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## Regulation of Standards in Technology Markets between Competition Policy and International Trade - The Chinese and European Experience (Foreword)

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**FOREWORD TO RICCARDO TREMOLADA, REGULATION OF STANDARDS IN TECHNOLOGY MARKETS BETWEEN COMPETITION POLICY AND INTERNATIONAL TRADE – THE CHINESE AND EUROPEAN EXPERIENCE**

PAOLO DAVIDE FARAH\*

Dr. Riccardo Tremolada in “*Regulation of Standards in Technology Markets Between Competition Policy and International Trade – The Chinese and European Experience*” analyses a very important topic in today’s society that bridges technology, economic development, innovation and regulations: standards.

A substantial part of this book was completed by Tremolada during his time as Research Associate at gLAWcal – Global Law Initiatives for Sustainable Development (United Kingdom) seconded in China as European Commission Marie Curie Fellow at Shanghai JiaoTong University. Consequently, the analysis, perspectives, reflections included in this book have benefitted from the opportunity of scholarly exchange and close collaborations among Chinese and European partners institutions and researchers. This manuscript is part of the European Union’s Seventh Framework Programme, Project POREEN. The research leading to the results of this book received funding from the People Programme (Marie Curie Actions) of the European Union’s Seventh Framework Programme (FP7/2007–2013) under Research Executive Agency (REA) Grant Agreement No. 318908. Acronym of the Project: POREEN (2013–2016) entitled “*Partnering Opportunities between Europe and China in the Renewable Energies and Environmental Industries*” within the results of the Research Team of the Work Package on “*The Legal Perspective on Europe-China Trade and Foreign Direct Investments (FDIs) Relations*”, coordinated by gLAWcal – Global Law Initiatives for Sustainable Development (United Kingdom).

Tremolada provides an in-depth analysis of the implications of standardization in the international trade arena. He emphasizes the intrinsic tension between intellectual property (i.e., the patent rights embodied in technical standards), innovation, competition policy and the international trade regime. In particular, standards are analysed as a regulatory tool that can not only influence economic development of a given nation but also negatively affect trade relations amongst partners and take the form of hidden trade restrictions. Technical standards are produced by a wide variety of State and Non-State Actors, which are however not often accountable to the public.<sup>1</sup> The lack of consistency and the missing single authority

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in charge of developing standards is consistent with the market force-oriented nature of this tool. Indeed, regulations are not able to keep up with the fast pace of technological development and therefore in this context single companies or informal *fora* have an interesting role in framing the standardization process.<sup>2</sup>

The comparison between the formal and informal entities in charge of standard setting is clarified by Tremolada via a solid analysis of the core principles of the process. This comparative lens, which can be found throughout the book, is a useful approach to understanding the legal and regulatory issues arising from standards. In the countries analysed, the importance of bringing together regulators and innovators is clear. Not least when addressing emerging technologies and when the implementation of such technologies interferes with or undermines fundamental human rights such as privacy and data protection. The establishment of working groups between industries and State actors can also partially facilitate the achievement of so-called non-trade concerns. In this regard, it is interesting to see how the recent EU law to require a common charging cable balances the need for innovation and technology with broader societal needs i.e. electronic waste reduction.<sup>3</sup> At the same time, it demonstrates how a role still exists in this field for State regulators.

The regulation of standard setting varies significantly across regions and the book covers and compares in detail two main regimes: the EU and China. The decision to focus on these two regimes is interesting and illustrates how two highly bureaucratic systems address the regulation of technological advancements.

The analysis demonstrates how not only legal and economic considerations play a role in the regulation of standards, but also and most importantly political ones.<sup>4</sup> The “openness” of China’s standardization is a telling example in this regard. China created a specific system for standard setting and invested heavily in high-tech industries. Initially, the State backed the industry to support the creation of a strong industrial base and then opened up to market forces.<sup>5</sup> Regulatory control over standards applied in the country enables the State to have a voice in technological advancement and also directs technological developments towards

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<sup>1</sup> Paolo D Farah, ‘Foreword to Technocracy and the Law: Accountability, Governance and Expertise’ in Alessandra Sofia Arcuri and Florin Coman-Kund, *Technocracy and the law: accountability, governance and expertise* (Routledge 2021).

