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Regulatory reawakening

Clark B. Lombardi Shaping courts' interpretations of Islam

Kyla Tienhaara Preserving governments' right to regulate

Sandy Gordon Mega-population, mega-corruption, mega-growth

Veronica Taylor Rethinking donor intervention

Tim Lindsey & Cate Sumner Islamic courts as governance institutions

Bruce E. Aronson Japanese financial regulation—the verdict

and more . . .

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From the Editor's desk

Images of regulatory failure in Asia are a staple of mainstream media in the West: contaminated food killing children; humanitarian disasters magnified by ramshackle construction; industrial landscapes thick with sulphurous smoke; corrupt officials facilitating transactions from traffic fines to people smuggling. In policy literature these acute social, economic and environmental issues are attributed to deficient national and local governance and a lack of regulatory capacity. Complex global problems such as energy policy and climate change require immediate engagement by states—many of which are not ready to implement policy promises. Asia's governance gaps impact everyone.

But a failure to live up to international regulatory standards is only part of the story. These essays present fresh perspectives on why, as Michael Dowdle argues, regulatory geography matters. Economies in the global south have less access to the public and social wealth necessary to maintain a modern regulatory state. And outliers such as Burma may be less amenable to punitive approaches. So we see considerable divergence from global regulatory norms. Japan's financial deregulation follows an Anglo-American script but local conditions thwart the anticipated economic growth. India adopts a World Bank formula for its investment climate, but the rise in foreign direct investment is coincidental.

Certainly Asian regulatory agencies and actors are as susceptible to corruption and opportunism as their Western counterparts. The counterfactual surprise, however, is the emergence of local regulatory actors who play new and unique roles. Malaysia's federated states are laboratories for both liberal and restrictive interpretations of Islamic law. By contrast, Indonesia's Religious Courts emerge as champions of access to justice. Read together, the essays in this issue speak less to the (undeniable) regulatory failures of the many political systems of Asia than to a regulatory reawakening: a region characterised by regulatory experimentation, adaptation to local conditions and the vigorous contestation of international norms that demands more intellectual engagement.

Veronica Taylor
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COVER: In Jakarta in September 2010, presiding judge Tri Widodo, centre, and judges Wahyu, left, and Donatus, right, try two men accused of selling firearms to alleged Islamist extremists. PICTURE: Romeo Gacad / AFP /Getty Images.

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PICTURE: BAY ISMOYO / AFP PHOTO / AAP

Drivers rest in their trucks at Merak, Indonesia, during a week-long traffic jam in February 2011 that involved more than 2,000 trucks. Transport costs are one of the factors that can affect a region's ability to generate wealth.

Regulation and the strictures of geography

MICHAEL W. DOWDLE

DISCUSSIONS and studies of regulation and governance draw their regulatory insights from the experiences of the advanced industrial economies. It is presumed that these insights, and the regulatory practices they recommend, apply with equal force to understanding the regulatory environments of other countries, such as the 'developing' countries of the global south.

This is not likely to be the case. The economic geography of the global south is such that regulatory strategies that work in the industrial north can become dysfunctional when transplanted to developing countries. Our understanding of regulation and governance needs to better take this into account.

This is because the effectiveness of many regulatory strategies is often tied to aspects of industrial and social organisation that are themselves the product of a larger transnational geography (particularly transnational economic geography). Transnational economic geography can affect regulatory capacity in a number of ways.

For example, a region's ability to generate wealth is strongly affected by that region's distance from its ultimate consumer centres—that is, by transportation costs. The more it costs to deliver regional products to their ultimate consumers, the more

innately fragile and underdeveloped the economy will be.

In addition, more developed economies often enjoy absolute advantage in high-wealth industries due to their external economies (agglomeration effects), while the particular comparative advantages of peripheral economies tend to focus on cutting production costs rather than on generating wealth.

Moreover, the psychological dynamics of transnational finance make capital intrinsically more expensive and more volatile in most global south economies.

This means that peripheral economies will be inherently more volatile, more fragile and less amenable to conditions of sustained and persistent economic growth. But many of the regulatory strategies that we use to evaluate and promote economic and legal development in the global south are vitally dependent on the presence of an already wealthy and stable socio-economic environment.

CONSIDER, along these lines, the regulatory practices associated with what is sometimes called the modern regulatory state: that is, regulation that proceeds via centralised rule-making, which is transparently administered by independent regulatory agencies, with a regulatory focus on the ongoing monitoring of the economy rather than on controlling entry into that economy. Also consider that it works in conjunction with a professionalised judicial system that is able to resolve disputes between private actors, and between private actors and public officials, in a fair and transparent manner, and which has effective capacity for enforcement.

Centralised rule-making, centralised monitoring and transparency all require an existing standardisation and stabilisation of national society, something that in the West came about only through advanced industrialisation. Independent regulatory agencies require an extensive public education system and extensive public funds to train and retain the highly professionalised workforces of lawyers, accountants, forensic investigators, and industry analysts needed to staff them—again, something that in the West only became possible when industrialisation greatly increased public wealth.

. . . patronage-based forms of institutional discipline so characteristic of developing countries, for example, can often represent very efficient and often vital governmental responses to low-wealth and inherently volatile socio-economic conditions

In sum, what today we call rule of law was actually built on top of a prior industrial development and the vast increase in public wealth it generated, not the other way around.

None of this is an argument for developmental fatalism. But it does mean that we have to be a little more nuanced in our approach to legal development. It means, for example, that in thinking about regulatory development in the global south, we have to be cognisant of their essentially different regulatory environments—environments that are likely to be innately less stable, less responsive to centralisation and rationalisation, with less access to the public and social wealth necessary to maintain a modern regulatory state. It means that we may need to start approaching issues of regulatory reforms in the global south from the perspective of promoting actual quality of life independent of promoting economic growth, since many of the geographic factors mentioned above suggest that in peripheral economies, capacity for growth can be limited by factors that escape the reach of human intentionality.

FINALLY, it suggests that regulation needs to be seen as being an extension of politics—and of the particular politics into which it is being inserted—and not a replacement for that politics. The patronage-based forms of institutional discipline so characteristic of developing countries, for example, can often represent very efficient and often vital governmental responses to low-wealth and inherently volatile socio-economic conditions.

This last point suggests a final lesson from all this: just because a particular regulatory arrangement differs from that with which we are familiar or comfortable, that does not by itself mean that it is dysfunctional. We too may have something to learn about regulation and governance from alternative regulatory practices found in the global south. EAFQ

Did 20 years of financial regulatory reform really fail?

BRUCE E. ARONSON

THE 'lost decade' of the 1990s in Japan has now become two decades, with the latter marked by persistent deflationary pressure. Beginning in the 1990s, the Japanese introduced short-term fiscal and monetary policies to stimulate the economy and 'structural reform' to achieve sustained economic recovery through a new post-industrial economic model.

Substantive financial deregulation under the Big Bang program, initiated in 1996, and reform of Japan's regulatory style were critical components of this effort. The aim was to transform a highly regulated, bank-oriented financial system to a transparent, market-based financial system. A newly efficient capital market would then lead to the revitalisation of Japan's economy by attracting bank deposits into higher-return assets such as stocks, developing emerging-growth companies, and expanding the financial services sector and Tokyo's role as a financial centre.

Both popular opinion and academic literature hold these reform efforts as a failure. Many cite Japan's continuing low economic growth, particularly compared with the United States' 1990s financial innovation, and strong economic growth in China over the past decade. Scholars have especially focused on the possibility that international competition among economic and legal systems would lead to global convergence (presumably towards the US model), and have noted the lack of a clear, transformative change in Japan. Commentators agree that, although Japan may talk about reform, it has merely changed laws 'on the books' and not actual practices.

But these views are based on a questionable assumption: that financial deregulation, accompanied by other structural and administrative reform, naturally leads to sustained economic growth under a new post-industrial economic model. This understanding presumably arose from the perceived success of the US post-industrial model and the earlier Big Bang deregulatory programs in New York and London.

The 2008 financial crisis has challenged these assumptions. The US and other countries were forced to take extraordinary 'Japan-like' measures in both fiscal and monetary policy, including large budget deficits and quantitative easing to increase the money supply. There is now serious concern in the US that America might repeat Japan's experience of slow growth and a lingering deflationary environment. Accordingly, the post-2008 environment provides a good opportunity to reassess a number of long-standing issues, including the significance of Japanese efforts at deregulation and related reforms.

> Assessment of Japan's efforts must consider the balance between deregulation to promote competition and regulation to maintain investor confidence and market stability

The Big Bang financial deregulation program has, together with other reforms, significantly altered Japan's regulatory style, particularly in the financial services industry. Japan has successfully evolved towards a regulatory framework with an increased emphasis on information disclosure and transparency, and a greater reliance on formal rules and market mechanisms. Moving clearly towards a rule-of-law system is a significant accomplishment.

EVIDENCE of this evolution is abundant. It includes changes in the structure of regulatory agencies (and increased independence for the Bank of Japan), the end of administrative guidance practices, far greater information disclosure by government agencies, and, in particular, a corresponding rise in the importance of lawyers to advise on rules in the administrative and regulatory processes.

Even though Japan's program of

PICTURE: KATSUMI KASAHARA / AP PHOTO / AAP

Financial deregulation has significantly altered Japan's regulatory syle, particularly in the financial services industry.

financial deregulation was more extensive than that undertaken in New York or London, it was not nearly as successful in growing Japan's financial services industry or achieving other broad goals related to a service-oriented, post-industrial society. The reason for this outcome is not primarily a failure to carry out promised regulatory reforms. Rather, it illustrates the limits of what can be accomplished through financial deregulation alone and the necessary contribution of other important factors.

Japan faced very strong headwinds: a rapidly aging society with increasing social welfare payments, a debilitating banking crisis, a reluctance on the part of banks to cede ground to the slowly expanding capital markets, poor economic growth and stock market performance, deflationary pressure, mounting debts from government fiscal stimuli to keep the economy afloat, and unfortunate external shocks in 1997 and 2008.

Still, Japan is better off for having completed substantial reform in financial deregulation and in its regulatory style. It is now considering a variety of measures unrelated to deregulation to achieve its goals. Assessment of Japan's reform efforts must consider the balance between deregulation to promote competition and regulation to maintain investor confidence and market stability. It must also take into account the role of non-regulatory factors such as macroeconomic growth and financial market performance in creating efficient capital markets that can support a post-industrial society. EAFQ

Rethinking donor intervention in promoting the rule of law

VERONICA TAYLOR

THE regulatory challenges faced in Asia have a magnetic effect on a group of less visible actors—foreign aid donors. Multilateral institutions, including the UN and its agencies, the World Bank and regional development banks, as well as key bilateral donors such as the US, Australia and the Netherlands, spend in excess of US$2.6 billion per year on legal and regulatory reforms worldwide. Even greater sums are spent on security sector reform and military-funded rule of law in fragile and conflict-affected states.

