<sup>44</sup> *Scandinavian Legal Realism*

<sup>43</sup> Details of this story in Franz Wieacker and Christian Wollschläger (eds.), *Jherings Erbe*. Göttinger Symposium zur 150. Wiederkehr des Geburtstags von Rudolph von Jhering, Göttingen 1970: Vandenhoeck & Ruprecht; Gerhard Luf & Werner Ogris (eds.), *Der Kampf ums Recht*. Forschungsband aus Anlass des 100. Todestages von Rudolf von Jhering, Berlin: 1995: Duncker and Humblot; Fikentscher. *Methoden des Rechts*, Vol. 3 (1976), Chapter 23. Jhering’s *Zweck im Recht* has been translated into English: Rudolf von Jhering. *Law as Means to an End* (Boston, MA: Boston Book Company, 1913), Isaac Husik, transl.

<sup>44</sup> On the mutual influence of ethnology and legal method in the work of Karl N. Llewellyn, see Wolfgang Fikentscher, *Die Erforschung des lebenden Rechts in einer multikulturellen Gesellschaft: Karl N. Llewellyns Cheyenne- und Pueblo-Studien*, in: U. Drobnig and M. Rehbinder (eds.), *Rechtsrealismus, multikulturelle Gesellschaft und Handelsrecht: Karl N. Llewellyn und seine Bedeutung heute*, Berlin: Duncker & Humblot, 1994, 45-70; on Clark, see Charles E. Clark and Werner R. Ilsen, *Federal Rules of Civil Procedure, including Monographs on New Developments and Trial and Appellate Practice under the Rules*. 1944 rev. ed., St. Paul, MN: West, 1944; on legal realism as a movement in legal methodology: Gerhard Casper, *Juristischer Realismus und politische Theorie im amerikanischen Rechtsdenken*, Berlin Duncker & Humblot,

formed one radical branch, *process*-related realism another.<sup>45</sup> Critical Legal Studies extolled another realism, that of *politics*.<sup>46</sup> “Law and *biology*” is one of the modern realisms.<sup>47</sup> Will there ever be an “*anthropological* realism” in Anglo-American law? To mention this possibility is – in view of the conceptually somewhat narrow realist tradition of the common law – not necessarily to recommend it. But not only the common law, every legal system today is in need of what may be called a broad “cultural realism,” meaning a more conscious consideration to be given to cultural factors as legal facts.

However, today the most influential realism is one that has a direct effect on the topic of the interface of economic anthropology and international law: *economic analysis of law*, or – as the newer and less radical term goes, *law and economics*.<sup>48</sup> Law and economics is a legal realism of a special kind. As such economic analysis of law is a highly necessary critique of the law from the point of view of cost and cost avoidance. Another question is whether and up to which degree law should integrate economic cost analysis into its evaluation of justice. Often these two aspects do not seem to be distinguished. But they should, because a costlier solution might be the just solution. Only if it is postulated that justice directly depends upon cost analysis can it be said that law and economics are a new legal realism.

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1967; Norbert Reich, *Sociological Jurisprudence und Legal Realism im Rechtsdenken Amerikas*, Heidelberg: C. Winter, 1967; Fikentscher, *Methoden des Rechts*, Vol. 2 (1975), Chapter 13; a historical survey and a political critique: Edward A. Purcell, Jr., *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory*, *American Historical Review* 75 (1969): 424-446.

<sup>45</sup> An example for Scandinavian Legal Realism: Alf Ross, *Towards a Realistic Jurisprudence: A Criticism of the Dualism in Law*, Copenhagen: Munksgaard, 1946, for process-related realism: Sally Falk Moore, *Law as Process: An Anthropological Approach*, London: Routledge and Kegan Paul: 1978.

<sup>46</sup> See, for an overview: Richard W. Bauman, *Critical Legal Studies: A Guide to Literature*, Boulder, CO: Westview, 1996; Barbara Fried, *The Progressive Assault on Laissez faire: Robert Hale and the First Law and Economics Movement*, Cambridge, MA: Harvard University Press, 1998.