<sup>2</sup> A similar situation takes place in the adoption by State Actors of emerging technologies such as blockchain see: Paolo Davide Farah and Marek Prityi, ‘Public Administration in the Age of Globalization and Emerging Technologies from Theories to Practice Symposium Issue: Blockchain Technology and the Law’ (2019) 88 *UMKC Law Review* 397.

<sup>3</sup> Elian Peltier, “In a Setback for Apple, the European Union Seeks a Common Charger for All Phones.,” *The New York Times*, September 23, 2021, < <https://www.nytimes.com/2021/09/23/business/european-union-apple-charging-port.html>.> accessed 1 December 2021.

<sup>4</sup> Such political goals have been also used to advance socio economic and cultural rights in the country: Paolo Farah and Elena Cima (eds), *China’s Influence on Non-Trade Concerns in International Economic Law* (Routledge 2016); Paolo Davide Farah, ‘Trade and Progress: The Case of China’ (2016) 30 *Columbia Journal of Asian Law* 51.

<sup>5</sup> Peter Nolan, *China and the Global Economy: National Champions, Industrial Policy, and the Big Business Revolution* (Palgrave 2001).

reaching societal outcomes.<sup>6</sup> Standards are closely connected to innovation. The adoption of particular standards has the power to shape the industry, fostering innovation and interoperability, and at the same time, competition. As pointed out in this book, this competition is not limited within State boundaries. It is taking place on a transnational scale where not only economic, but also geopolitical considerations play a role in shaping standards. Interestingly, China not only nationally but also regionally under its flagship “Belt & Road Initiative” (BRI) is focusing on standards. Under the *Action Plan on Belt and Road Standard Connectivity (2018-20)* standards are considered as a *universal language* and a way to promote *human civilization*. The plan is aimed at better aligning the standardization process and at “promot[ing] the application of Chinese standards in the construction of the “Belt & Road”,<sup>7</sup> clearly pointing out the geopolitical importance of standards. Thus, standards are a political tool and in particular a manner for a given country to forge alliances and promote its national business.

The focus on information and communication technology (ICT) introduces the connections and interlinkage between standards and Intellectual Property Rights (IPRs). It provides a detailed analysis of the rationale behind company decisions to rely on IPR protection to recover the investments made to reach the technological innovation that the standards seek to regulate.

Language in both agreements and standards is also addressed as a critical issue. Vagueness in language and definition of terms, necessary to reach an agreeable threshold for the standard, results in even more legal disputes.

The review of case law also underlines how countries have used their own judicial bodies to push a particular interpretation forward.<sup>8</sup> Both vagueness and the technical nature of standards and patents make adjudication difficult and uncertain. Competition over innovation is not limited to private companies but can also be found in the work of standard-setting bodies.

The present study further sheds light on how competition law in the EU and China fails to consider and fully take into consideration the standards-related IPR aspects.<sup>9</sup> Competition

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<sup>6</sup> This approach also informs energy policies in the country which place at the center administration and flexibilities: Haifeng Deng and Paolo Davide Farah, ‘China’s Energy Policies and Strategies for Climate Change and Energy Security’ (2020) 13 *The Journal of World Energy Law & Business* 141.

<sup>7</sup> Belt and Road Construction Leadership Group of the People’s Republic of China, “Action Plan for Connectivity of Standards on Joint Efforts to Build the Belt and Road Initiative (2018-2020)” (2018) <[http://english.www.gov.cn/archive/publications/2015/03/30/content\\_281475080249035.htm](http://english.www.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm)> accessed 1 December 2021.

<sup>8</sup> IPRs regulatory framework could also be leveraged to better protect Non-Trade concerns: Paolo Davide Farah and Riccardo Tremolada, ‘Desirability of Commodification of Intangible Cultural Heritage: The Unsatisfying Role of Intellectual Property Rights’ (2014) 11 *Transnational Dispute Management, Special Issue*; Paolo D Farah and Riccardo Tremolada, ‘Conflict between Intellectual Property Rights and Human Rights: A Case Study on Intangible Cultural Heritage’ (2015) 94 *Or. L. Rev.* 125.