Within Asia, what we broadly term 'promoting the rule of law' embraces environmental governance in China, judicial reform in Vietnam, court buildings and computers in Mongolia, independent regulators for Indonesia and anti-corruption initiatives across the region—all supported through donor loans, grants in aid, budget supplementation and technical assistance.

This is a good news story if donors and their stakeholders remain confident that rule of law works as advertised: to reduce poverty, open markets, boost economic growth and provide for more legitimate and more effective domestic governance institutions. Some of this is visible, but it is less clear that it flows as a consequence of donor assistance. For a host of reasons the intended impact of donor interventions tends to be blunted.

'Rule of law', like earlier forms of donor assistance, developmentally uses some less-than-effective regulatory techniques. One is standardisation. Donors tend to promote a set of institutions and attributes that aggregate to 'rule of law'. A core example is the 'independent' judiciary—an ideal in the West, and an ambitious reform in places with no tradition of separation of powers and no economic or ideological incentives for powerful elites to cede authority to the courts. No surprise, then, many donor years on, that Vietnam's courts are not independent, technically competent or efficient.

Another tendency is to ignore historical perspectives. We take late 20th century forms of law such as self-regulating bar associations, state-funded legal aid, 'access to justice', and comprehensive human rights norms, and project these on to states that—by definition—have not developed these institutions. What took decades to evolve in the West is presented as a three-year project in a development setting. So it is no coincidence that Indonesia's under-resourced sharia judges do a much better job of delivering justice at the local level than a Supreme Court which is saturated in donor funding but has not—and has not needed to—embrace a 21st century client-oriented mindset.

> . . . rule-of-law promotion requires less copying and pasting of competition legislation and more interdisciplinary understanding of the social, economic and political drivers for regulatory actors on the ground

Against this background, key players are now seriously re-evaluating the investment in global legal and regulatory reform. Bilateral donors are increasingly subject to regulatory pressures: their programming is driven by shifting political priorities; their budgets and procurement are more subject to technocratic accountability; and their failures are reported more aggressively by the media in both donor and host countries.

Multilateral donors such as the World Bank recognise those pressures but also have an institutional stake in advancing their role. The World Bank's 2011 *World Development Report* calls for greater attention to justice reform in fragile and conflict-affected states. In parallel, the bank's *Directions in Justice Reform* policy paper, currently in development, is likely to advocate an expansion of its support for justice reform worldwide, with greater differentiation of middle-income, plural legal regime, fragile or conflict-affected and authorisation states.

PICTURE: M. ANSHAR / THE ASIA FOUNDATION

The president of the tribunal wields the gavel at a sitting of the Sharia Court of Aceh in Bandah Aceh: the evidence is that Indonesia's under-resourced sharia judges do an excellent job in delivering justice at a local level.

The problem is that these are ambitious agendas that follow 20 years of post-Berlin Wall investment in promotion of the rule of law that have yielded mixed results. And the bank's clients seem underwhelmed: 'Widespread acknowledgement of the need for justice reform does not, however, necessarily correspond with immediate demand from client countries for World Bank justice reform operations.' In other words, the World Bank views justice reform as crucial for the achievement of its plans in areas such as forestry, land, and private-sector disputes within functioning markets, but client states and their agencies do not share the enthusiasm.

There are three reasons why donors are likely to encounter pushback in Asia.

Regulatory diversity: The template approaches of donors have not been particularly successful, on anyone's terms, in a region characterised by regulatory diversity. The World Bank codes countries in a binary style (middle-income or plural legal regime or fragile or conflict-affected or authorisation). Reality is more complex: China fits all categories. So celebrated models within the bank such as 'bottom up' legal reform featuring legal aid workers who challenge local power structures in places like Sierra Leone are likely to be much less successful in Cambodia or rural Vietnam.

Counting the wrong chickens: Rule-of-law promotion—like other fields of development—is now subject to more intense quantitative evaluation. Donor and host governments use national audit systems to track expenditures and 'impact' from rule-of-law promotion. Third-party tools such as the World Bank's Doing Business indicators of regulatory reform and the World Justice Project's Rule of Law Index are very much in vogue as indicators and benchmarks for national rule-of-law results. Donors' own project evaluations focus on the specific outcomes (or 'deliverables') for a short project timeline: '5 legal clinics in 5 provinces', or '1500 subsidised cases over 3 years'—arbitrary numerical targets that key to the available budget, but tell us very little about the quality of law—or regulation—or justice in the context of that particular host system. Paradoxically the metrics approach weakens sustainability, another key development mantra. Projects proceed

as far as the cash trail, unless the target community and its government really value the reform goal. Signaling that what matters is a country's rule-of-law 'score' or the number of computers delivered and police trained, rather than the quality of justice experienced by citizens, is a short-cut to swift expenditures but seldom transforms institutions and the people who constitute them.

Affluence: From Beijing to Ubud to Ulaanbaatar, Asia is becoming increasingly wealthy. That wealth is unevenly spread, the state is often predatory and local elites often benefit disproportionately. One effect of economic growth is reduced political traction for donor interventions—particularly in the governance and regulatory reform arena. What we see across China, Mongolia, Vietnam, and to some extent in Indonesia, is tolerance for donor money, but a robust attitude toward either steering project interventions or subverting the donor policies to domestic priorities. Thus China is unlikely to prioritise legal aid for its own poor in civil disputes—donors favour legal 'empowerment' while Chinese political elites want to keep many kinds of disputes out of the courts. The key issue here is that China is both itself a donor and a recipient of rule-of-law promotion funding and has both capacity and means to capture, steer and reshape donor interventions.

Body counts of judges are largely irrelevant indicators of legal 'development'

What should donors do in response? One approach would be to de-emphasise attention to formal legal institutions in Asia and look instead at the regulatory dynamics of individual systems at national and local levels. Regulatory reform in industrialised and post-industrial states relies on co-regulation by state and non-state actors and mobilising self regulation by understanding what motivates regulatory actors. Donors would get better results in Asia from investing in a nuanced understanding of how indigenous regulation works—at all levels. So rule-of-law promotion requires less copying and pasting of competition legislation and more interdisciplinary understanding of the social, economic and political drivers for regulatory actors on the ground.

We could also correct the technocratic emphasis on form over substance. Body counts of judges are largely irrelevant indicators of legal 'development'. Better measures would be rigorous, multi-method studies of how judges see their role, how their knowledge changes over time, and the personal costs and systemic constraints of, say, delivering accurate, appealable decisions.

A further dimension would be to take seriously the prospect that China may emerge as an intellectual force in the promotion of rule of law. It already stands as an alternative development model and there is no reason why Chinese adaptations of donor rule-of-law interventions cannot become suggestive models of practice elsewhere, regardless of whether they fit current donor orthodoxy. The indications seem to be that the donor era of 'Do as I say, not as I do' might be drawing to a close. EAFQ

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Judicial independence in authoritarian regimes

RANDALL PEERENBOOM

JUDICIAL independence is often assumed to be impossible in authoritarian regimes. Yet even the most cursory glance at authoritarian regimes reveals that law plays a much larger role than commonly believed. Authoritarian regimes turn to the courts for many reasons: to facilitate economic growth, to maintain social order, and to supervise and discipline local officials. Or they may use courts to define the relationships between central and local governments, monitor the boundaries between competing state organs, distance the ruling regime from unpopular decisions, and enhance regime legitimacy at home and abroad.

Conversely, it is assumed that democratic regimes favour judicial independence. Yet many legal systems in developing democracies are plagued by judicial corruption, incompetence and inefficiency. The judiciary is often controlled by the executive, beholden to the political and economic elite, threatened by organised crime, and subject to social pressure from the general public and media. Clearly much depends on the particular regime, whether authoritarian or democratic.

In China, blanket denunciations of the lack of meaningful judicial independence fail to capture a much more complex reality. The courts handle over eight million cases a year. Judicial independence is not an issue in many cases, nor is the source, likelihood or impact of interference the same across cases.

There is a need to examine a wider range of cases than just the high-profile conflicts involving political dissidents so prominently featured in the reports of human rights groups and the Western media.

Following the historical development of legal systems in Europe, America, Asia and some countries in Eastern Europe, Latin America and the Middle East, it is now clear that there is no single path toward the rule of law. The role and influence of foreign actors and the mimicking or transplanting of Euro-American institutions, values and practices into developing nations are now being called into question.

THERE is a danger of description passing as prescription, or of condemning deviations from a 'standard' model for promoting judicial independence. Thus, China's regulatory innovations—including individual case supervision, adjudicative committees, an extensive incentive structure for judges, and, most of all, the role of party organs in the court system—have all been widely criticised. Yet the wide variation in legal systems calls into question what is needed, as do the poor results when developing countries imitate practices that have evolved over centuries in developed countries

The lacklustre results from rule-of-law reform efforts strongly suggest there is a need for a more empirical, less ideological approach to assessing legal reforms in general and issues such as judicial independence or the role of the party in the judiciary in particular.

Judicial independence in China is far more complicated than is often recognised. Judicial behaviour cannot be explained without thick descriptions of the legal arguments, resource constraints and strategic interpretations open to the courts in a particular context. China's innovations or current practices may be problematic, but we lack the empirical foundation to make a judgment one way or the other.

ATTEMPTS to create independent judiciaries around the globe have demonstrated that the process is holistic. Reforms affect not just the judiciary as an institution but substantive and procedural law, the balance of power among state organs as well as social attitudes and practices. An approach focused primarily on the judiciary, or even on state institutions, is not sufficient.

Legal reforms must also be prioritised. Although judicial independence must be balanced with judicial accountability, the proper balance, and the methods, mechanisms and institutions to achieve it vary depending on the context. Judicial independence is not an end in itself but a means to other goals—there is substantive disagreement in China about how independent the courts should be and

whether the courts are the appropriate forum for resolving certain types of disputes.

While the most pressing issues in low-income countries are weak institutions and a lack of resources, political economy issues become more important as countries enter the middle-income stage. In China, the main emphasis has been on politically safer reforms aimed at promoting judicial efficiency, legal predictability and legal consistency in the economic sector.

Whether courts are the proper forum for resolving certain disputes will depend on the level of economic development, the status of the court, the relation of the judiciary to other political organs and the competence and integrity of judges. Forcing courts to hear socio-economic cases for which they are unable to provide an effective remedy undermines confidence in the judiciary. While the long-term solution is to outgrow such problems, in the meantime the courts will still play a role, enforcing minimal standards and reviewing decisions by administrative or government agencies after parties have exhausted their judicial remedies.

Given the diverse nature of the problems, there is no silver bullet that will ensure 'meaningful' judicial independence in China. Reforms must be tailored to the particular circumstances. In China there has been limited progress to create a more qualified and authoritative judiciary, able to handle an increasingly wide range of cases independently and competently. Nevertheless, as in other authoritarian regimes, there are likely to be limits on judicial independence in China, most notably in political cases that are perceived to challenge the ruling regime's grip on power.

