PART 4:

COMMERCIAL LAW REFORM

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Foiling the Financial Hegemons: Limits to the Globalisation of Corporate Insolvency Regimes in Indonesia, Korea and China*

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I INTRODUCTION

THE ASIAN FINANCIAL Crisis in late 1997 and early 1998 ('the Crisis') precipitated a wave of institution-building and law-making within those countries that suffered the deepest fiscal distress, most notably Thailand, Indonesia and Korea. Indeed, emergency assistance to those economies from the International Monetary Fund (IMF) was conditional upon their making substantial changes to legislation governing or regulating their economies (see Letters of Intent signed by the governments of Thailand, Indonesia and Korea.) In countries such as China, which rode out the Crisis relatively unscarred, the Crisis was nevertheless sobering. Agents of global economic development intensified their efforts to inoculate countries against prospective economic downturns, again through

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pressure for institutional and legal reforms. China, for example, facing widespread bankruptcy of state-owned enterprises committed itself to continuing large-scale corporate reorganisation (see World Bank, 2000) and welcomed the technical assistance given the legislative drafting committees by the German Government. In all cases, bankruptcy law and corporate restructuring regimes[1] were integral to the intensive negotiations and discussions between powerful global actors and national governments that led to market reconstruction via legal reformation.

These events offer a 'prime site' in which to address a major puzzle about the globalisation of law. Given the enormous coercive powers of global financial actors, why has the implantation of new bankruptcy regimes proved so difficult? Conversely, how do developing nations foil such legal 'transplants'? A solution to this puzzle would help define the limits to law-making by the world's financial hegemons, particularly in circumstances of financial crisis. It would also take us a step further towards a contingent theory of globalization of law (Halliday and Osinsky, 2006).

Reform of bankruptcy law in Asia since the Crisis presents a 'prime site' for analysis precisely because the circumstances should have been optimal for effective transplantation. On the one side, nations such as Indonesia and Korea confronted financial meltdown and desperately required massive infusions of credit that they could obtain from no source other than international financial institutions. On the other side, the world's financial powers could exercise maximal leverage as they controlled the conditions under which credit would flow. Economic coercion could not have been more intensive. In short, the enormous asymmetry in financial power presented conditions that were optimal for the adoption of transplanted law and institutions. Further, since commercial law is generally thought to be more readily transplantable than other areas of law (Harding, 2002), the combination of external pressure and internal need should have ensured ready conformity with global models of bankruptcy law and institutions.

We analyse three countries where adoption has been neither smooth nor certain—Indonesia, Korea and China. These countries lie on a continuum of proximate coercion. Indonesia represents an extreme case since the international financial institutions (IFIs) and the US government responded to its need with a series of explicit expectations for bankruptcy reforms,

[1] In this chapter we distinguish (a) the reform of substantive and procedural corporate bankruptcy law, from (b) the reform or formation of institutions to implement substantive law, such as courts, professions, and out-of-court agencies, and (c) broader initiatives at corporate debt restructuring, whether informal or formal, that influence and are influenced by bankruptcy law. We adopt the short-hand of 'bankruptcy law' to cover all three elements of a complete bankruptcy regime and distinguish among them only when the argument requires it.

codified in successive Letters of Intent delivered to the International Monetary Fund (IMF) by the Government of Indonesia (GOI), and which served as conditions for release of successive tranches of credit from early 1998 to the present. Korea represents an intermediate case of constraint, since the IMF compelled the Government of Korea (GOK) to incorporate into its first Letter of Intent a general commitment to reform bankruptcy law, but thereafter has relied on suasion of various sorts to effect reform up to the present. China represents the case of least coercion since its insulation from the Crisis did not expose it to the leverage of the IMF, although it has mostly welcomed technical assistance from the Asian Development Bank, the International Bank for Reconstruction and Development (hereafter, the World Bank) and the German government, all of which have relied on suasion to effect reform.

The three countries are similarly arrayed on a continuum of extensive to limited reform. Indonesia lies at one extreme. Here the IMF sought to create an entire bankruptcy system and debt-restructuring regime. Korea lies in the middle, where the IMF has principally sought reform of its substantive law, although it has encouraged some reform of the courts and the creation of other mechanisms for debt restructuring. China lies at the other extreme. Here most foreign influence is directed to its substantive bankruptcy law, although the World Bank has attended closely to the administrative initiatives of the government agency that regulates state-owned enterprises (SOEs).

The degree of success enjoyed by IFIs does not correlate perfectly with the intensity of external pressure. At one extreme, the Indonesian initiatives by the IMF have been the most ambitious but also the least successful, at least by an absolute standard. The World Bank and IMF have had some success in Korea, although it has been slow and mixed. And the influences of foreign and global actors on China have been perceptible in various drafts of its proposed bankruptcy law, but the influence is diffuse and success is uncertain.

We begin this chapter by considering what the literatures on globalisation and transplantation might have predicted or have subsequently concluded about the reformist aftermath of the Crisis. We then analyse each case, observing in turn the initiatives undertaken at the behest of global agents, the failures or successes of the reforms, and the mechanisms, strategies and processes that help explain why the transplants did or did not work. We approach the cases from the developing country's perspective to ask what capacities developing nations have to resist the power of the world's financial hegemons, even under the most extreme circumstances. We shall show that nation states can deploy many weapons of resistance. In conclusion, we reflect on some solutions to the puzzle of why legal

transplants do not take root readily, even under extreme asymmetries of global power. Those reflections, in turn, will indicate some limits to the globalisation of law.[2]

A Global Bankruptcy Reforms and the Asian Financial Crisis

While the Crisis dramatically focused the world's financial hegemons on market-making and institution-building, their concern with bankruptcy regimes was not without precedent. A global movement of insolvency reforms has been developing since the mid-1970s. Most of the world's leading economies, such as the United States (1978), England (1985), France (1985 and again in 1994), Japan (1992), and Germany (1994), have substantially reformed their approaches to corporate bankruptcy. All countries making a transition from a planned to a market economy have been compelled either to resurrect and amend a pre-Communist law, or, more commonly, to create a bankruptcy law de novo. Developing countries in Latin America, such as Chile (1987), Columbia (1988-89), and Argentina (1995), or in Asia, such as India (1985) and Singapore (1995), and all the countries of Francophone Africa, have similarly undertaken substantial changes. Common to most reforms has been a shift from a strict emphasis on liquidating weak companies, frequently through the unilateral action of major banks, to a softer landing for distressed companies through mechanisms for debt restructuring and corporate reorganisation. The principle of rehabilitation, as embodied in Chapter 11 of the US Bankruptcy Code enacted in 1978 (Carruthers and Halliday, 1998), has echoed around the world in one manifestation or another. And it is no accident that this rehabilitative turn has appealed to many countries precisely because it offers a convenient trade-off between the hard budget constraints demanded by the neo-liberal economics of the Washington Consensus and the demands of domestic political constituencies for protection of jobs and businesses (Carruthers, Babb and Halliday, 2001).

The Crisis stunned international institutions into a qualitatively different orientation towards market-making through commercial law reform. In response, the world's financial hegemons mobilised in unprecedented fashion. The Clinton administration (1992-2000) called for a new 'international financial architecture' (Gilpin, 2000:327). The 'G22', a coalition of

[2] We recognise that there are severe temporal constraints in our approach, as only some eight years have elapsed since the onset of the Crisis. By any standard, this is not a long time for any law to take root and flourish, especially if it demands fundamental changes in commercial and legal practice and culture, not to mention the creation and operation of new institutions. However, as this chapter seeks to demonstrate, all of the reforms stimulated by the IFIs exist in a longer context of anticipated or actual reforms. In some cases, the Crisis triggered what was already being put forward by governments.

22 of the world's most 'significant' economies, specified that that architecture include robust debtor-creditor regimes that would forestall crises by swiftly and effectively enabling work-outs of troubled firms. Substantive bankruptcy law must be accompanied, said the G22, by effective enforcement mechanisms and competent professions.[3] The G7 and G22 turned to the international financial institutions (IFIs) to begin building the new order. The Asian Development Bank (ADB) rated the bankruptcy systems of 11 Asian nations against 33 criteria and subsequently initiated technical assistance projects to correct problems (Asian Development Bank, 2000:3).[4] The IMF and the World Bank for the first time used the maximal leverage of their emergency lending agreements to demand bankruptcy reforms as a condition of new credit. Both institutions also initiated more comprehensive, long-term projects to create models or principles of good bankruptcy systems that any country might adopt (IMF 1999; Halliday and Carruthers, 2007).[5]

The interventions of the IFIs in the countries of East and Southeast Asia therefore mark a turning point in the globalisation of insolvency regimes. IFIs escalated their leverage through conditionalities for loan agreements. The legal departments of the IMF and World Bank embarked on an unprecedented level of intervention and institution-building; for the first time in emergency situations they were included in the initial wave of teams sent from Washington and so were involved at the onset of international responses to the Crisis. The IFIs sought to sustain their direct leverage over country bankruptcy reforms after the Crisis through a variety of expedients, ranging from persuasion to assistance. Global financial institutions muster enormous resources for economic coercion (Braithwaite and Drahos, 2000). IFIs can maintain continuing leverage through sequences of conditionalities for subsequent loan disbursements, through monthly or quarterly monitoring of progress (Interview 2278),[6] through the setting of strict deadlines for reforms, and through public shaming by releasing Letters of Intent signed by debtor nations which effectively amount to progress reports. In addition, the IMF has increasingly been using its mandated annual Article IV consultations on the economy of each

[3] Finance ministers and central bankers from, amongst others, England, Hong Kong, Argentina, Australia, Brazil, Canada, France, Germany, Japan, Malaysia, Thailand and the United States participated in the G22 (G22, October 1998a; G22, October 1998b).

[4] Hereafter, ADB Report.

[5] The United Nations Commission on International Trade Law (UNCITRAL), fresh from its success in creating a Model Law on Cross-Border Insolvency, also appears poised for further success in the production of the much more demanding task of a Legislative Guide for Insolvency—a three-year collaborative effort involving 30 to 40 countries and the world's leading expert bodies on bankruptcy law (Halliday and Carruthers, 2003b).