<sup>47</sup> A history of this realist movement has not yet been written. For an introduction, see the articles and references quoted in FS Margaret Gruter (see supra note 11); particularly informative: Oliver Goodenough, “The Nature of Business: Bringing the Insights of Biologically Informed Behavioral Science to Business and the Law,” loc. cit., 181-191, with bibliographical footnotes on p. 182 and 184.

<sup>48</sup> The reference to two introductory texts and one textbook must suffice: Avery Wiener Katz, *Foundations of the Economic Approach to Law* (New York: Oxford University Press, 1998); Nicholas Mercuro and Steven G. Medema, *Economics and the Law: From Posner to Post-modernism*, Princeton: Princeton University Press, 1997); Robert D. Cooter & Thomas Ulen. *Law and Economics*, 4<sup>th</sup> ed. Reading, MA: Addison-Wesley, 2003.

For example, Learned Hand's formula (the "Hand rule") for negligent behavior argues that the marginal cost of avoiding the damage is less than the amount of the damage multiplied by the marginal probability of the occurrence of the damage. Thus, the injurer is liable under the Hand rule when further precaution is cost-justified.<sup>49</sup> The Hand rule does not distinguish the probability that the damage occurs for natural reasons (the "accidental harm") from the probability that more precaution would help avoiding the damage. The Hand rule hides the degree of the probability that more precaution may contribute to the avoidance or diminishing of the damage in the marginality concept of "the probability" (e.g., more precaution would bring down the accidental probability of the damage from 50 to 40%). Other legal cultures such as the German would rely to a much higher extent on just this probability of avoiding the damage by a higher degree of precaution for which there is still no calculus. Thus, in German law, precaution is more independent from damage and the probability of its accidental occurrence, and hence in German law the costlier solution might be more just. However, there is another, more profound problem for law and economics in comparative legal culture:

It has been said that law and economics is a realism that asks after the cost of the law. Knowing what law costs means being able to implement existing law and develop future law in the most cost-efficient manner. Thus, if "cost" meant the same all over the world, from the point of view of law and economics, world law would be feasible. This world law would be efficient.

However, anthropology teaches that "cost" is a culture-specific notion. This is so, among other reasons, because cost cannot be meaningfully be separated from time. Cost is a disadvantage felt at a given time. Now, in anthropology the concept of time is culture-specific.<sup>50</sup> Thus, cost must be a culture-specific concept, too. Hence, there has to be a culture-specific context to law and economics, or in other words, cultures have their own law and economics relationships.<sup>51</sup>

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<sup>49</sup> Cooter & Ulen, see *supra* note 48, 313-316, 512, with a discussion of the Hand rule and its implication for law.

<sup>50</sup> See, e.g., the examples in Edward T. Hall, *The Dance of Life. The Other Dimension of Time*, New York: Doubleday, 1983; from an evolutionary point of view: Kenneth J. Arrow, *Workshop on the Economy as an Evolving Complex System*, in: Philip W. Anderson, Kenneth J. Arrow & David Pines (eds.), *The Economy as an Evolving Complex System*, Reading, Mass. 1988: Addison-Wesley, Santa Fe Institute Studies in the Sciences of Complexity, Vol. V. A survey on culture-specific meanings of time, with references, in Fikentscher, *Modes of Thought*, at 182.

<sup>51</sup> The question is raised in Ugo Mattei. *Comparative Law and Economics*, Ann Arbor: University of Michigan Press, 1997 (especially in the last chapter). The critique of realism offered in the text above has more aspects than the culture-specificity discussed

10. The same holds true for the concept of *risk*. Risk is a culture-specific notion that varies widely from culture to culture. Risk is anticipated cost, thus cost must vary, too.