EAFQ

LEGAL ACTIVISM

Behind China's official reaction to public interest law

HUALING FU

PUBLIC interest lawyering has developed quickly in China since its inception in the mid-1990s, and a small number of lawyers have used litigation as a key law reform strategy.

The popularity of public interest lawyering in China can be explained by the lack of alternative political institutions and processes where aggrieved citizens can assert their rights. In China's authoritarian system, political participation is prohibited or even criminalised, and dispute resolution through political deliberation is often unavailable. Courts thus provide a way of bringing social issues to public attention.

The long-held hope of many public interest lawyers is to build the rule of law and constitutionalism in China without directly threatening the core of the political system.

Initially, action over rights took place at the margins of political power and fitted with the government's agenda, which has at times been pluralistic towards certain social and economic issues. During the early stage of public interest lawyering, moderate rights claimants could, through courts, achieve some legal and political victories without challenging the Chinese Communist Party (CCP)/state.

However, legal activism without politics can only carry public interest lawyers so far. Law may be more effective in protecting rights at the margin of authoritarian politics, playing an ameliorative role in an otherwise harsh system. However, given the law's close relationship with politics, it is often impossible to make legal arguments without any political content.

Though most lawyers can refrain from making an overt political argument, there are always a few wayward lawyers who are determined to test the boundaries, causing the courts to become more politicised.

A lawyer must uphold the supremacy of the constitution and hold the party accountable to the law. However, when radical advocates attack party policies in a public forum, alarm bells sound within the CCP.

What then is the role of lawyers in the eyes of the CCP?

The traditional argument is that lawyers focus on the legal particularities of individual cases, thus isolating what could otherwise be explosive social and economic issues. Within this conceptual framework, lawyers and litigation deflect political contention, strengthen legal institutions and help to stabilise the existing political order. This is an appealing argument that has been accepted by the government and is the reason why the party has tolerated and supported public interest lawyering. After all, lawyers are mostly embedded in and supportive of the existing political system.

PICTURE: GREG BAKER / AP PHOTO / AAP

Li Fangping, lawyer for civil rights activist Hu Jia, speaks to reporters in Beijing on 3 April, 2008, after his client was sentenced to three-and-a-half years' jail on subversion charges. The traditional argument is that lawyers focus on the legal particularities of particular cases.

Over the past decade, however, citizens have begun to demand their rights more aggressively. They organise unofficial associations, take part in informal rallies and demonstrations, and take industrial action, including strikes. These forms of resistance represent emerging civil disobedience. Citizens are demanding that the CCP and government live up to their promises—a path which can eventually lead frustrated citizens to radicalisation.

Alarmed by this social activism, the party has retreated into its comfortable conservative zone. The rights discourse, popular in the 1990s, has started to diminish and stability discourse, focusing on concepts of harmony, has come to the fore. At the same time, thanks to its economic success, the CCP has become confident in its legitimacy and capacity to rule, and increasingly impatient with a rule of law it associates with inefficiency. In this context, it sees conformity and uniformity as equating with harmony, and repression and brutality equating with effectiveness and efficiency.

GIVEN this, the party's concern is that lawyers and activists are drawing otherwise isolated social forces together and channeling them into a confrontation with the CCP. In the cases of Falun Gong and political dissidents, the perception is that lawyers act as advocates for enemies of the state.

This potential to organise and mobilise the masses has caused the government to become more hostile and repressive, seeing lawyers as organisers of an emerging social force for transformative politics. Furthermore, the fact that public interest lawyering in China is largely foreign-funded allows the government to link it to hostile forces abroad and speculate about ulterior motives, such as a 'colour' revolution.

At present, the party/state has panicked at the emerging rights movement and social and legal mobilisation. The current system is not able to contain and internalise the societal demand. While the regime may not regard any particular lawyer or group of lawyers as the vanguard of a new revolutionary force subverting the party/state, public interest lawyers are clearly seen as a part of a larger 'colour' revolution, backed by hostile international forces, with the potential to create formidable political dissent. In an authoritarian regime, this creates a dangerous state of affairs—hence the repressive episode. EAFQ

Cool on investment climates

AMANDA PERRY-KESSARIS

FOR THE past 15 years, the World Bank has argued that a country or sub-national region can be analysed in terms of its 'investment climate', a collection of legal, political, infrastructural and economic characteristics which are thought to determine investment flows.

In this context it is constantly asserted that investors are drawn to 'climates' offering efficient (quick, predictable, cheap) administrative and judicial systems. In an attempt to identify which legal systems are relatively efficient, the bank has created legal system indicators. Some are based on expert observations ('Doing Business' surveys), others on the perceptions and expectations of foreign investors ('Enterprise' surveys). These indicators are intended for three purposes: as targets for World Bank-funded activities, to enable investors to make better informed decisions about where to do business, and to encourage competition in investment-climate league tables.

For the last decade in India, World Bank assistance has been directed towards improving Indian investment levels both by improving the investment climate and by increasing the bank's measurement of the investment climate. Investment flows have risen dramatically. Annual foreign direct investment flows to India, which stood at US$236 million in the pre-liberalisation year of 1990, grew ten times higher by 2000, then jumped to 20 times higher in 2002, when investment climate reforms were being introduced; and soared to over 170 times the 1990 level by 2008, when investment climate reforms had been in place for more than five years. Furthermore, the bank has increased its measurement of the Indian investment climate, and its measurements have indicated that clearances are being issued more speedily.

But are these three indicators of progress actually linked? Are clearances faster because measurement is up? Is investment up because clearances are faster? The bank and those who follow its policy lead do not know the answers to these questions because they have tended not to ask them. In fact, there is evidence to suggest that investors may pay far less attention to investment climate indicators than the World Bank policy presupposes, or that they pay attention to radically different indicators. For example, a close reading of the bank's own 2004 Investment Climate Assessment of India reveals that 70 per cent of respondent firms had not made a pre-investment investigation of the investment climate. So how could it possibly be true that the nature of the investment climate was a strong determinant of their investment decisions?

Furthermore, respondent firms tended to rank as offering relatively 'better' investment climates those Indian states which the bank would rate as 'poor'. Frequency of inspection visits, management time involved in complying with regulations, costs of regulation, the duration of customs clearance and levels of corruption were all higher in supposedly 'better-climate' states. Obviously this sheds doubt on the claim that there is universal definition of what constitutes a 'good' investment climate; a doubt which is second nature to anyone familiar with multiple legal cultures.

> The point of development is to enable real people to live . . . fulfilling lives

An additional layer of problems is posed by poor measurement practices. For example, the surveys from which legal system indicators are constructed frequently include questions such as, 'How much of an obstacle is corruption?'. If an investor replies 'none' does that mean there is no corruption, or that it is not an obstacle to the investor because they know how to navigate it? Indeed, how would you identify investors who actively prefer the kind of efficiency that 'corruption' can bring? And what would the bank be at liberty to do with that knowledge while it wages a war on corruption?

Of course one might argue that the question of whether the targets of investment, measurement and efficiency are linked is merely of academic interest. If investment is up, that is all that matters. But while investment and, for that matter, a good investment climate, may be a means to development, they are not development goals in their own right. The point of development is to enable real people to live happy and fulfilling lives. So it remains important to know whether the resources devoted to improving investment levels are bearing fruit.

The signs are not good. The bank's

Independent Evaluation Group (IEG) recommended in 2008 that the 'Doing Business' team ought to analyse the effects of 'Doing Business-inspired reforms' on: (i) firm performance, (ii) perceptions of business managers on related regulatory burdens, and (iii) the efficiency of the regulatory environment in the country. In essence, it told the bank to stop assuming that its work was effective.

One might add a request that we stop assuming that the investment climate agenda is not in fact damaging. In India, a number checks and balances, such as Environmental Impact Assessments and Public Hearings, have been eroded as a direct result of the effort to speed up clearances. Such an emphasis on speed at the beginning of the investment process risks undermining overall efficiency in the medium to long-run, as those concerns that are not heard before the project begins will surface later once costs are already long sunk. Furthermore, an emphasis on interstate competition for investment draws attention towards gaming investment climate league tables and away from debates over why the game is being played at all. Consider, for example, Georgia's literally incredible rank of 11th easiest place to do business in the world in 2010, not to mention its meteoric rise (overtaking Japan and Germany among many others) from 112th in 2004, via a 'best reformers' award from the World Bank in 2007.

The time has come for a frank inquiry into who does and should care about legal system indicators. It is heartening to know that the bank recently introduced a system to monitor and improve the quality of new indicators. But a haunting backlog of information overload and knowledge deficit remains to be cleared. EAFQ

Land governance challenges for Vietnam

TUNG NGO

THE PACE and scope of Vietnam's legal and regulatory reform in the last decade has been impressive. But land regulation now has the potential to be a brake on both economic growth and the government's ability to deliver social equity.

As enshrined in Vietnam's *Constitution and the Land Law* 2003, Vietnam's land is owned collectively by the nation's citizens; the state acts as the representative owner. Individuals and organisations enjoy use rights only. State-issued certificates of land use rights recognise the property rights of users, establishing who may transfer, exchange, assign, inherit, give or donate their land use rights, as well as use them as a capital contribution when establishing a business.

The constitution prohibits the confiscation of property. But government practices suggest this constitutional guarantee is not robust enough to restrain the state from manipulating the supply and pricing of land in a rising market.

Under the *Constitution and the Land Law* 2003, the state may acquire land use rights from individuals and organisations only for reasons of security, national defence or the national interest, and is required to compensate this acquisition according to stipulated land price framework at 'close to' market prices. But, in practice, compensation rates are much lower than the market price for the land and no legal mechanisms for challenging stipulated prices exist.

A practical problem is that Vietnam seems to have no market prices for land. Instead, government framework documents stipulate land prices which then form the basis for compensation or the unreasonably high inflated prices at which the land actually changes hands. The maximum for the most expensive areas in Hanoi (Hang Ngang and Hang Dao Streets in Hoan Kiem District) is stipulated at 81 million Vietnamese Dong (US$4,150) per square metre. These are most certainly not 'market prices', and anyone wanting to buy land in Hanoi would typically pay two or three times the stipulated price.

There are many reasons for such inflated land prices.

First is Vietnam's relatively young population of 85.847 million (in 2009) living in a proportionally small geographical area, with an annual population growth rate of about 1.2 per cent, leading to perceptions that land is a particularly finite resource.

Second, the population is on the move. Infrastructure in the provinces remains poor, so people continue to move to the cities to find jobs, schools, hospitals and entertainment. The official registered population of Hanoi is 6.472 million and the largest city, Ho Chi Minh City, is 7.163 million.