[6] To protect the anonymity of our sources, we cite interviewees by an arbitrary interview number.

country to put pressure on recalcitrant governments (Stiglitz, 2002), which pressure it relieves and focuses through technical assistance programmes (Interview 2305).

B Transplants and their Disconnects

Under circumstances of concerted global financial power, it follows that mandated law reform, especially in crisis circumstances, should be readily adopted and implemented. Some scholarship on legal transplants would predict just such an outcome. Watson (1974) and his followers maintain that legal transplants can readily be lifted from one legal system and embedded in another. Since law has some autonomy from social and cultural institutions, it is portable, and commercial law more so than areas of domestic legislation such as family law (Harding, 2002; Heydebrand, 2002). If this is so in general, it should be even more the case under the extreme circumstances witnessed following the onset of the Crisis.

In addition to negative incentives, such as withholding access to requisite capital if change is not implemented, there are also positive inducements for foreign capital inflow. Some research indicates that those countries that have adopted the property rights and corporate governance standards considered normative by creditor nations, and which are effectively enforced, attract significantly more foreign direct investment (FDI) or weather financial crises more successfully (Pistor et al, 2002:3; 2000). This creates domestic demand for laws that will speed the flow of foreign credit, and it is reinforced when IFIs press for changes that are consistent with the models or practices of the 'suppliers' of a country's capital (Pistor, 2000). Indeed it should be noted that whether better law does increase FDI and subsequent economic development remains contested. Clearly, China, or the Asian Tigers before 1997, offer striking counter-examples. Countries manifestly lacking in the very rule of law championed by leading creditor nations and IFIs nonetheless managed to attract, and in China's case continue to attract, massive overseas investment. The statistical evidence, also, is far from definitive.

A substantially larger body of scholarship, supported by the indifferent experiences of some of those global practitioners who must deal with transplants, remains wary—if not sceptical—of any assumptions that importation and implementation of laws and institutions will be easy. While the debate over legal transplants has been declared 'tired and often confused' in an Oñati volume (Nelken and Feest, 2002), new empirical scholarship in law and finance, heavily influenced by the experiences of legal transplants in the 1990s, has reinvigorated work on the concept. Initial work demonstrated a strong empirical association between property rights and economic development (Schleifer and, Vishny 1997). It seemed a

short step to conclude that the enactment of rights would produce immediate, effective implementation and, in response, that flows of capital, successful privatisation and the emergence of effective corporate governance regimes would follow.

More sophisticated subsequent work, however, casts significant doubt on whether transplants can be taken for granted. Indeed, Katharina Pistor[7] and her colleagues, who have undertaken extensive historical and cross-sectional empirical work on law and development, have coined the term 'transplant effect' to label ineffective transplants. There are two aspects to the transplant effect—demand and context.

On the *demand* side, the evidence suggests that laws will not be effective unless there is demand from within a country. That implies that there are strong interest groups who want change, and that they have the capacity to select what they want. Legal professionals are critical: lawyers, judges and related professionals must understand the new rules, the concepts behind the rules, and the compatibilities between those rules and concepts and others extant in current law. There must be a sufficient supply of professionals to satisfy the demand (Berkowitz et al, 2003). Yet the status and qualifications, not to mention reputation, of most lawyers in countries into which transplantation is being considered mean that the professional constituency able to command attention for reform will be quite limited in size and probably also quite limited in its capacity to satisfy demand, should reforms succeed (Lev, 1996).

On the *context* side, evidence supports the proposition that transplanted laws will not work if they are (i) not adapted to local circumstances, (ii) unfamiliar to the population, and (iii) bear little resemblance to the recipient country's own laws or practices. Familiarity might arise from geographic proximity, a shared history or immigration (Pistor et al, 2000). Context also relates to culture and institutions. It is probable that an imported law must in some manner be related to the myths and narratives of the recipient country's identity, both national and legal (Nelken, 2002). Unless an imported law can be conformed to a country's 'invented traditions' or 'imagined communities', and given its own local cultural warrants, it may be viewed as culturally alien (Heydebrand, 2002). Effective transplants require not only that the new law fits that immediate

[7] Pistor, herself, has extensive experience consulting with the Asian Development Bank, the European Bank, and the World Bank, among others. Her scholarship therefore reflects both intimate knowledge of reforms from the perspective of global actors and an extensive historical and comparative research enterprise in numbers of areas of law that are supposed by IFIs to be related to the flow of FDI. While Pistor and Wellons (1999) can be criticised for failure to integrate politics into the analysis of South and East Asia, Pistor's later empirical papers show a far greater sensitivity to local cultural and institutional variability and the political climate into which transplants are introduced.

moment, but that there are sufficiently creative and authoritative institutions to undertake the adaptations that will necessarily result from the law's incompleteness (Pistor and Xu, 2002).

Moreover, choice requires alternatives. This implies that alternatives exist and that a country's political leaders have had the chance to review and select what laws seem best suited to the country's exigencies (Pistor, 2002). Context also implies institutional affinities, since transplants will not work if the institutions that are to implement them are weak or absent (Pistor et al, 2002; Berkowitz et al, 2003).

The local story is invariably more complex than this, for domestic demand for reform is frequently contested, just as a variety of strategies may be deployed to 'manage' foreign imports (Halliday and Karpik, 1997; Nelken, 2002). Local contestants—elites excluded from power versus entrenched elites, entrenched professionals versus insurgent professionals, locals versus cosmopolitans—may play out their own struggles for influence on the international stage (Lev, 1996), just as international organisations and countries may re-enact their global competition on the national scene (Dezalay and Garth, 2001; 2002). Struggles ramify at the centre, at the periphery, and between centre and periphery. Thus the indeterminacy of successful legal transplants stems substantially from the outcomes of contests in multiple arenas, themselves unpredictable.

In sum, transplant scholarship offers extremes with many points along the continuum. Optimists would predict that IFI initiatives in commercial law will be readily transplanted (Watson, 1974). Pessimists hold that wholesale transplantation is simply impossible because law is always so deeply embedded in a social and cultural situation and in an interpretative community. Many other views are arrayed between these extremes. Harding (2002: 208, 219), for instance, accepts the Watson thesis that 'the idea of law can be readily transplanted' because historically 'western law has been digested by South East Asian societies'. A 'great battle-for-legality' is being played out across the region and contradictions abound. Thus it may be more constructive to view legal transplants and imports into South East Asia as 'an accretion of layers of law'. Pistor and her colleagues appear in their writings as moderately pessimistic: 'copying statutory law from foreign sources has only rarely resulted in a self-sustainable process of legal change and innovation' (Pistor et al, 2002: 37). And Dezalay and Garth (2002) observe that over a decade of effort by IFIs in Latin America has had no significant effect on developing effective courts. Yet support for the possibility of successful transplants may also vary by the degree of coercion and length of time given to transplants to take root. Harding's greater optimism may reflect his longer temporal horizon and the force of colonial power.

II THE FATES OF IFI REFORMS IN ASIA

The general parameters of the Crisis are well-known. On 2 July 1997, the Thai baht crumbled under assaults from global currency speculators. In relatively short order, speculators also attacked the currencies of Malaysia, Korea, the Philippines and Indonesia. By late 1997 what began as a currency crisis had escalated into full-scale economic crises: in each country, a 'domino effect' of crumbling companies led to collapsing banks and brought the entire financial system to the brink of failure (Carruthers and Halliday, forthcoming).

The IMF response in each country followed a broadly similar formula. The Fund negotiated massive rescue packages so governments might support their currencies and, not coincidentally, enable partial repayment to foreign creditors. Loan packages depended on extensive conditionalities—higher interest rates, reduced government spending and higher taxes. The conditions, codified in public agreements between each country and the Fund, included commitments by loan recipients to extensive institutional restructuring of the market, including the banking system and corporate governance. Integral to all loan agreements were commitments by governments to reform mechanisms for handling corporate failures, both in the emergency and in the longer term (Stiglitz, 2002; Wade, 2000). The devastating effects of the Crisis and the initial 'medicine' to cure it can be seen in plunging GDPs (for example, Indonesia's GDP dropped by 13.1 per cent in 1998), widespread failure of companies (for example, up to three-quarters of all Indonesian firms experienced some kind of financial distress) and deepening poverty.

III INDONESIA

Lawyers from the IMF and the World Bank descended on Jakarta in late 1997 to confront a legal system that had become effectively moribund and discredited. While Indonesia had a bankruptcy law on the books which it had inherited from the Dutch, the law had scarcely been used. Indeed, law in general had fallen into a heavy decline in use since the 1950s and had been broadly domesticated and corrupted by the Sukarno and Suharto regimes. Commercial litigants avoided the courts. Judges were thought to have little independence from either the state or the market (Lev, 2000). Commercial disputes of any consequence were settled privately or through interventions by politicians and officials.

The enactment and implementation of law reforms, substantive and institutional, occurred in a context fraught with conflict. IFIs differed fundamentally with each other. Creditor nations took sharply contrasting positions about how to restructure corporate debt. Foreign creditors

confronted national resentments and recalcitrant debtors. And entrenched interests in the justice system resisted reformist impulses. All of the reforms, therefore, reflected initial and continuing differences in policy, institutional prerogatives, economic interests, and even ethnic or regional tensions. Part of the political dynamic inhered in alliances formed between parties from the North and South as they confronted each other and those national interests fighting a rearguard action against the world's financial hegemons.

On 31 October 1997, the Government of Indonesia (GOI) signed the first of many Letters of Intent with the IMF to include substantive reforms in the extant bankruptcy law and the creation of new institutions. We focus on the three most important reforms which sharpened lines of conflict among institutions, elites and professionals: the courts, the out-of-court initiative, and the new receiver's profession.