<sup>9</sup> For an overview of the role of China and IPRs refer to: Paolo Davide Farah and Elena Cima, ‘China’s Participation in the World Trade Organization: Trade in Goods, Services, Intellectual Property Rights and

law is in fact partially excluded in this context even if markets and standard setting are more and more connected.<sup>10</sup> This issue could be found even more broadly in what can be termed “the crisis of multilateralism” and highlights the inability of the existing system to deal with the particular aspects of the Chinese system.<sup>11</sup> In this regard, Tremolada asserts that, “*China seems to enforce and make an effort to apply locally the many legal concepts related to standardization. In doing so, China nonetheless reinterprets them to strategically serve, and arguably defensively, to some extent, the goals of the country’s industrial and economic agenda, first and foremost the promotion of its indigenous industry*”. The promotion of Chinese indigenous innovation and of national digital champions is a theme not limited to standards. It is an all-encompassing issue that needs to be faced by both the WTO and the international community.<sup>12</sup> Yet, little progress has been made in this regard. While under the Belt and Road Initiative China is proactively pushing the implementation of the latest.

Tremolada makes it clear to the reader that regulating patents and standards from the perspective of competition law overlooks the effects that standardization can have on policy and the economy when it is controlled from an individualistic perspective. Tremolada shows the reader how the WTO can get involved in this process and the positive effects that could result from its involvement.

In an effort to outline a more feasible approach, Tremolada considers a “*principle-based*” approach, calling for an interpretation of the WTO provisions that uphold the core values of competition policy. In this regard, he refers to building on the existing considerable agreement on core principles, such as transparency and non-discrimination between domestic and foreign companies. He ultimately argues that a principle-based approach could contribute towards the depoliticization of competition law and policy, carving out industrial policy considerations from competition law. However, he asserts that the focus should not be on whether industrial policy is a factor in competition analysis, but rather on determining which of the two interests should prevail when conflict arises.

At the same time, as he highlights, it would be naive to think that internalizing the core values of competition law and policy within the international trade law regime would suffice. The need to adopt a regulatory solution to the current divergences in IP and competition law and practice remains.

Moreover, in light of the difficulties in the role of WTO rules in relation to anticompetitive conduct, Tremolada calls for a “*global competition policy*” that would rely primarily,

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Transparency Issues’, *El comercio con China: oportunidades empresariales, incertidumbres jurídicas* (Tirant lo Blanch 2010) <<https://archive-ouverte.unige.ch/unige:135649>> accessed 19 May 2021.

<sup>10</sup> For an example on the energy market see: Paolo Davide Farah and Tivadar Otvos, ‘Competition Law and Trade in Energy vs. Sustainable Development: A Clash of Individualism and Cooperative Partnerships’ (2018) 50 *Arizona State Law Journal* 497.

<sup>11</sup> The recent AB crisis is an emblematic example see: Bernard Hoekman and Petros C Mavroidis, ‘Burning Down the House? The Appellate Body in the Centre of the WTO Crisis’ (2019) 56 *The Appellate Body in the Centre of the WTO Crisis* (July 1, 2019). Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS.

<sup>12</sup> Mark Wu, ‘The “China, Inc.” Challenge to Global Trade Governance’ [2016] *Harvard International Law Journal*.

although not exclusively, on competition advocacy and soft legal tools. Arguably, this solution could nurture greater harmonization in competition law and practice at the worldwide level. It could also encourage best practice in addressing anticompetitive conduct, put in place by both private companies and governments, that restricts competition and supports anticompetitive measures aimed at benefiting a certain industry.

Dr. Tremolada's comparative analysis is enlightening and, at the same time, illustrates the lack of a one-size-fits-all solution for competition policy and international trade, not least in today's ever-evolving standardization and technology-driven landscape.

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