Not long ago, the tribal jail on the Hopi reservation at Keams Canyon in Arizona had no locks and no prison guards. A Hopi who was held as a suspect, or convicted to serve a certain term in jail, would go there and for a while stay voluntarily as a “prisoner.” Not much of an explanation is needed to show that in such a society the prisoner’s dilemma does not work. In turn, on the prisoner’s dilemma depend, in large part, the theories of law and economics.

The Hopi example of risk assumption is no proof of an exotic tribal idiosyncrasy. Rather it represents an attitude toward risk, risk-taking, and ensuing tribal wrong. There is a thought-modal consequence of this risk-taking at the expense of tribal harmony which might be typical for a culture of shame instead of guilt. Tribal disorder and trouble have to be cured. For this, the perpetrator goes into isolation. This attitude toward risk and wrong is different from “Western” microeconomic decision theory. But it is not “less efficient,” “exotic,” or “outlandish.” It is just different, and culturally for good reasons. It also teaches the cultural specificity of law and economics and of its favorite paradigm, the prisoner’s dilemma. Of course, risk and time again are intertwined cultural traits and therefore culture-specific.

A related reason why the economic realism of the law can only be of little help when the task is to investigate the interface of anthropological culture studies and world trade law is that modern microeconomics is timeless, and so is its efficiency dogma. But since, in cross-cultural comparison as well as within a single given economy, short-term efficiency is often inefficient in the long term, the anthropological pragmatics of a market require time, and thus a market theory that is open to time. Modern microeconomics cannot provide this.

By contrast, the individual market – the central idea of Part Two of this book – is defined by alternatives and rivalries across time (and thus can be only to a limited degree efficient as to information), including potential competitors and/or suppliers. Hence, the individual market exists outside of modern microeconomics. Therefore, one has to be critical of some parts of the modern microeconomic theory for doing the kind of research here intended, a research in anthropologically reasoned world trade law, because modern microeconomic theory cannot help its self-imposed epistemological limitations.

11. In the following chapters, the individual market forms the center piece which will be *derived* from economic-anthropological reasoning (in Part

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here; another aspect is epistemology in general, and the Kantian synthetic judgment a priori in particular; see Part Two, *infra*, at note 61.

One), and *lead* to a general human right to participate in a dialogue on values, including market values (in Part Four). Still, economic propositions in an anthropologically drafted world order are possible, especially when taken from a cross-border antitrust thinking. In discussing an antitrust model for world trade, Heinz-Dieter Assmann says:

It cannot be overlooked that the ‘antitrust’ model (*Ansatz*) is part of a more encompassing model of world economic order as a legally constituted competitive economy. Yet, (such an ‘antitrust’ model) appears acceptable as a starting point, if only separated from the rigorisms of the ordoliberal concepts of a world economic order. ... the actors of the world economy can only be formally be viewed as being of equal power (*als gleichartig*), and the globe is all but a ‘level playing field.’ A meta-order which builds upon ‘antitrust’ principles does in no way exclude grant market segment specific or market participant specific exceptions which take into consideration disparate competitive situations.<sup>52</sup>

This comes close to what is intended in Part Four: Antitrust is law-based power control, in Malinowski’s sense of “hemming in” natural propensities. Global economy must include this anthropological, or cultural, antitrust. The main difference between the “Wealth of Nations” and a “Wealth of the Globe” will not be the existence of antitrust as such, but the much greater weight to be given to antitrust, including the control not merely of economic but also of cultural power. World economy, if successful, will be different from national economies because of the much more intensive care for the cultures. On the other hand, the *antitrust nature* of this care for the cultures is important. The antitrust element in that postulated cultural awareness is able to prevent this “care for the cultures” from becoming a pretext for undisputedly maintaining the power of the local magnates, dictators, and oligarchs. World economy is bound to sail the course between Scylla and Charybdis, between economically overriding local culture and knowledge on the one hand, and protecting the overlords of economic and political dominance on the other: Cultural antitrust tackles both.