A Founding of the Commercial Court

While the IFIs agreed that extensive reforms were warranted if the law was to serve a central regulatory role in reconstructed Indonesian financial and other markets, they could not agree on the architecture of the new system, particularly on the role of courts (Halliday and Carruthers, 2003a). On the grounds that the court system could not be fixed, the US Agency for International Development (USAID), and subsequently the World Bank, together with some Indonesian reformers and expatriates, favoured a retreat from the judiciary altogether and its replacement by a government bankruptcy agency. The IMF and its Indonesian supporters, by contrast, believed that the Crisis provided an opening for a new specialist court that would serve as an exemplar for the entire court system. It was hoped that, by providing a 'wedge' in the court system, reformers might solve two problems—administration of bankruptcy law and generic court reform—by a single stroke. Yet others believed that a radical cleansing of the court system would occur only through a decisive purge of all sitting Supreme Court judges, an overhaul of court administration (including the employment of new staff), and the establishment of a new commercial court with 'clean', competent judges (Interviews 2273, 2276, 2249). Thus solutions arrayed along a continuum from gradualist and incremental to dramatic and jolting.

Final adjudication of the dispute occurred in Washington. The US Treasury lent its support to the IMF, and its solution—the creation of the new Commercial Court—was formalised as a commitment to international lenders by the GOI in June 1998 (GOI, Memorandum to IMF, 24 June 1998). A cluster of Indonesian reformers had high expectations of the new

court. They hoped that it would be a model court, 'clean, open, accountable, and also modern', a court comparable to those of Singapore, Thailand, and Malaysia, demonstrating to investors that they could expect fairness and competence. They were led to believe that the Commercial Court would have its own modern facilities, competent staffing, up-to-date equipment, and hand-picked judges (Interview 2265).

Almost immediately, limited resources and lack of political will began to compromise the initial concept. The first problem was money: the GOI made no new funds available to house a model court with modern equipment. Instead, the court was housed at the Jakarta Central Court in an old down-town building, where judges were packed, five or six at a time, into a single room with no computers and few staff. Even courtrooms were in short supply. Symbolically, the placement signified business as usual—this would be just another court. Moreover, the new court was embedded within the old court system. Instead of a clean slate, judges were compelled to rely on an 'arthritic', compromised bureaucracy. And rather than being a 'carve-out' within the court system, appeals went directly to the Supreme Court, itself an institution with limited experience in sophisticated commercial cases and of doubtful probity.

A great deal, therefore, rested on the selection of judges. Reformers had floated many ideas: finding clean, competent judges in Indonesia; recruiting judges from the Netherlands; relying on expatriates; or seconding first-rate commercial lawyers to the bench for a limited period. However the Ministry of Justice and Supreme Court prevailed upon the GOI to follow established procedures for judicial selection. It was politically unacceptable to employ foreigners and too radical to second private practitioners. Instead, the Supreme Court set up some selection criteria (for example, at least ten years' experience on the bench) and proceeded to maintain its own (compromised) control by selecting lawyers from the general courts. Most of the judges were ill-prepared, with little significant commercial and virtually no bankruptcy experience. The Japanese, Australian and Dutch governments did provide some funding for a crash training course in bankruptcy law, but that lasted only a few weeks (Interviews 2279, 2277, 2265; GOI, Letter of Intent, 29 July 1998).

Since the authoritarian regimes had never invested in law, and neither *pribumi* (ethnic or non-Chinese Indonesians) nor upwardly mobile Chinese saw legal administration as a channel of opportunity, recruits to the judiciary ranked low in the prestige hierarchy of legal professionals. High salaries might have provided an incentive for a career on the commercial court, but that hope, too, was frustrated by the GOI, which decided there were too many bureaucratic hurdles to surmount in order to get pay increases that, in any event, would create problems of equity with the rest of the judiciary (Interview 2265).

In short, the disturbance that a powerful and independent commercial court might have produced for the political elite, accustomed to a subservient court, or for the judicial elite, entrenched in a comfortable patronage system of mild expropriation, never eventuated. The entire infrastructure of the new court was effectively subverted by a collusion of political and legal elites before the first case was heard.

A reformist minister in the short-lived Wahid Government pleaded with the new judges 'to regain the trust of the people in the judicial and legal institution' and decide just three 'celebratory' cases free of corruption (Interview 2257). But their agreement rang hollow since the initial cases, brought to the court precisely because of the prominence of the creditors (including a World Bank affiliate) and the strength of the cases, were decided in ways that fulfilled the worst fears of the optimists and the cynical expectations of the realists (Interviews 2273, 2256, 2269).

Despite these early setbacks, the IMF did not retreat but pushed on with a series of measures to remedy the court's faults. In November 1998 the GOI announced the creation of ad hoc judges, experts from outside the judiciary who would sit on panels of judges and provide some insulation from external pressures (GOI, Letter of Intent, 12 November 1998). But when the GOI rejected the requests for procedures that might protect the reputations of ad hoc appointees, this reform ground to a halt. Only one ad hoc judge sat on a handful of cases, even though some lawyers for creditors said they always request an ad hoc judge on any case they take.

A further initiative, announced in March 1999, proposed legislation to combat corruption in the public sector, including the courts (GOI, Letter of Intent, 16 March 1999). Court watchers were put in place to monitor all cases closely and provide confidential reports to the IMF. Essentially staffed by foreign lawyers, and therefore politically explosive, they offered a source of valuable intelligence for the IMF (Interview 2250). Subsequently, an IMF grant enabled Pappenas, a government department, to appoint a team of seven Indonesian lawyers and retired judges to review and publicise all court decisions in order to keep the courts and judges in the spotlight (Interview 2278). The team reviewed every case from the beginning of the Commercial Court (approximately 300), created a concordance of the cases with the case law, digested the cases and for each offered a summary with their evaluation of the case. Essentially they asked of every case—is the decision good? Does it meet the law? If not, why not? Are there differences between similar cases? What is the reasoning of the judges? And is there consistency between decisions of the Commercial Court and Supreme Court on bankruptcy? For cases whose reasoning was hard to fathom, the team tried to suggest how it might better have been decided. The analysis was published as a report and forwarded to judges and the Supreme Court, all in an effort to improve consistency and

accountability (Interviews 2318, 4110). Regulatory and judicial clarifications of the new bankruptcy amendments continued, with the intention of tightening definitions, clarifying interpretations, increasing transparency, altering time limits, and specifying the method for setting professional fees (Interview 2278).

Despite these strenuous efforts, the principal constituency for the new court—creditors—remained profoundly frustrated. What went wrong? The incompetence of judges and counsel is one possibility. The most benign interpreters of the decisions blame incomprehension, lack of English, lack of experience and lack of confidence (Interviews 2274, 2265). Cynics or realists blame corruption. Judges are susceptible to bribes, particularly in a commercial court, says one of the lawyers most often alleged to corrupt the system. When judges earn US$200 a month on cases where the lawyers are earning US$200 an hour, he says, and where it is worth the while of business owners to spend millions to save control of their companies, then judges will be vulnerable to extra-legal considerations (Interview 2259). Is it logical, said a lawyer from the Indonesian Bank Restructuring Agency (IBRA), which lost most of the cases it took to the court as a creditor, that a given lawyer would win 100 per cent of his cases? Or is it something other than logic? (Interviews 2259, 2249, 2270, 2277, 2257).

The Commercial Court is an arena of struggle that reproduces in microcosm the contest between, on the one side, the giant conglomerates that led much of the Indonesian state developmental economy and, on the other, the mostly foreign credit institutions that fuelled the last years of the Indonesian economic bubble. The foreign lenders sought the repayment of loans, or the transfer to them of property that had collateralized their failed loans, or the exchange of debt for equity (and often control) of major Indonesian firms. In this contest, local 'debtors outgunned mostly foreign creditors'. The debtor corporations had much more at stake—control of their enterprises and conglomerates—than the foreign creditors who could write off or write down bad debt, or maintain the fiction in their balance sheets that one day the debt would be repaid. Debtors in control of major local corporations, by contrast, stood to lose everything. Because the stakes for them were high, and because their resources were extensive, they could fight their battles on the turf of the local courts by buying the 'best' counsel and using extra-legal means to get a favourable outcome, even if it meant enabling 'money to change hands' (Interview 2259).

Furthermore, debtors' lawyers could justify some of their extra-legal approaches to judges as an ideologically valid means of resisting illicit economic coercion by foreign interests. Judges, too, may find ideological solace in decisions that reflect resistance of many Indonesians to a law and court that seemed to exploit Indonesia's weakness during the Crisis. 'Someone wants to close this country' was the suspicion. Foreign creditors,

it was alleged, sought to force their will on a weakened economic and political system. And even if judges did not act for such grand nationalist ideals, they might exhibit a resistance to following a legally correct solution when that ruling would throw workers out of their jobs or when it would alienate senior politicians with financial interests in the company. Inexplicable legal decisions, therefore, could reflect a coincidence of personal economic interest, nationalist sentiment, social consciousness and plain political expediency (Interviews 2278, 2265).

B The Jakarta Initiative Task Force

The World Bank and the IMF also sought to reproduce in Indonesia an out-of-court restructuring scheme similar to those implemented in other situations of crisis, such as Ecuador and Thailand. The out-of-court mechanism existed alongside, and was intended to complement, the Commercial Court. The GOI launched the Jakarta Initiative in September, 1998, with assistance from the World Bank and the Asian Development Bank (GOI, Letter of Intent, 19 October 1998). It was envisaged that the Jakarta Initiative Task Force (JITF) would relieve the pressure on the courts by providing a forum in which companies with more than US$10 million in assets would obtain expert mediation in reaching agreement with their creditors on debt restructuring. Successful work-outs would result in a Memorandum of Understanding (MOU) among the parties, although the JITF did not have any powers to enforce the MOUs. Housed in the Ministry of Finance and staffed substantially by experienced expatriates from Australia, the United States, and other countries, the JITF was handling some 125 companies with US$17.5 billion in foreign currency debt and 7.8 trillion rupiah in domestic currency debt by March 1999 (GOI, Letter of Intent, 16 March 1999).

