

International and National Laws Intertwined in Asia*
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To conduct business activities in any jurisdiction today requires not only a knowledge of the relevant domestic laws but also an understanding of a complex multilevel legal framework that includes a myriad of international and regional rules and standards. The process of market globalization is inevitably linked to globalization of the legal rules that regulate the global markets, with result that national legal systems are distinguished more by local institutional practices than by differences in the substantive legal norms. In other words, it is important to understand that international laws can acquire a variety of local meanings that call for an understanding of the local history and culture in addition to knowledge of the local economy and local laws. This brief article aims at discussing the importance of the learning about the multifaceted regulatory environments of business practices through examination of not only the massive web of national, regional and international rules that frame business practices in a particular country, but also the unique historical, political and cultural context in which local laws and institutions have emerged.

A decision to do business in Asia, for example, is often based on the economic attractiveness of that market. Despite the financial crisis in late 1997 and early 1998, the past performance of the Asian market has been remarkably strong. Most of the Asian economies are export-oriented and their export power is growing. Asia's share of world trade was 34 percent in 2006 and accounted for about 40 percent of the total increase in world trade over that period.¹ Since 2004 when it overtook Japan, China has been the world's biggest exporter. The only countries with higher exports are Germany and the United States, and 20 percent of China's export goes to the US.² The strong economic growth in the whole region (approximately 6 percent to 12 percent in 2007)³, the vast market (Asia is the largest continent), the enormous labour resources (close to 3 billion people in China and India alone), a good work ethic based on traditional obedience and a sense of hierarchy, low labour costs, the dominance of the private sector (except in China), the diverse levels of economic development of the countries in the region (some are developing while others, such as Japan and Korea, are already developed), and the booming intra-regional trade despite a significant lack of complementarity among the

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¹ P. Gruenwald and M. Hori, See P. Gruenwald and M. Hori, "Intra-regional Trade Key to Asia's Export Boom", IMF Survey Magazine, February 6, 2008, available at <http://www.imf.org/external/pubs/ft/survey/so/CAR02608A.htm> (last visited March 17, 2008).

² IMF report, (2007) Vol. 44:3 Finance and Development, available at <http://www.imf.org/external/pubs/ft/fandd/2007/09/amiti.htm> (last visited March 17, 2008).

³ In general, economic growth throughout the region has been steady. Japan reached only 2.1% GDP growth in 2007, but Taiwan, Singapore, and Indonesia grew at 6% GDP per year, South Korea 7%, Malaysia and Thailand 8%, India 10%, and China 11.5%. See: www.wto.org and OECD at www.oecd.org.

goods and services traded⁴, are some of the factors normally considered by foreign investors in deciding whether to do business in Asia.⁵

One other factor, the importance of which is sometimes underestimated in this decision making process, is the system of legal rules in effect in the various countries. Regardless of the form that the business is to take, the regulatory power of governments, how and how well the court system functions, specific legislation on ownership, including intellectual property rights, and on investment, acquisitions, financing, employment, taxation, cross-border trade and dispute settlement, are all important elements that should be considered in deciding whether to conduct business in any foreign jurisdiction.

The question of whether a country's substantive legal rules are good for foreign investors can be translated into questions about justice and fairness of the legal system and equality for all business actors in the market. Do the legal rules provide equal rights to foreign and domestic businesses, and to small, medium size and big businesses? Are they easy for everybody to understand? Are the rules certain and predictable? Do they protect businesses from arbitrary decisions by local authorities and do they actually hold local authorities accountable for their actions? Are the stated rules actually applied by local institutions and are the procedures for their application and enforcement transparent and sufficiently accessible to all business actors? Finally, would the rules be more reliable if they were to assimilate principles and standards based on the models of Western law familiar to foreign investors?

The legal studies have emphasized the importance of legal reforms in the development of the region's market economies. Some legal scholars have focused on the reforms undertaken following Asia's 1997/1998 financial crisis in order to determine how strengthening the rule of law and building institutional infrastructure have influenced economic prosperity and business development in the region.⁶ Other studies, considering the multi-layered legal framework to be a complex relationship among international, regional and national laws in the region, have attempted to find out whether local laws and standards comply or conflict with international agreements.⁷ Yet other studies have analyzed legislation against the backdrop of the customary rules and values of the local societies and have tried to find out whether any observed lack of compliance is the result of a lack of understanding of state laws by the local communities and institutions.⁸

⁴ Intra-regional trade in Asia in 2006 accounted for 51.9 percent of total trade in Asia. See P. Gruenwald and M. Hori, "Intra-regional Trade Key to Asia's Export Boom", *supra* note 1.

⁵ C. Campbell, *Legal Aspects of Doing Business in Asia and the Pacific*, vol. 3 (The Hague: Kluwer Law International, 1998) at 2.

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⁶ See for instance C. Antons and V. Gessner, eds., *Globalisation and Resistance, Law Reform in Asia since the Crisis* (Portland: Hart Publishing, 2007).

⁷ See for example C. Wu, "One Country, Two Legal Systems, and Three Memberships: Legal and Economic Integration between China and its Two SARs" (2007) 7:3 *Global Jurist* (Advances), Article 7 available at <http://bepress.com/gj/vol7/iss3/art7>, M. Ulric Killion, "China and Neo-liberal Constitutionalism" (2003) 3:2 *Global Jurist Frontiers*, Article 3, available at <http://bepress.com/gj/>, K. Pistor and P.A. Wellons, *The Rule of Law and Legal Institutions in Asian Economic Development: 1960-1995* (Oxford: Oxford University Press, 1999).