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<sup>52</sup> Heinz-Dieter Assmann, *Weltethos und die rechtliche Ordnung der Weltwirtschaft*, in: Hans Küng and Karl-Josef Kuschel (eds.), *Wissenschaft und Weltethos*, Munich/Zurich, 1998: Piper, 84-123, at 93 (above translation by W.F.), in a discussion of earlier writings of the present author. Cf. Fikentscher, *Wirtschaftsrecht*, Bd. I.: *Weltwirtschaftsrecht, Europäisches Wirtschaftsrecht* (Economic Law, Vol. 1: World economic law, European economic law), Munich 1983: C.H. Beck, 125 ff., 129; an anthropological approach: idem, *Wirtschaftliche Gerechtigkeit und kulturelle Gerechtigkeit* (Economic justice and cultural justice), 1997. See C. Joerges, “Vorüberlegungen zu einer Theorie des internationalen Wirtschaftsrechts,” *RabelsZ* 43 (1976): 6 ff., 29 ff.

The search for literature pertaining to the issue of “anthropological antitrust” in economic writing did not produce a wealth of information. Neither does the search in fields beyond economy. Of course, there are important works on cross-cultural contact and conflict. Sam Huntington’s *Clash of Civilizations* has already been mentioned. His book triggered a wealth of critique, consenting and dissenting.<sup>53</sup> Similar publications of recent years include – without any claim of being complete – Dunn and Hall’s *Rise and Demise*,<sup>54</sup> Hodgson’s *Christianity and Islam*,<sup>55</sup> Martin Shapiro’s *Globalization of Freedom of Contract*,<sup>56</sup> Shmuel Noah Eisenstadt’s *Japanese Civilization*,<sup>57</sup> and works such as Jared Diamond’s on Europe’s Special Path<sup>58</sup> and others. None of them, so far as can be ascertained, introduces the aspect of power control in an anthropological perspective.

12. A difficult point in the present context is caused by the intrinsic abstractness of economy and economic theory. It is much easier to discuss and postulate on environmental concerns, comparative law, or ethnic values and their political and legal protection. A market seems so self-evident an institution, and money is such a fungible thing, that one may hesitate to bring law, environment, and cultural respect on the one hand, and economic issues on the other, into one line of anthropological argument. In other words, many may think: Why not leave to every ethnic group its cultural idiosyncrasies, but at least in economics let the world be a whole?

Is not the free market system good for everyone, and will the Taliban and the Navajo get used to it and let the Western style of sex-related advertising and hazardous waste in for money? Or shall we give up our Western ideals of a

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<sup>53</sup> For an example see: William H. McNeill, “Decline of the West?” 44 *The New York Review of Books*, January No. 1 (1997): 18-22; Bobbit (2002).

<sup>54</sup> Chase Dunn & Thomas D. Hall, *Rise and Demise: Comparing World Systems*, Boulder, CO: Westview, 1997.

<sup>55</sup> Marshall G.S. Hodgson, *A Comparison of Islam and Christianity as Frameworks for Religious Life*, Chicago: Chicago University Press, 1960; idem, *Rethinking World History: Essays on Europe, Islam and World History*, Cambridge and New York: Cambridge University Press, 1993 (orig. 1974).

<sup>56</sup> Martin Shapiro, “Globalization of Freedom of Contract,” in: Harry N. Scheiber (ed.), *The State and Freedom of Contract*, Stanford 1998: Stanford University Press, 269-363 (a warning against the assumption that the idea of the freedom of contract is acceptable everywhere and under all circumstances).

<sup>57</sup> S. N. Eisenstadt, *Japanese Civilization: A Comparative View* (Chicago: University of Chicago Press, 1996); idem, *Paradoxes of Democracy: Fragility, Continuity, and Change*, Washington. D.C.: Woodrow Wilson Center Press, 1999.