Yet again, however, the GOI frustrated the design offered by the World Bank by creating an entity that possessed few positive incentives and fewer negative sanctions. A World Bank architect for the Jakarta Initiative 'believed a voluntary scheme would never work unless there was a hammer to make people reasonable' (Interview 3002). In the initial drafts of the JITF legislation, both the World Bank and the IMF pressed for coercive measures potentially against recalcitrant debtors (Interviews 2277, 2251). But, according to an IFI official, the GOI deliberately backed down on its political commitment to include negative sanctions in the initial drafts of the enabling legislation. Many GOI ministers had financial interests in the largest debtors and therefore resisted disclosure to the JITF of their interests (Interview 2277).

The consequences of mediation 'without teeth' quickly became apparent. Debtors immediately understood that they could resist creditors and the

JITF with considerable impunity. The JITF had no powers to bring them to mediation in the first place. And once there, JITF officials had only persuasion to produce a result. Creditors, too, realised they were completely at the mercy of debtors who feared neither the Commercial Court nor the criminal system. Consequently, debtors employed every possible delaying tactic, both in getting to JITF and in agreeing to an MOU once there. To get closure, creditors felt compelled to take extraordinary 'haircuts' or loan reductions, frequently approaching 90 per cent, in order to get an agreement. To save face, creditors also offered long-term bonds with generous terms, never expecting to see them mature (Interviews 2260, 2277, 2251).

Whilst the GOI could therefore report to the IMF that some US$12 billion debt owed by 54 companies had been restructured by June 2001 (GOI, Letter of Intent, 27 August 2001), and at the closing of the JITF that it had restructured 96 companies with an aggregate debt of $20.5 billion, these figures need to be interpreted with caution. Creditors essentially had lost most of the value of their loans. And, in any event, MOUs were documents of intent, not of effect.[8] Further, the debt restructuring amounted to financial restructuring only. It included no operational restructuring to enhance a company's managerial effectiveness or efficiency.

The IFIs sought another corrective iteration of legislative amendments that would provide more effective positive and negative sanctions. On the one hand, if parties dealt in good faith they might become eligible for tax incentives, banking incentives, and capital incentives, while debt-to-equity swaps were made tax-neutral. And companies would be protected from being de-listed on the Jakarta Stock Exchange.[9] On the other hand, several negative sanctions were proposed by IFI officials. These included publishing the names of uncooperative debtors and taking away the licences of companies that failed to negotiate in good faith. Neither was accepted by political authorities. The former seemed too modest; the latter removed a form of government patronage. Some government ministers were sceptical that the state had any role to play in private negotiations between parties to commercial transactions (Interviews 2251, 2253).

C The Receivers' Profession

Effective corporate bankruptcy regimes require skilled professionals. Since corporate bankruptcy work can be highly lucrative, decisions over which professionals obtain 'jurisdictional rights' from state authorities frequently

[8] JITF had no statistics on what proportion of its MOUs were closed in what timeframe.
[9] Some 25 per cent of 60 cases brought to an MOU had taken advantage of tax incentives (Interview 2260).

lead to contests of several sorts—between state officials and private professionals who covet work; between different professions, such as lawyers and accountants; and between resident and non-resident professionals in a jurisdiction (Carruthers and Halliday, 1998). The stakes become higher with economic globalisation as new markets open and old markets are transformed, often at the behest of IFIs. When IFIs encounter national professions, they become potential allies for local professional elites who seek to maintain current perquisites or endeavour to open up new opportunities (Dezalay and Garth, 2002; Halliday and Carruthers, 2000).

At the outset of their engagement with the Crisis in Indonesia, IFIs and USAID confronted a confusing and inadequate division of labour for corporate restructuring. While Jakarta could boast some excellent corporate law firms, lawyers could not hope to handle the massive volume of bankruptcy work themselves, in part because so much of the restructuring would rely on valuations where accountants were needed. International accounting firms and major local firms also had a notable presence in Jakarta, but they did not have the experience of acting as bankruptcy receivers or administrators as is common in Britain and many other Commonwealth countries. Receivers in the GOI were too few and knew little about modern business or international transactions.

The IFIs considered several options. The Dutch and civil law tradition leaned towards lawyers. Australian and Commonwealth professionals in Jakarta preferred the English-style reliance on accountants. The IMF wanted to let the market choose either accountants or lawyers. The IFIs and USAID also intended that experienced foreigners could enter the professional services market and train indigenous professionals. Finally, the GOI agreed with the IFIs to create a new profession of receivers. These might be either lawyers or accountants, but they would need to be trained in bankruptcy law and practice, to qualify through examination, and to become members of a self-regulating professional association, the last of these a particularly critical condition given the susceptibility of bankruptcy professionals to economic or political corruption (Interviews 2273, 2256, 2266).

Implementation went less smoothly. The GOI committed itself in June 1998 to create a new system of receivers and administrators to be drawn from the private profession (GOI, Memorandum to IMF, 24 June 1998). Yet, in response to the fierce protectionism of the Indonesian legal and accounting professions, and aware of nationalist sentiment about foreign influence, the Ministry of Justice issued implementing regulations that required oral and written examinations in *Bahasa Indonesia,* thereby at a single stroke excluding virtually all foreign professionals, except the handful of long-time expatriate residents who spoke *Bahasa Indonesia*.

The regulations required that receivers be members of the Receivers Association, thus placing it in a gatekeeping and self-regulating role (Interviews 2273, 2266, 2258).

The merits of the GOI's move can readily be debated. Importing judges from a former colonial overlord would inflame nationalist sentiment. And given the significance of *Bahasa Indonesia* as a defining linguistic characteristic of post-colonial Indonesian society, its abandonment as a necessary condition of membership in a public profession would undoubtedly be politically awkward, especially at a time when foreign influence seems unusually intrusive.[10] Nonetheless, the understandable retreat by the GOI from facilitating participation by foreign professionals had the effect of subverting an approach that might have gone some way to overcoming a dearth of expert services in an area critical to corporate reorganisation.

From the beginning, the new profession ran into difficulties. Little time was available for training the first cohort. Methods of appointing receivers by the court quickly became suspect. Although the regulations envisaged that receivers would be appointed by the court, it had been mandated and expected in practice that creditors could nominate receivers for court confirmation. In fact, many sources reported that Commercial Court judges frequently rejected creditors' nominees and selected alternative receivers without adequate explanation. While some qualified receivers got no cases (for example, one experienced lawyer had been proposed eight times by creditors and never accepted by the court), other firms got many. Such arbitrariness and concentration of appointments fuelled conjecture that a 'bankruptcy ring' of collusion had formed between judges, debtors, and receivers, where judges received a kick-back from receivers and/or debtors in order to appoint debtor-friendly receivers (Interviews 2265, 2268, 2266, 2305).

In sum, the Indonesian pattern is consistent. In each case—the Commercial Court, the Jakarta Initiative and the receivers' profession—the IFIs were able to get a law on the books which reflected some of the principal elements of the IMF design. In each case, however, in either the law or the regulations implementing the law, the GOI managed to subvert the overall intent by opening each institution to the very attacks the IFIs were intent on avoiding. As a result, the GOI and the IMF engaged in a series of skirmishes in which the IMF sought to plug a gap or fill a hole or add another check or balance, and the GOI acceded formally but proceeded half-heartedly or incompletely. And even when formal assurances were implemented, the GOI could rely on disabling institutionalised practices to

[10] We are indebted to Christoph Antons for pointing out the political sensitivity of implementing what on its face seemed a plausible instrumental solution to a vexing problem of limited supply of expert services.

permeate the new institutions as they have the old. In this condition of maximal leverage, therefore, even the largest multilateral lenders found themselves substantially foiled.

Reasons for the extent of this resistance inhere in the magnitude of the challenge implied by the bankruptcy reforms to fundamental institutions and interests in Indonesian society. In systemic crises, when a large proportion of companies and conglomerates are in severe financial difficulty, massive shifts may occur in ownership and control of entire sectors of the economy. Where the shift occurs from control by Indonesians to control by foreign banks, and then the subsequent sale of Indonesian assets to foreign corporations, a forced internationalisation of the national economy readily stirs nationalist reactions.

If the shift of control effectively takes the commanding heights of the Indonesian economy away from the Chinese commercial elite, a dual threat emerges: at best, a reluctance by Chinese business leaders to bring back into Indonesia any of the enormous assets they are alleged to have removed from the country at the onset of the Crisis; and, at worst, a recurrence of the intense *pribumi*-Chinese conflicts that produced civil strife and economic disaster in the 1960s.[11] The post-Suharto governments sent no clear signal to the Chinese business community that a new social 'contract' would give them the same security as the relationship built up between the Chinese merchants and Indonesian political elite during the Sukarno and Suharto regimes, or would at least protect their assets (Interview 2255).

The strategic response of Chinese entrepreneurs was to play for time. They dragged out debt restructuring. They fought to maintain control of their companies. They kept most of their money out of the country. They cooperated just as much as they must, to save face and to save their companies. Until clear political signals emerged that gave them confidence in renewed economic opportunity, they had little incentive to play a game in which they could only be the losers, as entrepreneurs and as a vulnerable ethnic minority (Interviews 2255, 2264, 2260).

Confronted with such intractable constraints, therefore, it is not surprising that many in Indonesia wrote off an initiative such as the JITF as 'an abysmal failure'. But then, again, precisely because the JITF faced such long odds, with 'no legal system to enforce rights, with 'no leverage' itself and with no leverage for creditors who have nowhere else to go, a JITF

[11] One of Indonesia's most perceptive commentators believes that the most fundamental question confronting Indonesia is the incipient tension between the Chinese and *pribumi*. 'Can a pribumi-led democratically elected government find a peaceful sustainable relationship with a Chinese-led entrepreneurial economy?' (Interview 2255)

staff person might have been justified in his conclusion that 'given its resources, the JITF has done bloody well' (Interviews 2260, 2251).[12]

Moreover, the successive iterations of court reforms, each one attempting to close the gap between law and practice, sought in effect to re-institutionalise courts as a new centre of power in the state and market. The difficulties in this exercise appear to vindicate the pessimism of Dezalay and Garth (2001) about IFI reforms of courts on other continents. As the problems in the courts mounted, evidence appeared that both the World Bank and the IMF had encouraged the Litigation Division of IBRA, the state debt restructuring agency, to seek to solve its problems outside the bankruptcy courts. If so, this signalled some recognition that institutional reconstruction might be beyond even the formidable pressures of the IMF (Interview 2275).