Third, domestic and international demand for land for infrastructure and

PICTURE: DAI KUROKAWA / EPA / AAP

Demand for land for infrastructure and investment is driving state officials to compulsorily acquire land in Vietnam.

investment purposes is driving state officials' compulsory acquisitions of land.

Fourth, the lack of alternative investment channels is motivating the perception of land scarcity. Despite the newly established stock market, the legal system and corporate governance are not transparent enough to gain strong public confidence. For the average person, acquiring land remains the ideal secure investment.

Finally, property transactions are an enticing way to launder money in a system that lacks sufficient oversight of cash transactions. After buying land and reselling it, dirty money is magically cleaned. This helps explain why land in Hanoi is more expensive than in Ho Chi Minh City: while Ho Chi Minh is the commercial hub, more developed and in many ways a better place to live, Hanoi is where the central government is located and where big infrastructure projects are decided. Since kickbacks are common in infrastructure projects, it would not be surprising to find local property market functions absorbing and laundering the proceeds from government procurement.

Rent-seeking speculators, often opportunistic political insiders influencing public policy, are interwoven with all of these factors, contributing to inflated land prices.

In one 2010 example, the National Assembly debated intensively whether or not Vietnam should move its administrative centre from Hanoi to Ba Vi, located 48 kilometres west of Hanoi. Land in Ba Vi was not expensive before the debate, but as rumours circulated that the capital would move, land prices in Ba Vi rocketed up by a few hundred per cent. Ultimately, the National Assembly rejected the government's proposal to move the administrative capital and those land prices fell precipitously. It was widely believed that the land had been bought by governmental officials (in the names of family members) long before news of a potential move leaked to the public. Those insiders had bought and then timely sold the land in question long before the National Assembly rebuffed the proposal.

Confronting the government as a social issue is whether Vietnamese citizens can afford to participate in this 'market' when the per capita income (in 2009) is US$1,052 per annum. Even at artificially regulated prices, Vietnam's market is unaffordable for most ordinary people.

The government needs to deal more effectively with immediate issues such as land speculation, but also to formulate a more flexible and realistic land regulatory system. Only then will it be able to fulfill both its constitutional promise to its citizens and the demands of infrastructure development. EAFQ

The limits to judicialisation

JOHN GILLESPIE

AFTER the Asian financial crisis in 1997, most Asian states moved towards a regulatory model that gave judges a greater role in resolving contentious social issues such as land disputes. This policy of judicialisation, submitting new social and economic problems to regulation by courts, faced considerable hurdles in transforming socialist Asia, particularly in China and Vietnam. Political intervention is the standard explanation for poorly performing courts in this region. But politics is relatively unimportant in the numerous land cases in which state interests are not an issue. In resolving land claims, courts encounter more deeply rooted problems than a lack of judicial independence and may not be the most appropriate means of regulating this type of dispute.

Attempts by party leaders to legislate uniform land laws have not succeeded in displacing pre-existing community-based self-regulatory systems. Decades of socialist land policies constrained self-regulation and private land markets without eliminating them. Following market liberalisations in the late 1970s, community-based self-regulatory systems recovered their popularity and in some urban centres even began to rival state-backed procedures. In juggling competing land claims, courts today face a dilemma: do they uphold state laws that disregard local regulatory traditions and risk losing social relevance, or do they apply community notions of situational justice which undermine land rights codified in legislation? This is a significant problem because grievances about access to urban land pose a serious challenge to government legitimacy and social stability in China and Vietnam.

For decades self-regulatory communities in urban centres have constructed housing and land markets based on small contingent commonalities between community members, without a reference to abstract land rights. Consequently, just access to land is not primarily understood by referencing predetermined legal rules and rights, but rather by engaging sentiments of sympathy and solidarity with family and community.

Courts dealt with community disputes by flexibly applying the law. Socialist legal thinking discouraged judges from bringing legal discourse into conversation with the community norms and epistemological assumptions which informed self-regulating land markets. This promoted a bifurcated dispute-resolution system in which judges strictly enforced socialist legality to protect party and state interests while they applied the law only flexibly to other cases in order to accommodate the norms and epistemological assumptions animating the self-regulatory systems. Depending on the nature of the dispute and the status of the parties, judges would use both legal formalism and community-based regulatory traditions.

> . . . self-regulatory traditions have proved remarkably resilient and adaptable

Recent legislation extending greater recognition to private property rights has not reconciled these two systems, because the law continues to disregard self-regulatory approaches to land. To make the matter worse, judicialisation and the associated push for greater rule formalism insists that judges should become more detached from self-regulatory communities. As this policy gains momentum, pressure is mounting for judges to further insulate themselves from the community and uniformly apply standardised and exclusive property rights. At the same time, judges are expected to remain engaged with socialist legality and blur property rights to protect party and state interests.

Most judges seem genuinely to want their judgments to reflect self-regulatory approaches to land. Some even regard statutory property rights as an alien concept incommensurable with community beliefs. To engage with the community and put an end to disputes, they have felt the need to reconcile property rights with community claims to property. Strictly enforcing exclusive property rights leads to winner-takes-all outcomes that fail to settle the underlying dispute because the losing parties frequently petition government and party authorities. Judges need discretionary flexibility to bridge the epistemic divide between state and community understandings about just access to land. Judges are concerned that rule formalism may have the unintended consequence of reducing their capacity to find lasting solutions to land disputes.

Another problem with judicialising land disputes is that conciliation and mediation are better at reconciling law with community justice than strict legal reasoning is. The purpose of law in judicial rulings is to create legal fictions that provide solutions to otherwise socially intractable problems. Despite decades of legal reforms, surveys routinely show that many citizens in China and Vietnam distrust legal solutions to land disputes.

The centralising forces of rule formalism are unlikely to annihilate community property norms and practices. Despite the state's strong opposition, self-regulatory traditions have proved remarkably resilient and adaptable. Research suggests that no matter what the government does, many urban residents are likely to continue using community-based regulatory systems. But if the state recognises self-regulatory land systems, it will leave in place the power and epistemic relationships that undermine attempts at creating unified national land tenure regimes.

In searching for a regulatory response to land disputes the state will eventually need to find some accommodation between state and non-state systems. In the short term the dialogues that might encourage the state to learn from self-regulatory communities are most likely to occur in quasi-judicial citizen compliant tribunals that are given discretionary power to experimentally apply the law. These bodies have close links to government policymakers and can draw on their national expertise to craft a universal set of land law principles. To remain relevant courts need flexibility in applying the law: a requirement that calls into question rule formalism and the judicialisation of land disputes. EAFQ

MONGOLIA

Gridlocked: the uneven road to rule-of-law reform

BRENT WHITE

IF YOU want a sense of the outcome of rule-of-law reform efforts in Mongolia over the last two decades, spend a few hours driving in Ulaanbaatar. Your immediate impression is likely to be one of chaos. This is especially true at any intersection where police are not present to control traffic—and drivers are thus expected to follow traffic rules on their own. At such intersections, vehicles are typically gridlocked as drivers fight inch-by-inch to get to the other side, seemingly oblivious to the traffic signals above them.

Your second reaction is likely to be fear—either because of the cars flying towards you on the wrong side of the road or because of the number of drivers who apparently conflate red with green. As you watch more closely, you may sense that some drivers—typically those in luxury cars with special license plates—are 'more equal than others'. These vehicles, usually occupied by politicians, government officials, or other Ulaanbaatar elites, cut others off with impunity and are free to disregard traffic rules even in the presence of police officers (whose directions they are also apparently free to ignore).

While the above description might fit any number of developing countries, it's also an apt metaphor for 'rule-of-law' in Mongolia. First, a rule-of-law culture has not taken hold. Laws are routinely flaunted unless enforced by some immediate positive authority. Second, the higher one's position or status, the less one is bound by the law.

These messages are conveyed in many other ways as well, including the illegal and disorderly construction of luxury apartment buildings south of the city in Zaisan, part of the Bogd Khan National Park, in open and blatant disregard of a law barring construction of such structures there. Indeed, development in Zaisan stands as a highly visible symbol of corruption and the impotency of the law—a point underscored not only by the fact that many high-ranking government officials now call Zaisan home, but also by the irony of the Constitutional Court itself having moved to a new building there.

But what has happened in Zaisan, or what happens daily on Ulaanbaatar's roads, is not exceptional. The same open disregard for the law is a defining characteristic of post-transition Mongolia—and corruption seems to permeate every level of Mongolian society.

This is not to say that no one follows the law. To the contrary, most Mongolians do stop at traffic lights and don't go barreling down the wrong side of the road. Moreover, most Mongolians would prefer a society with less corruption, where the law was applied democratically. But Mongolians must survive in the

PICTURE: / GERRY SHIH / AP / AAP

The burnt-out headquarters of the Mongolian People's Revolutionary Party in Ulaanbaatar, torched in July 2008 after protesters rioted over alleged electoral fraud. The lesson that no-one stands above the law is still to be learned.

society in which they live—and this frequently means disregarding the law.

Those in Mongolia who most resist the rule of law are those who benefit most from its absence.

In this light, the chaos of Ulaanbaatar's roads seems less a product of a developing society than a product of design. A chaotic and lawless society facilitates the goals of the corrupt elite by normalising their behaviour. Moreover, because traffic affects the lives of every Mongolian city-dweller on a daily basis, it's where they learn their primary lessons about the role of the law in society. These lessons don't bode well if the goal is to develop (or regain) respect for the law.

For this reason, however, beginning by addressing the lawlessness on Ulaanbaatar roads would offer an opportunity to teach different lessons about the rule of law and to develop a rule-of-law culture. For example, it might offer lessons about the utility of law (reduced traffic accidents, congestion, and commuting times) that go beyond positivist rationales for obeying the law.

Moreover, it might begin the process of inculcating 'habits of obedience' to the law in a society where disregard for the law has become a norm. Finally, were traffic rules enforced evenhandedly, it might also teach the important lesson that no one stands above the law. Indeed, if the Mongolian elite were forced to follow even traffic laws, then perhaps it wouldn't seem so unreasonable to expect that they follow other laws as well—and that public officials carry out their duties without corruption.