<sup>58</sup> Jared Diamond, *Guns, Germs, and Steel: The Fates of Human Societies* (New York: Norton, 1997); idem, “Der Ursprung der Kulturunterschiede,” *Zeitschrift für Philosophie* 2, No.4, (1999): 4-15. Europe’s Special Path is my translation of the German *Der europäische Sonderweg*; see also text following notes 129 and 136, and note 425.

free market and make concessions to unimportant minorities? Is not the redistribution of power and the establishment of a level playing field effectuated again and again as a matter of course by letting things go their unfettered way? Freedom will re-establish itself and needs no chaperoning. Friedrich August von Hayek has taught us to think this way. Neoclassical economists would agree. From this point of view, the protection of ethnic cultures is nothing more than modern romanticism.

Freedom as the guarantor of freedom has proved to be an illusion. Liberty does not fall from heaven, nor does it survive by itself. The freedom paradox is ever present,<sup>59</sup> and works not only in politics (Hitler) but also in economics (monopolies). Once freedom has brought about power, freedom is in danger. Power over culture is no exception.

It may be that the proponents of unlimited economic freedom are right in that the necessary redistribution of power and resources (in order to prevent inefficient monopoly) may work in the very long run. But, first, this lasts too long against the background of justice, and, second, it cannot work on a global scale since there are no re-distributive factors left which could start the fresh wind for change from the outside. Because, in terms of globality, there is no outside any more.

Moreover, as has been indicated, economy is more abstract than other cultural attributes. Still, it is a cultural attribute. Thus, the problem of culture-specificity cannot be negated altogether. And if it remains on the agenda, how should it be solved in view of the world-encompassing capital market and other markets?

The aim cannot be the abolishment of the free market system as it has been born in Western economies, and spread to most corners of the world. Rather,

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<sup>59</sup> The first who is said to have defined the paradox of freedom is Plato, who remarked that legally unprotected freedom includes the freedom to abolish freedom. Adolf Hitler made use of the freedom paradox by using the free democratic system in Germany's Weimar Republic (1918-1933) to install his dictatorship. Josef Goebbels, Hitler's *Reichsminister for The Enlightenment of the People and Propaganda*, is reported to have made the following remark (about 1930): "The funny thing about democracy is that it protects precisely the one who wants to abolish it" (*das ist das Komische an der Demokratie, dass sie auch noch denjenigen schuetzt, der sie beseitigen will*). Modern discussions of the freedom paradox: Popper, *The Open Society and Its Enemies*; Fikentscher, *Freiheit als Aufgabe – Freedom as a Task*, both cited in note 1, supra; see also Andreas Heinemann, *Die Freiburger Schule und ihre geistigen Wurzeln* (The Freiburg School and its mental roots), Munich 1989; Florentz; Lawrence A. Sullivan & W. Fikentscher, *On the Growth of the Antitrust Idea*, 16/2 *Berkeley Journal of International Law* 197-233 (1999); W. Fikentscher, *Die Freiheit und ihr Paradox: Ueber Irrtuemer unserer Zeit* (The paradox of liberty: On errors of our time), Graefelfing 1997; *Frankfurter Allgemeine Zeitung* & Dr. Resch Verlag.

the issue is the time-, space-, and culture-related completion of the free market system wherever it meets justice-related data of time, space, and culture.

The guiding idea must be human freedom, including the freedom to live one's own culture and to be free from cultural imposition.<sup>60</sup> But there is the freedom paradox: Freedom tends to abolish itself. Von Hayek's and many others' open-aimed process of discovery, as the proclaimed essence of free competition, may soon discover its opposite because it is also open to monopoly. Then, von Hayek's neoclassics are unprotected and legally helpless. They do not offer a theory-immanent key to protect liberalism from becoming illiberal. For this reason, antitrust is no paradoxical policy and not in conflict with itself,<sup>61</sup> because it is an anti-regulation (meta-)regulation, and thus no regulation.<sup>62</sup>

For this very reason, only a free system (on the meta-level) can guarantee, as well as afford, protected pluralism (on the level "below"). This is why "anthropological antitrust" – as it was named above – consists of an anthropologically well-reasoned power control. This power control must exercise its effect in cultural, economic, environmental, and legal respects.