⁸ See D. Nelken and J. Feest, eds., *Adapting Legal Cultures* (Portland: Hart Publishing, 2003), D. Martiny, "Traditional Private and Commercial Law Rules under the Pressure of Global Transactions: The Role for an International Order" in R. Appelbaum, W. Felstiner and V. Gessner, eds., *Rules and Networks; The Legal Culture of Global Business Transactions* (Portland: Hart Publishing, 2007) 123-159, and D. Cass, B. Williams and G.

case—the adoption of well-known and already-tested laws of other states, or of the accession to international treaties—borrowing is appealing. It is a time and cost efficient shortcut to legal reforms and an immediate response to the need foreign investors have to operate within a certain, predictable legal environment. Similarity of national business laws and the acceptance of international standards are viewed as important elements of the harmonization of business laws upon which international business and cross border transactions depend while diverse laws are usually seen as obstacles to regional business and even more so to international business. However, that borrowing is usually selective and filtered by the local cultural, historical, religious, social and political context. Ultimately, rules that appear similar and harmonious on the books become interpreted and applied differently by different communities. Adoption of the WTO rules and disciplines certainly leads to the harmonization of trade rules and, as long as those rules are uniformly interpreted and applied in each member state, brings certainty and predictability to the legal framework for business. However, uniform interpretation and application of the WTO rules depends not only on the political will of the member states to comply with the rules but also on the complexity of their domestic legal and political systems, on whether they possess the financial resources to introduce the reforms necessary to support application of the WTO rules, and on the ability of the local legal culture to absorb the Western ideas of trade liberalization and the rule of law.¹⁷

Thus, despite the apparently significant similarity between Asian and Western business laws, the decision to conduct business in Asia should also take into consideration the “procedural dimension” of legal rules, or the way in which similar or even the same legal rules are actually interpreted and enforced locally,¹⁸ and the effectiveness of local institutions in securing the interests of the business community. Each year the World Bank investigates business regulations around the world and publishes country evaluations in its Doing Business report.¹⁹ The Doing Business 2008 Report suggests, for example, that requirements for complicated, multi-stage processes of incorporation and registration of business, which also tend to be costly and time-consuming, are the most cumbersome ones. These processes are daunting to businesses, which could lead to the development of an informal or grey economy. They are also burdensome to the ultimate consumer because the higher transaction costs usually result in a higher final price of products. Moreover, the cumbersome (rules and) procedures create ideal conditions for a culture of bribery of the local authorities in charge of registering and approving business start-ups. Thus, the preferred is a simplified but transparent process. However, the Doing Business the World Bank report does not address the end goal of the laws that mandate these complex procedures. Therefore, the possibility does exist that some such procedures and a significant level of governments’ restrictions on private economic freedoms might have as their objective to provide legal

laws during their colonial past in the second half of the nineteenth century – Hong Kong and India received English common law while other received primarily French and German legal systems.

¹⁷ For more on adoption of the rule of law principle in Asia see R. Peerenboom, ed., *Asian Discourses of Rule of Law – Theories and Implementation of Rule of Law in Twelve Asian Countries* (London and New York, RoutledgeCruzon, 2004).

¹⁸ K. Pistor and P. A. Wellons, *supra* note 7.

¹⁹ Doing Business 2008 Report compares 46 Sub-Saharan, 31 Latin American and Caribbean, 28 Eastern European and Central Asian, 24 East Asian and Pacific, 17 Middle East and North African, and 8 South Asian countries against the benchmark consisting of 24 OECD high income economies. See <http://www.doingbusiness.org> (last accessed on February 9, 2008). The study is based on the analysis of data collected until June 1, 2007. The report focuses on the legal rules and procedures governing: (a) starting a business; (b) dealing with licencing; (c) employing workers; (d) registering property; (e) getting credit; (f) protecting investors; (g) paying taxes; (h) trading across borders; (i) enforcing contracts; and (j) closing a business. The data generated for each country, taken together, is a measure of the “ease of doing business” in that country.

security, certainty and better screening by government of business activities. They might be intended to protect business from arbitrary actions on the part of local officials and they might even be transparent and non-discriminatory. The 2007 World Bank Institute paper on the rule of law and economic growth finds that, over the past three decades, Japan, South Korea and China have consistently recorded high economic growth (at least 5 percent per year) despite the fact that they impose significant restrictions on economic freedoms and have governments that actively intervene in the economy.²⁰ Similarly, Pistor and Wellons in their study of the influence of the role of law and legal institutions in economic development in Asia during the period from 1960 to 1995 suggest that the state and strong bureaucracies have played a more important role in their development and that the states have adopted Western business laws as a means of promoting state control over economic resources in addition to jump starting economic development.²¹ Thus, substantively similar laws have been used in the West and in Asia but by different institutions and in significantly different procedures; and, yet they brought about a similar result—that is, economic development.

The liberalization of trade at the multilateral and regional level makes it easier for national businesses to trade with and invest in other markets but it also intensifies the influence of international law on private business transactions in each country. On the other hand, there is not the chance that even businesses that operate within the confines of a single state are not affected by the myriad of legal provisions normally enacted in order to implement and to give meaning to international treaties locally. Thus, teaching the law of international business transactions should address a global perspective as much as the ways in which such a perspective gets transposed locally.

²⁰ D. Kaufmann, A. Kraay and M. Mastruzzi, “Governance Matters VI: Aggregate and Individual Governance Indicators 1996-2006”, World Bank Research Policy Working Paper WPS 4280, July 2007.

²¹ K. Pistor and P.A. Wellons, *supra* note 7.