IV KOREA

While superficially similar—two countries in crisis requiring immense infusions of capital—Korea entered the Crisis with a much stronger economy than Indonesia, a transforming polity, a technocratically sophisticated state, and the foundations of a robust legal system (Carruthers and Halliday, forthcoming). Only one year earlier, in 1996, Korea had signalled its economic 'coming-of-age' by being admitted to the OECD, the club of the world's richest nations. On all counts, Korea bounced back rapidly, and within four years of its massive bailout was already repaying its multilateral creditors.

At the moment of crisis, however, its indebtedness and dependency on foreign creditors far exceeded those of Thailand and Indonesia. In principle, IFIs had the Korean government at their mercy and could exact strict conditions for the release of the bail-out package the Government of Korea (GOK) negotiated with the World Bank, the IMF, and the wealthiest creditors nations, including the United States and Japan. In fact, the economists and lawyers of the IFIs did descend on Seoul in October and November 1997 and quickly thereafter a succession of Letters of Intent and Memorandums issued every three or four months from the GOK, promising an array of financial and regulatory reforms, most directed to a reconstruction of the financial system.

IFIs entered Korea under quite different conditions from Indonesia. On the one hand, because Korea's economy was so developed, neither the

[12] At the time of its closure, in December 2003, the Chairman of the JITFreported that it had successfully financially restructured 96 companies with debts that totaled US$20.5 billion. Companies reduced their debt by approximately 50 per cent. (JITF Press Release, 18 December 2003).

World Bank nor the IMF had offices in Seoul or personnel on the ground on whom they could draw for immediate expert insight. On the other hand, Korea boasted a government and 'an already vibrant, semi-independent research community' that had produced significant data and analysis that could immediately inform IFI interventions (Interview 2040). More importantly, the Ministry of Finance and Economy (MOFE), which had driven Korea's state development model of economic advancement, had successfully recruited Korea's most outstanding economists, significant numbers of whom had taken advanced degrees from the best research universities in the west, and a critical few of whom had worked for the IMF in Washington.

And therein lay much of the deeper problem confronting the IFIs. Their concern was much less a solution of the liquidity crisis and much more a bold venture to restructure the Korean economy. This, in effect, presupposed a restructuring of much more—the depth of government intervention into the market, the shift of power from technocrat ministries to the National Assembly and the Blue House,[13] and an enhanced carrying capacity for law as the principal medium of market relations. Not least, to implement these institutional restructurings of Korean society, MOFE, the locus of the best and brightest technocrats, would need to yield its pervasive presence in the market to other institutions, including law. The underlying scope of IFI ambitions, therefore, integrated bankruptcy reforms into broad systemic restructurings in the balance of power in control of the economy (Halliday and Carruthers, 2004).

When the IMF and World Bank lawyers reached Seoul at the outset of the Crisis, they knew that law had an ambivalent status in Korean society. While prestigious and competent, the tiny size of the legal profession[14] intimated that the preponderance of commercial activity bypassed private, corporate law practice. If a technocratically-regulated market rendered lawyers relatively marginal, it did no less to the judiciary. The judiciary valorised the generalist judge. No judges had direct experience of private commercial practice. Few major commercial disputes entered the courts. And, in particular, as the IFI lawyers discovered, corporate debtors and

[13] The Blue House is the Presidential residence in Seoul (the equivalent of the US White House).

[14] The approximately 500 Korean lawyers and a handful of first-rate corporate law firms fought strenuously to keep their numbers low and competitors out of what was a lucrative professional services monopoly.

creditors avoided courts, not least because public proceedings over corporate failure would intensify the loss of face and shaming of a company's management (Interview 3002).[15]

The paradox of legal competence and institutional marginality played itself out through the Crisis in a veiled struggle between economists at MOFE, commanding the heights of Korean technocratic power, and lawyers, whether in the conservative, weak Ministry of Justice, or in the private bar, long sheltered in its lucrative and comfortable practice. Each profession premised its actions in response to the Crisis on epistemologies that sharply conflicted over how law works (Halliday and Carruthers, 2004). Economists believed rapid iterations of law reform would produce immediate efficiencies and effective restructuring. Lawyers believed the law needed little revision and the real problems lay outside it. The Washington architects of Korean institutional restructuring not surprisingly discovered a greater affinity with the MOFE economists than with the Ministry of Justice. The substantive and institutional reforms that flowed from the Crisis were therefore driven principally by a working relationship between IFI economists and lawyers, on the one side, and MOFE economists, on the other side, with the Ministry of Justice and private and academic legal experts and the Supreme Court reluctantly following (Interview 2040).

The IFIs pressed for reforms that occurred in rapid succession. The Korean response to IFI intervention appears as a complicated mix of swift compliance by the economists impatient for quick results, and 'foot-dragging' by the lawyers, who never ceased doubting that substantive reforms were needed at all or, if so, not on the scale they were occurring. The cycles proceeded along two, intertwined tracks: in-court, law-based initiatives alongside out-of-court, market-based experiments. The two tracks reflected the continuing ambivalence of different reformers over the belief that more law is necessary for a sophisticated market but that law might not be ready yet for such a responsibility or that legal solutions themselves rely on effective out-of-court mechanisms that nonetheless work only in the shadow of the law.

IFI lawyers concurred with their economist colleagues that the bankruptcy reforms should support the wider structural and institutional aims of reducing the intrusion of government agencies into market behaviour, compelling banks to act more like profit-maximising market actors than instruments of government policy, encouraging corporations to engage in genuine restructurings, and employing law to take up the burden, efficiently and fairly, of regulating market transactions.

[15] In 1996, for instance, in the whole of Korea, 18 individual estates and companies were liquidated under the Bankruptcy Act, 9 individuals and companies entered proceedings under the Composition Act, and 81 companies made use of the Corporate Reorganization Act (Nam and Oh, 2000: 37, Table IV-1).

A Producing Legal Efficiency: 1998 and 1999 Reforms

The Government of Korea (GOK) committed right away, in October 1997, to revising bankruptcy procedures in line with 'international best practices,' and it followed up this general commitment with a more expansive pledge to undertake 'a thorough review' of liquidation regulations and bankruptcy law (GOK, Letter of Intent, 31 October 1997; GOK, Memorandum to IMF, 15 January 1998). Apparently, behind the scenes the GOK went so far as to accept that its three different laws governing bankruptcy would be combined into one harmonised statute, a promise perhaps rashly given at a time of emergency and subsequently weakened.

Experts and the IFIs agreed that the courts had limited expertise and moved too slowly. Debtors abused reorganisation proceedings in order to escape loss of control and liquidation of their firms. Courts treated debtors and shareholders too leniently. And creditor-banks often colluded with debtors not to liquidate firms, since the debt write-offs would adversely affect their balance sheets (Nam and Oh, 2000: 55–6). Within months, the GOK introduced regulations and amendments. A 1998 amendment reduced judges' discretion and overrode creditors' preferences by pushing companies into liquidation if they failed a 'simple' economic test of having a liquidation value higher than a going concern value (Oh 2002, 2003).[16] Procedural rules sought to speed up the disposition of cases so that reorganisations not completed in a year consigned firms to liquidation. Amendments made it easier to move a corporation from one track—reorganisation—to liquidation and they took measures to forestall delays caused by appeals (Nam and Oh, 2000; GOK, Letter of Intent 24 June 1998; Oh, 2002, 2003; Interviews 2280, 2281, 2285).

Significant institutional reforms were mooted. To increase transparency and expertise in the courts, the amendments created a new entity, the Management Committee, which would permit experts from the private sector to sit with judges and advise them on the complexities of corporate finance. In addition, the GOK indicated that it would create a specialised bankruptcy court or bankruptcy division within the Commercial Court (Nam and Oh, 2000; GOK, Letter of Intent 24 June 1998; Oh, 2002, 2003; Interviews 2280, 2281, 2285).

Some in the legal community viewed the 1998 amendment as an 'economising' of a legal domain, since several provisions directly attacked the judicial discretion that lawyers avowed must always be available to a court, given the complexity of real-world situations. Observers disagreed over the success of the Management Committee. Some applauded the

[16] Simply put, 'liquidation' refers to a breaking-up of the company and the piecemeal selling of its assets; 'going concern' refers to the sale of the company as a functioning entity.

expertise they brought; others said they added delay. The Budget Office rejected as too expensive the proposal for a separate bankruptcy court and so the Supreme Court instead created a bankruptcy division within the Seoul District Court.

Later amendments refined the earlier adjustments with measures to return more discretion to judges; to give judges new powers to send a company into liquidation; to speed up decision-making; and to push debtors into real restructurings. The MOFE-led reforms aimed no less than to compel banks to confront the magnitude of their non-performing loans and recognise that they must take steep write-offs, even if it adversely affected their own balance sheets. It limited the ability of debtor/owners to avoid liquidation when no hope of reorganisation remained. And it pressured courts to act more expeditiously and ruthlessly when the facts and circumstances warranted it (GOK, Memorandum/Letter of Intent 12 July 2000; Nam and Oh, 2000: 35ff, 48).

B Invoking Market Efficiencies: The Creation of Debt-Restructuring Mechanisms

While the GOK was pursuing one track of reform within the courts, it pursued another track out-of-court. MOFE officials continued to believe that the courts could not handle the largest reorganisation cases. In any event, it was better to catch cases of corporate failure at a stage before technical insolvency. MOFE therefore tried to adapt the London Approach[17] in a peculiarly Korean form. In June 1998, the GOK compelled all major financial institutions in Korea to enter into an agreement to implement a work-out programme for the largest *chaebols*.[18] When a large firm or conglomerate got into difficulty, a lead bank would bring together the major creditors and hammer out a Memorandum of Understanding with the debtor (Nam and Oh, 2000: ch V).