Unfortunately, because lawlessness and chaos benefit the corrupt elite, there is little chance that they will address it (on the roads or elsewhere)—especially not now in the new age of Minegolia. Lest the West point its finger, it bears remembering that the current political, legal, and economic system in Mongolia was put in place with the assistance—and insistence—of the international donor community. Whether one agrees that endemic corruption in post-transition Mongolia is a direct product of these reforms, it's at least powerful evidence of their failure to effectively advance the rule of law. EAFQ

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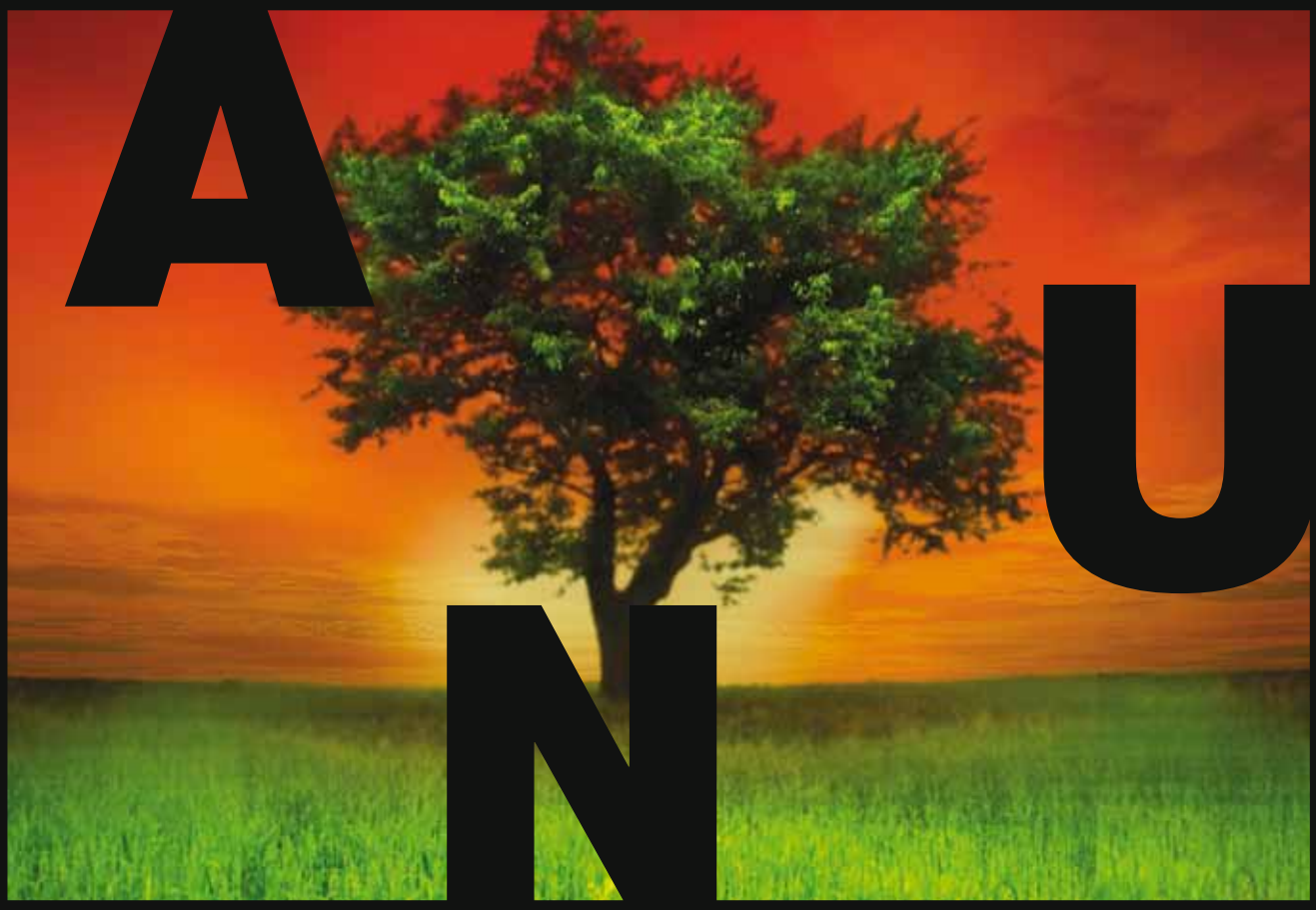

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Imagining a new human rights strategy for Burma

MORTEN B. PEDERSEN

INTERNATIONAL regulation of human rights poses a difficult challenge. Nowhere is this more apparent than in the case of Burma, which has topped the international human rights agenda for over two decades, with little to show for it. This is, in part, a problem of limited international influence, which is bound to remain in short supply. Yet it has been compounded by a failure of imagination. While we might not be able to end human rights violations in Burma, we could almost certainly do better.

There is broad recognition that international shaming, shunning and sanctions have done little to improve the human rights situation in Burma. Indeed, ample evidence reveals that it has been counterproductive and, at times, directly harmful to the Burmese people. Nonetheless, many human rights activists seem unable to imagine alternatives to the traditional 'punitive paradigm'—and governments, too, have been distinctly unwilling to do much more than tinker with existing policies. This is a great shame, as another approach has greater potential.

Principled engagement represents a 'middle way' between ostracism and the business-as-usual policies of regional governments that human rights activists understandably decry. The hallmark of this approach is direct engagement with the Burmese Government, as well as broader societal groups, to improve

PICTURE: TED ALJIBE / AFP PHOTO / AAP

the practical framework for human rights protection. While relying on non-punitive means, principled engagement combines pressure for reform with positive support, typically through a mix of advocacy, technical cooperation and financial support, as well as programs aimed at empowering local agents of change.

This approach is theoretically attractive for several reasons: First, it addresses key structural challenges of promoting human rights in any country, notably the need to secure local ownership of governance reforms and overcome the cultural and institutional legacy of past repressive practices. Secondly, it provides opportunities to enhance the benefits and lessen the costs of current Western sanctions, as well as regional trade and investment, and thus to build positive synergies between different approaches. Thirdly, and perhaps most importantly, it helps Burma begin reintegration into the international community after half a century of isolation, which has greatly hurt the country and its development prospects.

The effectiveness of principled engagement in practice is harder to assess since relevant programs have been few, and primarily implemented by UN agencies and non-governmental organisations with limited leverage and resources. Nonetheless, the experience, so far, has generally been positive, indicating that this approach would have broader potential if it were better supported by key governments.

Despite onerous restrictions by the Burmese Government and donors alike, international organisations on the ground have made significant, if limited, contributions to the human rights and welfare of the Burmese people by providing for basic needs, protecting vulnerable groups and promoting improved policies, particularly in the area of health where efforts have been concentrated. They have also started socialising Burmese military and civilian officials into international human rights norms and building the capacity of both the state and society to formulate and execute relevant programs.

Proponents of punitive measures tend to dismiss such achievements as insignificant. And, granted, principled engagement rarely shows major immediate results. It is by nature an incremental, and even slow, approach, since it works within the existing political structures rather than seeking their overthrow. Yet, as Burma's

military leaders are drawn out of their shell and activities on the ground expand and accumulate across sectors, it is certainly possible to imagine international programs becoming catalysts for broader internally-driven reforms.

This is especially likely to happen if more can be done to improve the structural conditions for human rights by consolidating the embryonic peace in the border areas and reforming the economy to strengthen and spread the benefits of growth, two objectives that also require effective engagement. In the meantime, engaged agencies at least help the general population cope with a bad situation and protect them from the worst excesses of individual abuses of power.

Quicker, more thorough change would obviously be preferable. However, there is no realistic way for Burma to move directly from dictatorship to a rights-abiding regime. If the country's tortured history shows one thing, it is that direct challenges to the military invariably provoke hostile backlashes and undermine opportunities for change.

Given this sadly predictable outcome, it makes strategic sense to work instead for smaller, more incremental changes that, precisely because they do not threaten the military's immediate interests, may be able to penetrate the regime and gradually transform the configuration of power and interests to a point where bigger change becomes possible.

As a policy proposal, principled engagement is still ahead of the curve. But without imagination, we are likely to remain stuck in established patterns, no matter how dysfunctional they are known to be. And with important changes underway inside Burma, now is the time for new and bold approaches. EAFQ

Muslim popular organisations and governance reform

ROBIN BUSH

GOVERNANCE is Indonesia's greatest challenge. In 1998, after 32 years of authoritarianism, Indonesians demanded a democratic system and got one. In the ensuing 13 years Indonesians have demonstrated a remarkable commitment to democratic values. They have twice directly elected a president and vice-president, and directly elected over 500 regional executives and more than 17,000 regional representatives. The question now is how well these elected officials are governing.

If poverty levels and the state of service delivery are any indication, there is room for improvement. More than 100 million Indonesians live on less than $2 a day. Twenty-five per cent of children under five are malnourished, only 48 per cent of the rural poor have access to clean water, and only 55 per cent of poor children complete junior secondary school.

One explanation for this poor performance is low capacity. Indeed, 70 per cent of parliamentarians elected in 2009 had never before served in parliament. Celebrities, former officials' wives, and shop-owners were all in the mix. However, low capacity is not the primary cause of poor governance, and therefore pure technical assistance is not the most effective solution.

As any policymaker knows, law and policymaking are political processes influenced by many competing interests. Recently, political scientists and development theorists have argued that to deliver truly effective governance it is not enough to reform institutions, or to provide officials with technical assistance, but that political elites must be engaged and mobilised. This call for 'politics' to be brought back into development looks at the problem of vested interests and argues that unless reformers have powerful political leverage, government policy and spending will often undermine the interests of the majority, especially the poor.

Scholarly work on Indonesia's two large mass-based organisations, Nahdlatul Ulama (NU) and Muhammadiyah (with a shared membership of 70 million people) has often not addressed the groups' engagement in governance reform. During the *reformasi* period, these groups used their influence to encourage democratic reform. More recently they have worked towards encouraging governance reform. Soon after Suharto's fall, both groups joined efforts to integrate democratic education into school and university curriculums, to influence legislation related to religious freedom and to ensure free and fair elections.

As democratic values have become increasingly integrated within Indonesian political culture, NU and Muhammadiyah activists have turned their attention to more technical

issues of governance reform, especially counter-corruption and pro-poor budget advocacy at the district level. The Asia Foundation has supported these efforts, on the premise that their political clout is necessary in order to counter vested interests at the local government level. Preliminary evidence indicates that this is an effective strategy. For example, when a Regent (Bupati) in eastern Indonesia was resistant to civil society efforts to allocate line items towards health and education, NU, Nahdlatul Wathon, and Muhammadiyah leaders convened 5000 people for an *istigosah* (religious rally), after which the Bupati promised to increase the health and education budgets.

This activity on the part of NU and Muhammadiyah is not only relevant to service-delivery and technical governance reform, but also provides insights into the changing political role of these two organisations. There is a perception expressed within both organisations that they are facing an identity crisis as Indonesia modernises and integrates increasingly into the global economy and community.

After the 2009 elections, many analysts argued that NU and Muhammadiyah were no longer the political brokers they had been for the last seven decades. Both groups publicly endorsed former Vice President Jusuf Kalla, who garnered less than 12 per cent of the vote. At the same time, the two political parties affiliated with NU and Muhammadyah, PKB and PAN, joined President Yudhoyono's coalition, despite their organisations having endorsed his opponent.