One consequence is cultural respect.<sup>63</sup> International intellectual property law knows the concept of national treatment: According to the rules of pertinent international treaties (in this case, e.g., the Paris Convention of 1883 and the

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<sup>60</sup> The term imposition is borrowed from acculturation theory; see, e.g., Fikentscher, *Modes of Thought*, at 478, with references; idem, *Migration, Akkulturation und Biculturalität aus rechtsanthropologischer Sicht* (Migration, acculturation, and biculturalität from the viewpoint of legal anthropology), in: FS Walter Odersky, Berlin & New York 1996: de Gruyter.

<sup>61</sup> Robert Bork, *The Antitrust Paradox: A Policy at War with Itself*. With a New Introduction and Epilogue, New York and Toronto: Free Press & Macmillan, 1993, orig. 1978; cf., E.-J. Mestmäcker, *Der verwaltete Wettbewerb: Eine vergleichende Untersuchung über den Schutz von Freiheit und Lauterkeit des Wettbewerbs* (The administered competition: a comparative investigation of the protection of freedom and fairness of competition), Tübingen 1984: Mohr Siebeck; in this publication, Mestmäcker criticizes the abundance of instruments of regulatory competition in a field that should be able to guarantee its own thrust – competition; however, this position may not give enough attention to the freedom paradox. Bork's and Mestmäcker's books are outstanding introductions to the core problem of antitrust, some of the best ever written, but – according to the opinion of this book's author – they both miss the point that it is the freedom paradox that forces antitrust theory to provide for its own *system-immanent* justification. In antitrust, it is not enough to use the state as a *deus ex machina* who is called upon or dismissed according to the exigencies of the plot. Rather, antitrust is in need of its own system-immanent justification: the liberal paradox.

<sup>62</sup> Seen from a meta-level; the differentiation between level and meta-level is as such a consequence of the paradox.

<sup>63</sup> See 6, *supra*.

Revised Berne Convention of 1886) the member states of these conventions grant to foreigners the same intellectual property rights as to their own citizens. Anthropologically reasoned international power control should include – in a parallel manner – *cultural treatment*. In principle, cultures are not permitted to discriminate against one another. But, whoever grants no cultural respect is not entitled to claim one for one's own purpose.

Antitrust principles and methods can be used to protect cultures.<sup>64</sup> Now, as a next step, *cultures* are used for building an ethno-pluralist world political and economic order that *embraces* antitrust thinking. Hereby, antitrust becomes more than its mere name may indicate: it is an expression of a understanding of world politics, *including* economics, and therefore also for the protection of those cultures. What is the common ground of economic and cultural justice so that a broad understanding of antitrust helps to insure the protection of both? Understanding and appreciating the diversity of cultures<sup>65</sup> teaches new concepts of economics and law. From this it follows that antitrust is a consequence of affirming diversity, in both economics and culture. It is Malinowski's "hemming in."

Thus, the concern is essentially on anthropology and economics, and their relationship in world trade. The book should not be understood as one of the many recent criticisms against a liberal economy. In this criticism, the Seattle protesters are wrong. Whoever feels no positive – and grateful – inner relationship to a smoking chimney, to a well-organized supermarket, and to a tidily written, sincere balance sheet should not deal with economy.

This book pleads against cultural and natural neglect and impoverishment, and – by consequence – against ways and means to bring about this impoverishment, for example by reducing the cultural forms of economy. Instead, it pleads in favor of a world in which both economic and cultural justice are goals to be pursued.

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<sup>64</sup> This context is discussed in Fikentscher, *Wirtschaftliche Gerechtigkeit und kulturelle Gerechtigkeit*.

<sup>65</sup> See the Introduction under 1, *supra*.