Though beguiling in its simplicity, the programme ran into unforeseen difficulties. In the first place, while the IFIs pressed hard to keep the government from interfering in the market, the Corporate Restructuring Agreement institutionalised such interference. While the banks controlled the work-outs, the GOK had a controlling interest in many of the largest banks. Secondly, the work-out procedure produced a significant free-rider

[17] The London Approach is an out-of-court technique employed by the Bank of England, bringing together major creditor banks in order to produce a consensual debt restructuring plan for major companies in distress. Variants on the London Approach have been tried in many Asian countries, although there are questions as to their effectiveness: see Flood (2001) and Meyerman (2000).

[18] *Chaebols* are large conglomerates of companies where control is centralised and ownership is closely held by families (Steers et al, 1989).

problem where foreign banks and trade creditors who had not signed the Agreement were not bound by it. And thirdly, the work-out scheme did not solve the problem of large creditors and debtors who colluded to avoid meaningful restructuring. Large banks did not want to write off massive amounts of debt that would expose their weak balance sheets and shareholders of large debtors did not want to exchange debt for equity, since they might lose control of their companies (Nam and Oh 2000: 72, 83–4).

The work-out scheme seemed successful on paper, and presumably saved transaction costs incurred in legal processes.[19] But much of the requisite information for calculating their success is not in the public domain. Thus we cannot know how completely the scheme was foiled. But we do know that three parties within the scheme—debtors, creditors, government—as well as excluded parties from the scheme, all had reasons to undermine it.

That the scheme also paid a price for avoiding law and the courts was manifest, among other things, in its limited ability to bind various parties in a way necessary to make a restructuring work in practice. MOFE therefore tried to borrow a concept from US bankruptcy law and yoke the out-of-court, private negotiations among leading creditors with the powers of a court. However, its Korean-variant of the US model had several deficiencies that made it unattractive to lawyers and judges alike, so it was scarcely ever used (Interviews 2294, 2282).

In its place, MOFE tried again, over the objections of the Ministry of Justice, this time with the Corporate Restructuring Promotion Act (CRPA) enacted in July 2001. The Act mandated that when a leading bank creditor saw that a client was ailing, it must call together the major creditors and prepare a restructuring plan. The plan could be passed by 75 per cent of creditors. Effectively, the Act allowed banks to force a restructuring plan on minority and dissenting creditors so they were bound by the decision of the majority (Interview 2290; MOFE 2001; Oh, 2002).

What looked like more efficiency to the MOFE economists, however, appeared to be inequity to lawyers and foreign bankers. For lawyers, it was inequitable because it discriminated against minorities and on those grounds might even be unconstitutional. Since it applied only to domestic banks and foreign resident banks, it let foreign creditors off the hook and thus discriminated against domestic banks. And in practical terms, by excluding certain creditors from a binding decision, even voting against their interests, the inequity readily converted into inefficiency, for those creditors (for example, trade suppliers) in the longer term would have the

[19] Nam and Oh (2000: 76) report that 'as of October 1999 a total of 93 firms, of which 54 belong to the top 6-64 chaebols and 39 not affiliated with the top 64 chaebols, were in workout programs'. The 81 firms with an approved plan had loans totalling 38.4 trillion won.

capacity to unravel the deal and thus frustrate the purpose. Short-term inequity buys long-term inefficiency. Foreign banks resident in Korea, which by definition are almost always minority creditors, viewed themselves as 'victims' of an edict that reduced a creditor to an 'asterisk' when it was told ex cathedra, 'this is what we decided for you.' Even the IMF wondered if the design might be flawed since it did not make court protections available to minority creditors (Interviews 2299, 2305).[20]

Consequently, lawyers resisted it and stayed away from it. Foreign investors didn't like it and adopted stalling mechanisms to keep it at bay: 'if you are a smart creditor … and CPRA hits, you ignore it, hold onto to your security … and play a waiting game' until the Act expires in 2005 (Interviews 2299, 2303). And even senior MOFE technocrats were divided over whether the out-of-court or in-court options worked better (Interviews 2290, 2293).

C Unification of Law as a Legal Efficiency

Korean bankruptcy law—borrowed from the Japanese, who in turn borrowed from the United States in the 1950s—was divided until 2005 among three separate acts, as was US bankruptcy law before its unification in 1978. At the time of the Crisis it was inconceivable that something so radical as a complete unification of these three pieces of legislation could be accomplished right away, but the GOK indicated a willingness to consider unification at a later time. After a World Bank report to the GOK recommended unification in 2000, the IMF also encouraged the GOK to unify and harmonise its law, which it committed to do in its last Letter of Intent/Memorandum in July 2000.

It is notable that the World Bank and the IMF could no longer apply economic pressure, for Korea had rebounded so fast it was now repaying its loans. Indeed, the rapidity of its rebound allowed Korea, according to the IFIs, to drag its feet on earlier commitments. Instead, the IMF from 2000 through 2004 kept up a steady moral suasion, in part through its regular Article IV reviews of Korea's economy. Reportedly, the IMF approach was to play to Korea's intense desire to meet the highest global standards by steadily calling for a modernised bankruptcy law (GOK, Letter of Intent, 12 July 2000; Interview 2305).

The unification of the three laws pitted lawyers, judges and legal academics against powerful proponents. MOFE wanted unification because it supposed that the blending of three laws into one would create efficiencies in smoothly switching from one track (for example, reorganisation) to another (for example, liquidation). The Blue House supported this

[20] Some dissensus existed within MOFE among senior officials on the impact of the Act.

view, partly because it accepted the efficiency argument, partly because it wanted to respond positively to IFI recommendations, partly because it seemed modern and reflected a global fashion, and partly because there seemed to be some public sentiment for holding corporate managers accountable (Interviews 2281, 2290, 2293). The Ministry of Justice also supported the concept and took the lead in its development.

Despite the consensus among MOFE, the Ministry of Justice, the Blue House and the IFIs, a significant current of opinion in the legal community remained strongly opposed. It might be that lawyers are inherently conservative, as proponents of unification asserted. Most lawyers remained to be convinced that a consolidation of three acts into one would produce any efficiencies. They saw no 'cry from the marketplace' (Interview 2280). And judges feared that it would raise false expectations of an assertiveness by courts that many judges were reluctant to provide. Even professionals quite intimately involved in the preparation of the legislation were not all persuaded that it represented an advance.

Despite lawyers' resistance, a draft bill was completed by the drafting team and sent to the IMF for review. The IMF in turn sent it to one of their principal consultants.[21] His reservations were passed on to the Minister of Justice, who introduced the bill to the National Assembly on 20 February 2003 where it wound a twisted path until enactment and promulgation in 2005.[22] With some 660 articles, the Act is one of the biggest pieces of statutory law in Korea. However, it is unlikely that adoption of the Act will entirely satisfy either the IMF or MOFE. Already there is discussion over substantive amendments, most notably to change current composition provisions which allow owners/managers to stay in control of their firms without undertaking substantial restructuring. Thus the recursivity of law continues (Carruthers and Halliday, 1998; Oh, 2003; Interviews 2298, 2305).

Foiling IFIs in Korea took a more subtle form than in Indonesia. The IFIs did have a strong internal partner inside Korea—MOFE, which welcomed IFI leverage to maintain its own threatened influence on the institutional restructuring of the Korean economy. In this sense, many aspects of the IMF programme for Korea were championed by its internal proxy, which was a great advantage to the IFIs.[23] The IFI/MOFE alliance has effectively pushed through reforms in the face of broad opposition.

[21] The consultant was Manfred Balz, drafter of the current German Bankruptcy Code. Balz has worked on the insolvency laws of several countries, most recently of Cambodia.

[22] The Debtor Rehabilitation and Bankruptcy Act was passed on 2 March 2005 by the National Assembly, was proclaimed on 31 March 2005 by the President, and will become effective on 1 April 2006.

[23] This proxy is by no means a cipher, since the IMF aims to *diminish* MOFE's direct interventions in the economy. Their interests, therefore, are by no means identical, although their orientations converge.

Other parties, however, resisted. The foiling of reforms in the Korean case ultimately reflected the strong inertial tendencies long institutionalised in the GOK, markets, and law. Government agencies and technocrats found it difficult to withdraw from their close interventions in economic life, which extended all the way from broad policy to directives for credit to particular firms. The banking industry was long unaccustomed to decision-making on commercial criteria alone, and banks remained defensive about their balance sheet vulnerabilities if government was too vigilant in enacting reforms. Major corporations fought rearguard battles to preserve their ownership and control. Segments of the state and market remained ambivalent about the capacity of law to undertake a task so critical to the economic well-being of Korea. And the judiciary and legal profession only reluctantly greeted the new institutional responsibilities of autonomous law.

Change occurred, therefore, but in the face of stolid resistance. It is too early to tell whether reforms in the form and substance of law or the creation and refinement of agencies and organisations will achieve the surface goals of effective corporate debt restructuring. Even less can it predicted whether the cluster of all IFI-stimulated or supported reforms since the Crisis will realise the fundamental goals of institutional restructuring.

V CHINA

Just as Indonesia was a situation where IFI powers to transplant law should have been most effective, China was the opposite, where those powers should have been least effective. In that respect China helps specify the limits of globalising agents on the law of developing countries (Halliday and Carruthers, 2001). Because IFI influence has been less direct and intrusive in China, we sketch only some broad outlines of its significance for our thesis.