If the primary influence of NU and Muhammadiyah remains at the local level, presumably this dynamic contributes to the further decentralisation of power in Indonesia. Scholars have argued that while vertical accountability has improved with direct local elections in post-*reformasi* Indonesia, horizontal accountability remains very weak—this indicates room for a reformist role for these Muslim mass-member organisations. Furthermore, if engaging political elites is an effective approach, decentralised power could be an opportunity for civil society organisations within NU and Muhammadiyah to effect reform and improve governance.

These groups have played an important role in Indonesia's democratic reform; the indications are that they will continue to play an equally important role in governance reform. More research is needed in order to understand how such influence is exerted, pinpointing the precise combination of factors—individual relationships, public pressure, technical know-how—that foster effective governance. EAFQ

An election worker in Jakarta rolls a banner showing portraits of presidential candidates before the presidential election in July 2009. Muslim mass-member organisations have been influential in promoting democratic reforms.

PICTURE: IRWIN FEDRIANSYAH / AP PHOTO / AAP

Indonesia: Islamic courts as governance institutions

TIM LINDSEY AND CATE SUMNER

ONCE routinely described as 'Islam with a smiling face', the image of Indonesian Islam has been sullied in recent years by a noisy minority of radicals. The toxic combination of the violent terrorism of Jemaah Islamiyah, vigilante gangs like the Islamic Defenders Front (Front Pembela Islam), inter-religious civil wars in eastern Indonesia, and local governments legislating conservative versions of sharia have all given the impression to some outsiders of an incipient takeover by what Indonesians call 'hardliners' (*garis keras*).

But Islam in Indonesia has many more benign faces. These usually play a much more important role in the lives of most Indonesians than do the hardliners, who dominate media coverage.

Ibu (Mrs) Suciwati, an Indonesian mother living in West Java, experienced firsthand the often-overlooked positive aspects of Islam in Indonesia when she made a reluctant appearance in Indonesia's Islamic courts last year. Known as the Religious Courts, their main work is family law for Muslims, which constitutes more than 90 per cent of cases.

Ibu Suciwati's parents arranged her marriage when she was 14 years old, two years below the age at which girls can legally marry in Indonesia. This meant her marriage was not registered and that her three children lacked birth certificates. This is not unusual. UNICEF says as many as 60 per cent of Indonesian children under five are in the same predicament.

After five years of marriage Ibu Suciwati's husband left to work on another island and never returned. She subsequently had no contact and even learnt that he remarried. Naturally, she had long wanted a formal divorce to legitimise her situation as a female head of household. But, earning less than US0.70 a day (the Indonesian poverty line), even a trip to the local town where the court sits would have cost her more than two weeks' income.

Then Religious Court staff advised that her case could be heard by a circuit court (*sidang keliling)* when judges travelled to a village near hers, thus slashing her travel costs. Better still, the judges would waive court costs because of her poverty. When Ibu Suciwati finally appeared before the court in a village office a few kilometres from her home, the judges first formalised her earlier non-legal marriage and then issued the divorce certificate she needed to officially end it. As a result, Ibu Suciwati's three children now have birth certificates showing both parents' names and, importantly, showing they were born within wedlock — thus allowing them to enrol for national school examinations and avoid social discrimination.

> Contrary to common assumptions about Islamic courts, nearly two-thirds of applicants in the Religious Courts in Indonesia are women. Even more counter-intuitively, the vast majority of women win their cases

IN Ibu Suciwati's case, the key to her family's hopes of breaking out of the poverty trap was her ability to access the Religious Courts to formalise her legal status and, therefore, that of her children. This was only possible thanks to innovative circuit courts and their fee waiver programs, supported by the Australian Government's aid agency, AusAID, and the Family Court of Australia. The Government of Indonesia has since approved a significant budget increase for these initiatives. Now the troubled secular courts, notorious for their resistance to change but anxious not to be left behind by Religious Courts, are looking to adopt such programs as well. The Islamic judiciary has thus become leaders of court reform in Indonesia.

The result has been a tenfold

increase in access to the Religious Courts for the poor. Contrary to common assumptions about Islamic courts, nearly two-thirds of applicants in the Religious Courts in Indonesia are women. Even more counter-intuitively, the vast majority of women win their cases, most of which are decided procedurally on the basis of codified state versions of sharia. These confer on women and men alike similar rights to what is virtually 'divorce on demand'. One ground available to both parties is simply 'absence of harmony' in the marriage.

As in Ibu Suciwati's case, Indonesian women's ability to document their role as female heads of household gives vital access to the Indonesian Government's social welfare programs. These include cash transfers, free health treatment, subsidised rice and enrolment of children at state schools—benefits that often determine whether a family survives at all. The new initiatives to waive fees for the very poor and send courts out to remote villages, once cut off from these programs, will make an important contribution to breaking long-standing poverty cycles.

It is often forgotten that Indonesia's remarkable transition to democracy after Soeharto's fall in 1998 was driven in part by mainstream Muslim organisations. The work of the religious courts over the last five years is a fresh example of the potential of Islamic institutions in Indonesia to act as agents for reform, development and social justice, despite the contrary ambitions of hardliners. It shows a willingness to engage with government, civil society and non-Muslim foreign institutions to achieve objectives that both judges and litigants in these courts see as 'real Islam' in action. EAFQ

MALAYSIA'S COURTS

How state governments shape the courts' interpretation of Islam

PICTURE: / SAEED KHAN / AFP / GETTY IMAGES

Suraya Ramli, left, and Radidah Abdul Razak after their appointment on 14 July 2010 as the first two women judges in Malaysia's Islamic courts.

CLARK B. LOMBARDI

ISLAMIC law is playing an increasing role in the Malaysian legal system. While many celebrate this trend, liberal Muslims inside and outside of Malaysia are concerned.

In particular, liberal Muslims are concerned about the recent application of strict Islamic law to women, Muslims who hold unorthodox beliefs, or religious minorities. To their great consternation, non-Muslims in Malaysia are even finding that the state's application of Islamic law for 'Muslims' also encroaches on their lives.

In order to fully understand the impact of Islamic law in contemporary Malaysia and how to soften it, a nuanced examination of the political landscape is needed.

This begins with Malaysia's independence, when the country federated, and state governments were constitutionally granted the exclusive power to create family and inheritance law applicable to Muslims within their state. The states also received the ambiguous power to punish 'Islamic' criminal offences, and were granted the constitutional authority to create courts to adjudicate cases arising under the state's interpretation of Islamic law.

These continuously expansive powers—allowing for the creation and administration of local versions of Islamic law—are cherished by state governments, and their authority

here was cemented by a late-1980s constitutional amendment making state court interpretations of Islamic law, for the most part, unreviewable by federal courts.

In the past, federal legislators and judges have preferred a more liberal interpretation of Islamic law than the states. Malaysian commentators have thus suggested that the situation could be addressed by stripping the state governments of their control over Islamic law and, instead, establishing a national Islamic legal system. Such reforms, however, would be very difficult to implement, and the potential follow-on effects are further questionable. State governments are likely to fight vigorously any attempt to constitutionally strip them of one of their last vestiges of legislative and judicial power. Strict Islamists will also fight such attempts to disarm state authority unless they believe the national government will apply a similarly stringent version of Islam.

Even if the Islamic legal system could be nationalised, past practice is no guarantee of future returns. The federal judiciary might once have been a bastion of liberalism and champion of liberal (critics said 'Westernised') versions of Islam. Over the last 15 years it has undergone many changes. Augmenting this, Islamist interpretations of a particularly inflexible nature have become increasingly popular in contemporary Malaysian society, backed by powerful institutions with national reach. In short, the voice of liberal Islam is diminishing. The fact is, in Malaysia today, a majority of Muslims may well favour statutes very similar to those in the states and favour expansive application of them. It is only in a few regions that Muslims favouring liberal Islam currently exercise significant political power.

It is only in a few regions that Muslims favouring liberal Islam currently exercise significant political power

In light of the challenges Malaysia's federalism has triggered, it would be ironic if the federalised nature of Malaysia's legal system was also the key to setting the liberal voice free, to shape dialogue and argue for a more liberal interpretation of Islam.

It was US Supreme Court Justice Louis Brandeis who once argued that federalism was a blessing—particularly in times of social change and disagreement over responses. Federalism allowed the states, Brandeis said, to become 'laboratories of democracy' where different policies and laws could be tested. In the Malaysian context, whilst conservatives are probably stronger than liberals overall, there are some states where liberals are powerful. And it is here we may be able to see the 'laboratories' of Islamisation play their part.

Still, if the states were given the chance to embrace diverse interpretations of Islam, how many would do so? This is unclear. One comparison can be drawn with Indonesia, where local communities have recently been handed the power to enact local 'Islamic' regulations. Most that have exercised this power have enacted conservative regulations—including ones requiring Muslim women to wear head coverings when receiving government services. But that said, state-level politics in Indonesia and Malaysia are difficult to compare, particularly when it comes to Islam.

Recent developments in the Malaysian state of Perlis suggest that some Malaysian state governments—under the right political circumstances—could come to champion a liberal version of Islam. The Sultan of Perlis has appointed two consecutive Muftis who champion liberal positions on a number of contentious issues. There have been highly publicised controversies between these Muftis, Dr. Asri Zainul Abidin and Dr. Juanda Jaya, and the religious conservatives who dominate neighbouring states. Such controversies have raised awareness around the country about the diversity of Islamic legal interpretation among classically trained scholars and Islamic intellectuals alike. They have empowered liberals around the country by demonstrating that liberal positions are not associated with Westernised liberals alone.

The Malaysian federation contains few Perlises right now—laboratories of progressive Islam. If others are to arise, this will be because the champions of more liberal visions of Islam have studied state politics, learned to speak to a wide audience and adeptly grasped the skills necessary to influence the mechanisms of state politics. Beachheads at the leading institutions that train future state bureaucrats and judges, such as the International Islamic University of Malaysia, will also need to be established.

There are groups in Malaysia already working hard towards these goals. Those who wish to see a more robust, multi-faceted debate about the future of Islam in Malaysia should support them. The stakes are high enough. EAFQ

PICTURE: ADEK BERRY / /AFP PHOTO / AAP

A bridge under construction in Jakarta: Indonesia has made major efforts to increase efficiency in public procurement processes.

Independent regulators: the competition experience

NISA ISTIANI

IN 2010, Indonesia's volume of public procurement for goods, civil works and consulting services was around US$36 billion. According to the State Audit Body (Badan Pemeriksa Keuangan, or BPK) 2010 First Semester Report, the potential loss was around US$1 billion due to bad practices such as budget inefficiency, double receipt, price mark ups, fictitious tenders and collusive behaviour between parties in the bidding process. Before 1998 the so-called Suharto Franchise—a cabal of ministers, key bureaucrats and the military—was known to secure property and enforce contracts in both public and private sector markets. Without links to the inner circle, no businesses could hope to win a contract, particularly in the public sector. After Suharto's departure in 1998, those cabals that ran the franchises remained largely intact.