China escaped the direct impact of the Crisis that brought other Asian economies to their knees (Stiglitz, 2002). Partly for this reason, IFIs have had no direct financial leverage over China and instead have relied on invitations by the Chinese government to provide technical assistance, albeit on China's terms. Another source of potential influence, foreign creditors, remains diffuse since the orientation of global creditors towards China appears fundamentally different from virtually any other country. While China relies heavily on foreign direct investment,[24] those creditors

[24] In 2003 FDI to mainland China reached approximately US$55 billion and in 2004 US$47 billion (OECD, 2005). However, per capita China's FDI is considerably lower than some other leading developing countries such as Brazil (OECD, 2003).

who take a long-term view seem prepared to accept short-term losses as a price of entry to long-term access to prospectively the world's largest single market. Consequently, while the Chinese are aware that rolling law reform is necessary to attract the massive quantity of capital they believe necessary to fuel growth, the evidence of continuing overseas investment probably conveys to Chinese law-makers that there is no urgency for them to provide effective mechanisms (such as bankruptcy law) that will allow foreign investors to protect their investments.[25] Given China's sense of dignity, and its awareness of its attraction as a trading power to the world's leading economies, it has also limited the visibility of other sovereign nations in the construction of its market regulatory institutions.

The institutionalisation of bankruptcy regimes in China has proceeded in three stages (Halliday and Carruthers, 2001). The first stage began in the middle 1980s when a remarkable moral entrepreneur, Cao Siyuan, managed to build a groundswell of political support to implement China's first post-Mao bankruptcy law in 1986. Since the initial law applied only to state-owned enterprises (SOEs), a second stage, initiated in the early 1990s, saw a patchwork of special bankruptcy laws, regulations, and procedures erected for particular categories of companies or regions so that all enterprises of any kind in China were covered. The third stage began in 1994 when the State Council charged the Finance and Economic Committee of the National People's Congress with the responsibility for creating a single, integrated bankruptcy law for all China.

On a quite independent track, in response to a commission from the State Economic and Trade Commission (SETC), which administered China's state-owned enterprises,[26] the Asian Development Bank (ADB) in 1996 issued a report with extensive recommendations about how to reform China's bankruptcy system—or, more accurately, how to erect such a system *de novo* (Asian Development Bank, 1996). The ADB Report recommended the drafting of a unified substantive bankruptcy law which included a strong regime for rehabilitating companies. It urged the creation of specialised bankruptcy courts that were independent of government intervention and staffed by thoroughly trained judges. It called for the

[25] Fragmentary evidence indicates that most large foreign companies take a quite realistic view of the protection of their investments in China. On the one hand, they do not expect that if investments turn bad they will have any legal basis on which to protect their assets inside China. On the other hand, they use forms of informal insurance within China (eg, building relationships with government officials) and conventional forms of loan protection outside China (eg, obtaining collateral on assets of Chinese companies which are located *outside* China and therefore subject to enforceable legal remedies).

[26] The SETC was abolished in 2003 and its responsibilities distributed principally to a newly formed Ministry of Commerce and a new state agency, the State-Owned Assets Supervision and Administration Commission of the State Council (SASAC). SASAC has responsibility for the administration of approximately 200 of the most important state-owned enterprises in China (Interview 2308).

formation of an insolvency practitioners' profession and the application of 'recognized accounting standards'. And it proposed that the government consider a bankruptcy agency to handle 'hopelessly insolvent' cases (Asian Development Bank, 1996: 2–3).

The ADB Report gracefully but directly indicated the problems the implementation of the recommendations would confront. It pointed to the government's vexing problem of developing a *socialist* market economy. It anticipated that the state would withdraw from direct intervention in the economic affairs of firms. It also recognised the challenge of creating independent institutions and professions, all of which were alien to post-revolutionary China. Not least, it recognised the necessity of a new system of welfare for unemployed workers.

In the event, the ADB Report effectively disappeared from sight. It was not made public by the government. Five years later senior officials at SETC were still unaware of its existence. And, most remarkable of all, the drafting committee of the new bankruptcy law had neither seen it nor knew it was available, even though it set out the most complete template for an entire bankruptcy system of any document on China (Interviews 2001:107, 2001:108). Evidence does not enable us to conclude whether this involved deliberate burying of unwelcome advice or the hapless result of inter-ministerial rivalries or bureaucratic incompetence.

By contrast, a World Bank Report released in 2001, and also commissioned by the former SETC, had a higher profile. Whereas the ADB Report was prepared by lawyers specialised in insolvency affairs, the World Bank Report was written principally by economists and it drew on extensive data and research the World Bank itself undertook at many experimental sites in different parts of China. The World Bank Report described and appraised in detail the various schemes that the Chinese government had tried, step by step, at increasing scale, to liquidate or rehabilitate SOEs. It applauded the gradualist and experimental approach undertaken in first a handful, then in hundreds, of jurisdictions and it recommended which of these to continue, extend or revise (World Bank, 2001).

Above all, the World Bank urged the Chinese government to enact its draft bankruptcy law quickly. It sang the praises of the current draft law which, it pronounced, 'largely resembles the bankruptcy laws of developed market economies' (World Bank, 2001: 34). But it also reflected, and stated plainly, the political realisms that reforms would need to surmount, including fears of local authorities that they would lose their powers, fears of workers that they would lose the social welfare system intertwined with SOEs, and the sustained fear expressed by the Chinese Communist Party that social unrest caused by displaced workers could lead to political instability (World Bank, 2001: ii, 15, 22–4, 29, 34).

In the meantime, the German aid mission in Beijing (GTZ) provided steady and extensive expert assistance for reform of Chinese commercial

law, including bankruptcy. The GTZ hosted several conferences to which they brought bankruptcy experts from many parts of the world—and a scattering of 'legal families'—to provide critical and constructive comments on each successive draft of the bankruptcy law. The cumulative effect was to provide the Chinese drafting committee with comparative reference points for every Article in the draft code.[27] The World Bank's insolvency specialist consulted with the Chinese and compared the draft law to the standards the Bank has been developing for insolvency systems everywhere. And the Asian Development Bank brought together experts at the penultimate stage to advise the Legal Affairs Committee of the National Peoples Congress.

Despite ample expert and IFI advice, however, the Chinese government resisted the urgings of the World Bank for rapid enactment and repeatedly delayed putting the bill before the Standing Committee of the National People's Congress (NPC) until 2003. It moved stop-and-start through successive readings until enactment suddenly took place in August 2006 to become effective in July 2007. The twelve-year marathon demonstrated simultaneously the overwhelming influence of domestic issues and the comparative weakness of international influence. The top leadership of the Chinese government knew it faced proximate opposition from many quarters: SOEs, which might be exposed to the harsh currents of the market; banks, which became accustomed to avoiding responsibility for bad loans, since they were directed and cushioned by the central government; provincial and municipal leaders, who often had and continue to have well-entrenched patronage relationships with local industry; and workers, whose low wages had traditionally been compensated for by a cradle-to-grave welfare system.

Two deeper reasons for the delays come from the bureaucracy and the Party. Bankruptcy reform efforts proceeded on two parallel tracks. The National People's Congress drafting team pushed forward its bankruptcy law mostly independent of the extensive administrative solutions to failing SOEs that had been attempted by the SETC since 1994. If SOEs were to be included within a new bankruptcy law, it would sharply diminish the powers of the SETC,[28] long one of China's most powerful government ministries. A loose coalition of SOE managers, provincial leaders, and senior SETC administrators viewed the diminution of the SETC's leading role with anxiety.

[27] See, for instance, Symposium of the Foreign Experts on the Law of Enterprise Bankruptcy and Restructure of the People's Republic of China (Draft, June 2000), hosted by GTZ, Changsha, 1–8 July 2000.

[28] In 2003 the SETC was abolished, its several functions divided among several government agencies and ministries. Some 190 major SOEs, often corporate groups, were placed under the supervision of the new State-owned Assets Supervision and Administration Commission (SASAC) of the State Council.

The SETC resistance coincided with the complex problem a market-based bankruptcy system posed for the Party. Reforms presuppose a successful ideological project to adopt a manifestly capitalist institution whilst preserving distinctively socialist attributes. The 1986 law ran into heavy ideological opposition, some of which remains. And solving the ideological problem by maintaining distinctively socialist characteristics might practically subvert the value of the law.[29] It is no surprise that the final road-block to enactment came in the form of a struggle between factions that supported the priority of workers versus those who favoured secured creditors and banks. Most fundamentally, to implement the ADB and World Bank reports presupposed institutions China does not yet have (such as a comprehensive welfare safety net for unemployed workers) and entailed political risks (such as large-scale economic disaster and social unrest) that the Party will not tolerate.[30].

VI LIMITATIONS OF THE FINANCIAL HEGEMONS

We began with a puzzle—how can the world's most powerful economic actors, especially in crisis situations, be foiled by comparatively weak developing countries? Answers to this question should suggest some limits to globalisation and specify some conditions under which transplants will not succeed.

A Bridled Power

Global actors mobilise enormous financial powers, especially in crisis circumstances, as they control the disbursement of tens of billions of dollars in initial bail-out packages. Any one category of actor—a multilateral institution, a sovereign creditor nation, international private banks—would be influential on its own terms. In crisis circumstances, they act collectively and thereby unify and concentrate their powers, ensuring a coherent approach and forestalling any recipient country's proclivities to divide and conquer. The flow of capital is thereby channelled through a single outlet. This monopoly of supply sends clear signals to global

[29] The two most distinctively socialist provisions in an earlier version of the draft law were to give both (a) the wages and benefits of workers and (b) state tax claims for unpaid taxes an unlimited priority above all other creditors, a priority that would doom most reorganisations since it would drain the cash needed to jump-start a reorganised firm.

[30] A lively debate among legal scholars turns on whether China has, or is likely to have in the foreseeable future, a legal infrastructure, of which courts are the most important, that can handle commercial cases such as bankruptcy competently and independently. Contrast Lubman's (1999) pessimism with Peerenboom's (2002) optimism.

financial markets, since private capital markets will price their risk, and thus future investments, on the terms of the deal reached between the IFI-led bail-out consortium and the distressed country.