To overcome these bad practices, Indonesia has made major efforts to increase efficiency in the public procurement process, with the eventual aim of increasing the money available for public priority projects. Pursuant to a World Bank Assessment Report, the first national procurement regulation was issued in 2003. Revised seven times and substantially amended last year, the purpose of the new regulation was, among other things, to reduce bottlenecks occurring in budget spending due to delays and cancellations on the part of officials.

Many attribute such delays and

cancellations to the unnecessarily complicated public procurement procedure required by the first version of the regulation and by officials overreacting to concerns about the higher risk of prosecution since the establishment of the Anti Corruption Commission (Komisi Pemberantasan Korupsi/KPK) and the Commission for the Supervision of Business Competition (Komisi Pengawas Persaingan Usaha/KPPU). These new institutions enjoy a high degree of public trust on independence and fair investigation. Almost all the cases that they handle involve illegal practices and unfair competition in public procurements.

In 1999, Indonesia enacted its Competition Law and created the KPPU to enforce it. The law provides rules and guidance with respect to substantive and procedural matters. It covers monopolistic practices, price fixing, price discrimination, bid rigging, cartels, trusts, and vertical integration, among other features.

IN ITS first eight years bid rigging emerged as the predominant form of complaint filed by providers to the KPPU. Since 2000, the KPPU has accepted around 2,200 bid rigging cases, or around 80 per cent of total investigations.

The high proportion of bid rigging cases is interesting. For some time there has been a general assumption in Indonesia that collusive practices in public procurement are usual, if not 'accepted', so businesses tended to follow the 'rules of the game' to maintain future business opportunity and good relations with public procurement officers. For this reason they might be expected to abstain from filing formal complaints in situations where they presume collusive practices.

Second, the public and businesses have had low trust in law enforcement institutions and may consider filing a complaint to be a waste of time, money and energy. Thus the high rate of bid rigging complaints might indicate an increasing willingness by providers to play a more active role in breaking the cycle of collusion within public procurement.

Before the establishment of the KPPU, complaints could only be filed to the police in the form of a criminal allegation, or to the procuring entity itself on the grounds of administrative fault. A 2003 regulation (Perpres 80/2003) tried to provide a better mechanism, but the system for dealing with complaints resulted in a clear conflict of interest, with final appeals heard by the project officer in charge of the budget.

The 2007 establishment of the National Public Procurement Policy Agency (Lembaga Kebijakan Pengadaan Publik/LKPP) brought little improvement. The agency has almost the same role as a procurement agency as the Office of Federal Procurement Policy (OFPP) in the United States or the Office of Government Procurement Policy Board (GPPB) in The Philippines. As an independent agency LKPP's task remains limited only to providing recommendations upon the request of the head of department or ministry, there remains huge potential for conflict of interest, sending a negative message to business community and the public in general.

Should the KPPU maintain or even improve its performance, bid rigging complaint applications might continue in the years to come. Thus, considering the positive impact the KPPU can bring about, efforts should be taken immediately to overcome challenges such as insufficient budget and human resources.

Two other important elements were introduced by the new procurement regulation (Perpres 56/2010), which are e-procurement and wide access to small businesses and local products.

E-procurement is a recent innovation involving the acquisition of goods and services through an electronic catalog system. In 2010, the volume of public procurement of goods, civil works and consulting services using e-procurement was around US$1.4 million. Since it was started in 2010, 180 e-procurement centres have been set up successfully in 30 provinces, although only 33 of the potential 291 public institutions served by the centre actually use it (progress as of 7 March, 2011). This is still a promising figure and will increase in future. With e-procurement it is hoped that any registered provider will have an equal opportunity to participate in the procurement process, giving rise to healthy competition.

ACCESS to small businesses and local products means that procurement officials should maximise the use of local products and providers, while increasing the participation of micro and small businesses. When no local product meets the requirements, imported goods may be used. But foreign providers must first consider such local services as insurance, bank financing, product maintenance and shipping. These requirements should be inserted in the procurement qualification documents—a kind of protection measure that has become a trend in other countries. It is also a challenge for the KPPU to interpret fair competition should any dispute arise around the unfair application of protectionist measures. EAFQ

PICTURE: AFP PHOTO / AAP

Energy governance in Asia: beyond the market

NEIL GUNNINGHAM

CLIMATE change is widely recognised as the greatest challenge confronting our generation, one which, if not addressed, may have catastrophic consequences. Recent science reveals that the window for effective mitigation is short.

As to *how* large cuts in carbon emissions might be achieved, attention has focused on the role of a global climate change agreement. Although some progress was made at the Cancun Climate Change Conference late in 2010, agreement concerning an emissions trading scheme seems as remote as ever.

Even if such a market mechanism were agreed upon, it would be insufficient to resolve the crisis. Carbon pricing does not address the large market failures undermining research and development in climate mitigation, such as incompatibility with existing infrastructure and weak intellectual property rights protection. Nor would such a market mechanism sufficiently accelerate the development and dissemination of low-carbon technologies.

In examining mitigation options 'beyond the market' the single most important sector is energy. Energy production and consumption accounts for more than 40 per cent of greenhouse gas emissions, and without achieving a drastic transformation in the energy sector, climate change mitigation will be close to impossible.

This is every bit as complex a challenge as achieving a climate change agreement. It raises questions: how can resources be pooled to create a global technology development fund? How can intellectual property constraints on the use of new technology be minimised? And how can developing countries be effectively integrated into a global energy strategy? Such questions are about the appropriate allocation of scarce resources and the coordination of collective action. As such, they are all, fundamentally, questions of regulation and governance, concerned with 'societal steering'.

Unfortunately, current energy policy frameworks fall far short of what is needed to make the transition to a low-carbon economy. Within Asia, some of the challenges can be illustrated by the circumstances of Indonesia, the world's second-largest thermal coal exporter and currently the 'darling of the West', having made

commitments to climate change mitigation and to renewable energy.

However, there is a tension between energy security (having a reliable and adequate supply of energy at reasonable prices) and climate change mitigation. With large coal reserves and a growing demand for electricity, building more coal-fired power stations offers a relatively low cost and reliable means of increasing electricity production. While this makes sense as a matter of political expediency, it runs counter to Indonesia's commitments to reduce its greenhouse gas emissions.

Second, there are perverse incentives. Fuel prices are heavily subsidised, and removing or even reducing these subsidies would put the government at serious political risk. This makes a transition to renewable energy extremely difficult. Alternative fuel sources, such as Indonesia's vast geothermal potential, cannot be realised because, particularly in early stages of development, they cannot compete with the subsidised fossil fuel prices set by the state electricity supplier.

Third, there is tension between climate change mitigation, energy policy and economic development.

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States have guarded their autonomy over energy issues, especially energy security . . .

For example Indonesia, along with Malaysia, produces about 90 per cent of the world's palm oil. Widespread deforestation is the price for this development, but with Indonesian palm oil generating some $14 billion per year, further growth in deforestation is anticipated. Climate change mitigation continues to be trumped by the demands of resource exploitation.

Fourth, no government can deliver on its promises without harnessing state institutions to implement them. The Indonesian bureaucracy lacks the capacity and resources to do so. Key energy policies are not well defined, nor is it clear how energy governance is handled across the bureaucracy.

Of course, much depends upon an individual country's energy profile and capability. By way of contrast, Korea, which imports more than 90 per cent of its energy, has a strong incentive both to increase energy efficiency and identify low-carbon sources of energy (primarily nuclear power) to reduce supply risk and its energy bill. China, which is similarly heavily energy dependent, is also taking energy policy seriously (notwithstanding its posture in international negotiations) and may well become an important energy innovator in future years.

But the central challenge of energy governance—meeting growing global energy needs while transiting to a low-carbon economy—must be engaged in globally and regionally. What is needed, in the words of the International Energy Agency, is 'radical *and co-ordinated* policy action across all regions'.

Within Asia, regional agreements such as the ASEAN Petroleum Security Agreement, which commits signatories to cooperate in times of shortage and oversupply, might also be expanded. The Trans-ASEAN Gas Pipeline project is already in train and will be important in terms of regional energy security. An ASEAN Power Grid project is also being contemplated.

Notwithstanding some modest individual achievements, acting collectively on matters of collective interest *on the scale that will be necessary* has so far proved an insurmountable challenge. States have guarded their autonomy over energy issues, especially energy security, with the result that global and regional institutions, norms and organisations are weak or absent. Strikingly, no UN organisation has the responsibility to regulate energy policy internationally (apart from the International Atomic Energy Agency).

In the case of the many developing countries that lack the economic and the technological capacity to bring about an internal energy transition, it is only with considerable assistance and support that change can be achieved. The level of support currently provided by the World Bank, Asian Development Bank and national aid agencies does not remotely approach this level. Whether a sufficient proportion of the US$100 billion Green Climate Fund, the key outcome of Cancun, will be allocated to assist the transition to a low carbon economy in developing countries remains to be seen. EAFQ

Preserving governments' right to regulate investment

PICTURE: OU NEAKIRY / AP PHOTO / AAP

KYLA TIENHAARA

THE PAST decade has seen an explosive increase in disputes between foreign investors and governments that have been resolved in international arbitration. Many of these disputes have revolved around public policy measures and have concerned sensitive issues such as access to drinking water, mining development on indigenous sacred sites, health warnings on cigarette packages, and restrictions on the use of dangerous chemicals. This has sparked a debate within academic and policy circles about whether the international trade and investment agreements that facilitate investor – state dispute settlement (ISDS) infringe on a government's 'right to regulate'.

Until recently, the debate has been largely confined within countries that are party to the North American Free Trade Agreement, which have longstanding experience with ISDS. However, it is evident that ISDS is now truly a global phenomenon: governments in more than 80 countries have been brought before investment arbitration panels. In light of the ongoing negotiations for a Trans-Pacific Partnership Agreement (TPP), the concerns surrounding ISDS are particularly relevant for governments in the Asia-Pacific region.

The TPP builds on the Trans-Pacific Strategic Economic Partnership Agreement and has been described as a building block for a free trade

area covering the entire region. Also ongoing are negotiations for a Pacific Agreement on Closer Economic Relations (PACER Plus), and several other bilateral treaties. All of these agreements could potentially include provisions on ISDS.

When considering such provisions, governments in the region should carefully read a report on Bilateral and Regional Trade Agreements released by the Australian Productivity Commission (PC) in November of last year. The findings are unequivocal: the commission sees no economic justification for including provisions on ISDS in trade agreements, pointing to a lack of evidence that such provisions influence flows of foreign direct investment. It additionally argues that 'Experience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions.'

The report discusses several ways of ameliorating such risks. Developed countries such as Canada and the United States have tightened the language of treaties in an attempt to constrain the scope of arbitrator authority over disputes. However, the Productivity Commission rejects this approach, arguing that it is difficult to precisely define the terms commonly found in investment agreements and suggesting that no matter how well ISDS provisions are designed, risks will remain.

Considering these risks and the absence of any evidence that ISDS brings substantial benefits, the commission favours the outright rejection of ISDS provisions in agreements signed by the Australian Government. Over 45 academics (including the author) have also advocated that governments avoid ISDS in a Public Statement on the International Investment Regime.

Another option mentioned in the report may prove attractive to Australian negotiators. This is what I call the 'double standard' approach in which the application of ISDS is limited to a subset of the member countries in an agreement. Such a strategy was taken in the ASEAN-Australia-New Zealand Free Trade Agreement, which provides for ISDS except between Australia and New Zealand (i.e. Australian investors can take any ASEAN government to arbitration, but not the New Zealand Government and similarly investors from New Zealand cannot sue Australia).

A consistent approach rejecting investor-state dispute settlement would better protect Australian public policy . . .

Adopting a double standard may appear strategic for developed countries, but it lacks foresight. It is well recognised that global trade and investment patterns are rapidly changing and that some countries which were historically considered capital importers are now major sources of overseas investment. In the long run, Australia may not be as immune to claims from investors from developing countries as is currently assumed; in fact, last year a Sydney-based lawyer suggested that the Chinese company Chinalco could have theoretically taken the government to arbitration over Kevin Rudd's proposed super profits tax on the mining industry.

Neither is it uncommon for investors to establish 'mailbox' subsidiaries in countries in order to gain access to arbitration. This has been the strategy of the Canadian company Pacific Rim Mining Corp, which moved a Cayman Islands-based subsidiary to Nevada to facilitate its arbitration claim against El Salvador under the terms of the Central American Free Trade Agreement.

A consistent approach rejecting investor-state dispute settlement would better protect Australian public policy, and would also complement the government's efforts to support sustainable development in the Asia-Pacific region. The regulation of foreign investment is crucial in ensuring that projects contribute to sustainable development but it is much more difficult for developing countries to preserve their right to regulate under trade and investment agreements than it is for developed countries.

The significant procedural costs associated with arbitration and limited access to specialised legal expertise in many countries are critical issues. Even assuming that governments have the resources to defend their actions in arbitration, if they lose they may face considerable difficulty in paying damages awarded to the investor, which can cover 'lost future profits' and amount to hundreds of millions of dollars. It is, therefore, commendable that the Productivity Commission report concludes its discussion of ISDS along these lines, suggesting that it might be preferable for developed nations like Australia to focus on assisting developing countries through legal capacity building initiatives, rather than on aiding corporations in their efforts to evade their obligations under domestic legal systems. EAFQ

Investor – state arbitration provisions: what future?

LUKE NOTTAGE

IN ITS recent Review of Bilateral and Regional Trade Agreements (BRTAs), the majority report from Australia's Productivity Commission remained opposed to including treaty provisions for investor – state dispute settlement (ISDS). Recommendation 4(c) advised that Australia should not include ISDS 'provisions in BRTAs that grant foreign investors in Australia substantive or procedural rights greater than those enjoyed by Australian investors'.

This threshold would exclude ISDS in almost all situations, at least where host states—like Australia and 145 others—are party to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States. This is because subsidiary BRTAs or Bilateral Investment Treaties typically allow investors from those treaty partners to commence arbitration against host states through the World Bank's ICSID facility, established by the 1965 Convention. The arbitral award then enjoys a special regime for enforcement: it can be reviewed for serious irregularities by other ICSID arbitrators, but not by host state courts. By contrast, local investors seeking remedies for their own state's illegal interference with their investments must generally sue in local courts.

The Productivity Commission is therefore implying that Australia should never allow ICSID arbitration in its BRTAs. Arbitration administered under the Rules of the International Chamber of Commerce, for example, would be acceptable: such awards cannot obtain the special enforcement mechanism provided by the ICSID. This is contrary to Australia's investment treaty practice, and to the spirit of the ICSID Convention to which Australia is party. Australian investors will also no longer be able to enjoy protection under ICSID when partners illegally interfere with their own investments abroad.

The Productivity Commission also insists that the obligations imposed on Australia as host state go no further than those already stipulated in local Australian law. Yet it is often difficult to compare the two, especially as both treaty and local law are continuously evolving. Further, if a potential treaty partner (such as the US) adopts a similar policy, and its local law protections are higher than those under Australian domestic law, then no investment treaty can be concluded involving ISDS. The partner will want its higher standards built into the treaty to protect its own investors, but the Australian Government is now unable to provide them.

> . . . host state court systems may be unreliable and domestic law provisions may be idiosyncratic even if offering substantive law protections

The Productivity Commission suggests that 'other options are available to investors' to protect their investments abroad. But host state courts and domestic law are usually unattractive. The court system may be unreliable and provisions may be idiosyncratic even if offering substantive law protections similar to those found in the home state. Litigation procedures are unfamiliar and may involve more scope for appeals than international arbitration. Judges will also be less specialised in cross-border investment dispute resolution and hearings will often be in a foreign language.

An alternative suggested by the Productivity Commission is political risk insurance. But coverage is typically narrower than under treaty protections and governments often support such schemes anyway. Another given is an investment contract between an investor and the host states, but these involve considerable transaction costs (possibly including lateral pressure brought by the investor's home state), and such contracts are much less feasible for smaller investors or projects.

A further option is the inter-state claim process that the home state can invoke, on behalf of its affected investor, against the host state. The main problem is that the home state

retains discretion and control over this claim process, and again it is less likely to be invoked for smaller investors or projects. An alternative would be to structure an investment through a third country that has an investment treaty with the destination state, which includes full ISDS protections. But the transaction costs and inefficiencies will be large.

The Productivity Commission's analysis and recommendations are therefore unconvincing, and hopefully will not be followed by the rest of the Australian Government—let alone others in the region. The commission's concern that inefficient foreign investors might enter Australia due to artificial advantages created by treaty protections seems more theoretical than real and its proposed responses lack practicality. Concerns over adverse effects from investor – state arbitration are better addressed by drafting exceptions more carefully and building other innovations into investment treaties. Active engagement by Australia in refashioning the investment dispute resolution system in such ways is also crucial to promote its legitimacy, not just its efficiency advantages. This is particularly true for the Asia Pacific region, where investor – state arbitration provisions have become increasingly pervasive in treaty practice. EAFQ

EASTASIAFORUM Quarterly

IN OUR NEXT ISSUE . . .

Governing China

Mega-population, mega-corruption, mega-growth

SANDY GORDON

INDIA and China are Asian mega-population powers. Each has enviable economic growth rates, but each also has a mega-sized problem with corruption—and each is handling it differently.

Corruption in India is nothing new. But recent accusations appear to place India in the same class as Africa's worst kleptocracies.

Corruption is not only politically destabilising, it is also a potential restraint on India's rapidly emerging economy. India needs to guzzle massive amounts of capital over the next three decades to pick up the labour-intensive manufacturing mantle—which will likely be dropped by China as its population ages. A recent study by the consultancy firm McKinsey & Company estimated that India would need to spend US$1.2 trillion by 2030 to cater for the high levels of urbanisation involved. Ports, power and roads will also be needed to cater for rapid industrialisation.

Unless markets can be confident that funds will be allocated quickly, efficiently and fairly, investment and associated technical assistance will slow. Politicians concerned about accusations of corruption will be paralysed in the allocation of funds, as occurred in the power sector following the Enron debacle in Maharashtra.

Relatively low-key government instrumentalities, set up under India's Westminster system of checks and balances, have frequently been involved in exposing major corruption, assisted by civil society and media. Political pressure exercised through India's democracy has also played an important part. For example, in the minerals-rich state of Jharkhand, former Chief Minister Madhu Koda allegedly syphoned off about US$1 billion during his short tenure. Koda was exposed not by local police but by a central government tax compliance authority. The press attacked, and Koda languishes in jail.

Similarly, in the recent 2G telecommunications scandal, in which the central government allegedly undersold mobile network licences, the state lost approximately US$39 billion. The government's own audit office, the office of the Comptroller and Auditor General (CAG), identified the apparent shortfall. Following the CAG report, the matter was pursued vigorously in the press and the telecommunications minister has been forced to resign. Prosecutions are likely to follow.

A campaigning Supreme Court was involved in forcing the government's hand in the telecommunications scandal, and an activist Supreme Court is also bringing to light major tax evasion cases kept secret by the government.

Another key instrument in fighting corruption is the *Right to Information Act 2005*, a powerful piece of

PICTURE: / NG HAN GUAN / AP PHOTO / AAP

Zheng Shuzhen holds a photograph of her one-year-old granddaughter, Zhou Mengxin, in Beijing in May 2009. The child is said to have died after drinking milk powder tainted with an industrial chemical.

legislation by international standards, and one that has been used effectively even by small-time anti-corruption campaigners. Sadly, at least a dozen campaigners seeking information under the Act have been murdered.

This patchwork of checks and balances needs to be strengthened and consolidated. If the besieged Singh government is to give teeth to India's weak-kneed anti-corruption agencies then a robust, independent, well-resourced judicial agency with royal commission-like powers at the central level and at the individual state level is needed. Hong Kong's Independent Commission Against Corruption provides a successful model for both central and state governments.

The situation in China is very different. To the extent that corruption is exposed, it is often through a 'top-down' decision rather than a 'bottom-up' process. The hierarchy in Beijing is reportedly deeply concerned about the effect of pervasive corruption on perceptions of the Communist Party.

At the provincial level, such is the nexus between corrupt senior officials and businesses and even criminal enterprises that exposure often requires the attention of a very senior official who may have a personal agenda. In the giant Chongqing urban conurbation, Bo Xilai, who reputedly has central political ambitions, has exposed significant official and criminal collusion in the city.

Alternatively, it will take a major disaster such as the Sichuan earthquake, in which poorly built schools collapsed, killing hundreds of children, or the Sanlu milk scandal involving the addition of melamine to milk and the deaths of a number of infants, to precipitate action.

It is often difficult though for a small-time campaigner to achieve a result. In China you will rarely find a government agency, auditor, individual, district or even central court exposing corruption—at least not without top-level sanction. Indeed, some of those seeking to petition against corrupt officials in Beijing are reportedly spirited away to private jails.

So we have two systems, two models. The Indian one delivers economic delay, but its long-term promise is rule of law and relative transparency. The system in China has provided for rapid, command-driven economic growth. When needed, land is quickly, and often corruptly, appropriated. But the Chinese system contains little promise of a long-term amelioration of the grievances of affected people.

Given this, can India improve on its anti-corruption record so as to provide a rapid and relatively transparent vehicle for much-needed investment? And can China improve individual rights while retaining the economic benefits that have contributed to the growing wealth of its citizens? Two giant, rapidly growing countries, two 'experiments'. It will be fascinating to observe the results. EAFQ

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