We have seen that IFIs exercise initial and continuing powers from conditionalities for loans to close monitoring and surveillance through periodic reviews (Article IV), technical assistance and aid programmes. Yet successes appear incommensurate with leverage. In Indonesia, laws were amended, institutions constructed, processes initiated, and the new Commercial Court, the Jakarta Initiative, the new receivers' profession, and the substantive and procedural law reforms produced flattering statistics (for example, number of cases coming to court, speed of disposition, extent of assets restructured in JITF MOUs, numbers of qualified receivers) but also widespread disappointment. In Korea, the government undertook formal reforms consistent with IFI preferences, albeit on its own schedule, but those reforms still confronted a wall of inertia and resistance from affected parties. In China, experiments widened and deepen to reform SOEs, but the decade-long momentum for the creation of a comprehensive bankruptcy system remained incomplete as late as mid-2006.

B Weapons of the Weak

How does the asymmetry between enormous financial power and manifest vulnerability lead to partial success for the subordinate party? Or in the memorable title of Scott (1985), what are the 'weapons of the weak'? As importantly, in what circumstances are particular strategies of resistance likely to be most effective?

i Avoidance of Conditional Foreign Capital and Aid

There are two notable instances in recent years where nations have refused the terms of the IMF, or have not been dependent on IFI interventions. In contrast to its neighbors in Thailand and Indonesia, Malaysia in 1997 refused to accept the IMF bail-out package. Its judgment was courageous, for its economic risk and its exceptionalism, but in hindsight it is arguable that its decision was defensible and the results acceptable because Malaysia did not suffer such drastic domestic reversals in its economy as its neighbours (Stiglitz, 2002).[31] China was somewhat inoculated against the Crisis and it therefore had no need to expose itself to pressures from the IFIs, although the repercussions of the Crisis elsewhere led to numerous domestic reforms on China's own terms.

[31] It continues to be a matter of debate whether Malaysia paid a subsequent price in a reduction of foreign investment.

The ability to reject pressure from the IFIs therefore appears more likely in three circumstances: when there is no crisis and thus no desperate internal demand for capital and therefore less external leverage for suppliers of capital; when there is a crisis, but capital can be found elsewhere or a country is prepared to ride out the crisis while sustaining domestic economic damage (cf, Argentina since 2003); and when there is a powerful, entrenched national leadership that can speak to outside institutions cohesively and remains in control domestically.

ii Outright Refusal

On occasions a country may accept IFI-led bail-outs, but will refuse explicitly to implement major recommendations of international agencies. It simply says 'no'. More common is the practice of accepting some recommendations but obtaining relief from others. Korea engaged in hard bargaining and did reject some important recommendations of the IFIs, such as the creation of a specialized bankruptcy court. Indonesia similarly did not create its Commercial Court outside the regular court system as the IFIs wanted. Indonesia was prepared to enact positive sanctions to get debtors to restructure through the Jakarta Initiative, but it successfully resisted enacting negative sanctions.

Refusal to adopt important recommendations may be possible under three conditions. If levels of external leverage are low, as subsequently became the case in Korea, then the country obtains degrees of freedom to go its own way. If a country can show general compliance with IFI demands, and demonstrate a readiness to undertake major initiatives at least on the books, as did Indonesia, then the IFIs tolerate some opposition to specific proposals, even if in the end they would prove troublesome for the general reform programme. If a country can persuade the IFIs that local circumstances will create more problems than the solution, then this also can justify rejection, but this is a reasoned justification rather than a straightforward refusal and thus looks more like (iv) below.

iii Fragmentation of Powerful External Coalitions

Since a co-ordination of foreign lenders and a near-monopoly of supply gives the dominant financial powers a large advantage, the force and focus of pressure can be relieved by either forestalling concerted action or segmenting and dispersing it. In its selective acceptance of assistance from several IFIs and sovereign creditor nations, China essentially controlled the inputs from outside the country. And by spreading those inputs over time and among different reform bodies within China, bodies which may not agree with each other or which compete as centres of power, the Chinese

government gave itself maximal degrees of freedom to make its own choices in its own time. Indeed, China so successfully pursued its two-track programme of reform (of bankruptcy law through the NPC, and of state-owned enterprise reform through SETC and now SASAC) that leading officials on one track were not even aware of developments on the other. Moreover, each of the major aid agencies—the German overseas aid agency,[32] the World Bank, and the Asian Development Bank—were given a particular fragment of the overall reforms with limited opportunity to combine forces or develop a concerted approach.[33]

Of course, attempts to fragment the powerful may not be necessary if the IFIs are already divided. In cases, such as Indonesia, where national constituencies know that competing plans were advocated by different IFIs and even different branches of the US government, it may be enough to keep those differences alive when problems arise on the path actually taken. In a sense, an alternative path not taken that had been advocated by a powerful external agency provides some legitimacy for resistance.

The contingencies of dividing exogenous forces therefore arise from outside (ie, global institutions) and inside (ie, from domestic institutions). International institutions not only disagree with each other but often compete with each other for primacy in programme leadership and recognition. If the distance between the local and global is narrow (Carruthers and Halliday 2006), then a nation state will be aware of these differences and can exploit them. To do so will be more possible when diminished pressures for reform, or an absence of crisis, do not require concerted action by IFIs. But if fragmentation of external agents of change can occur without domestic pressure, and if nation states may also on occasion have the capacity to exploit a lack of external policy coherence, it is also the case that fragmentation might occur as a by-product of intra-state rivalries. Fragmentation of the powerful thus occurs less as a result of calculated state tactics and more as a result of state disorganisation. In this sense, the existence of many competing and powerful state agencies provides its own protection from IFI intervention.

iv Invocation of Cultural Exceptionalism

Countries sometimes fend off IFI recommendations by maintaining that implementation would be contrary to cultural mores. This can be a rather

[32] The Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH is a private-sector enterprise owned by the Federal Republic of Germany. See <http://www.gtz.de/china/chinese/english/gtzchina.htm>, last accessed 23 October 2004.

[33] Significantly, the World Bank itself operated on two tracks—the report prepared for the SETC on SOEs was primarily driven by economists; the contributions of the Bank to the draft law prepared by the NPC committee came from the World Bank's Legal Department, though they were quite limited by comparison.

powerful shield because the IMF and World Bank, among other international agencies, are often caught in a cleft stick. On the one hand, they usually propagate convergent norms, sometimes in the form of 'best practices', and sometimes as a result of agreements among global norm-making institutions. On the other hand, they are very sensitive to accusations that they force 'one size fits all' solutions on countries regardless of their culture and institutions. Finding a resolution of this tension often proves elusive. For instance, Indonesia seems to have successfully side-stepped negative sanctions on debtors that might have been administered by the Jakarta Initiative by maintaining that they were culturally inappropriate, an approach that echoed an earlier report on commercial law reform drafted before the Crisis (Halliday and Carruthers, 2003a). China frequently invokes its own exceptionalism by championing models of its development that combine a global label (eg, market) with a qualifier (eg, '*socialist* market economy,' 'democracy *with Chinese characteristics*').

The effective use of this weapon increases when global institutions are already under attack for cultural insensitivity from other critics. Since this is a rallying cry of anti-globalisation movements, it strikes IFIs in a sensitive place and may compel them to ease their pressure for adoptions of global norms in all circumstances. On the domestic front, effective playing of the 'culture hand' requires some plausible basis. Domestic authorities must be able to point to well-known cultural practices or rely upon cultural stereotypes (eg, Indonesians avoid conflict) or even construct a cultural practice that has validity for outside observers. It is likely, however, that this strategy will be more effective in minor rather than major elements of structural adjustment and externally-induced reform programmes.

v Symbolic Compliance

Countries, like organisations, can offer signals of compliance to external constituencies, but proceed divergently with internal practices (Hirsch and Rao, 2003; DiMaggio and Powell, 1983; Meyer and Rowan, 1977). This strategy is relatively cheap since promulgation of regulations or enactment of legislation is not capital-intensive but appears to be compliant. Nor does it create the political and administrative problems that might be entailed if implementation were to be taken seriously. There are several variants of symbolic compliance.

A country may enact the principle, but implement partially. Indonesia set up Commercial Courts but it starved them of resources. Korea said it was prepared to create a specialised bankruptcy court but the Budget Office ruled it too costly and instead substituted a division of the Commercial Court in Seoul.

Countries may implement laws perversely in order to maintain control, as was the case in Indonesia where judges were recruited in ways that ensured the Supreme Court would keep control through its recruitment and appellate functions.

Countries will enact legislation, but qualify or subvert it through enabling regulations. Indonesia created a receivers' profession, but ensured its relative ineffectiveness by inserting an Indonesian language requirement which kept most foreign specialists at bay. Korea implemented some taxation measures, but nullified them effectively in some obscure regulations written only in Korean and that were invisible to overseas observers (Interview 2277).

A country will enact legislation, but not enforce it. For instance, new laws gave Indonesian prosecutors authority to bring criminal charges against debtors, but these were not employed.

In practice countries exploit the classic socio-legal gap between law-on-the-books and law-in-action. They send a signal to international organisations with their law on the books but resist in the implementation phase.

This strategy will not work on all circumstances. It requires that external regulators have limited surveillance or enforcement capacities, and internal practices are relatively invisible. It depends upon the attention span and will of the IFIs. If a new crisis, such as September 11, distracts the IFIs then external pressure for compliance is relieved. It can work when nation-states can plausibly plead incapacities of resources, bureaucratic limits, corruption and asymmetries of power between government authorities and those they attempt to regulate.

vi Substitution of a Solution

A country may substitute a home-grown solution to solve an IFI-designated problem. The IFIs wanted Korea to make liquidation a credible threat to firms and to speed up court procedures. Korea responded by adopting the strict economic test which was close enough to IFI intent that the government could maintain it was compliant but flawed in its reduction of judicial discretion. Similarly, Korea passed the Corporate Restructuring Promotion Act (2001), which seemed responsive to IFI pressures for out-of-court work-outs, but it did so in ways which subverted rights, including those of foreign creditors.

Substituting an alternative will be possible when a country has some degrees of freedom from IFIs, when for instance the asymmetry of power diminishes. It requires that national officials are sophisticated enough to craft an alternative and persuasive enough to convince IFIs of its functional equivalence to their proposals. That in turn depends upon the presence of experts within a nation state who can communicate as peers with experts from IFIs. An alternative to a global model may also be more acceptable if

the IFIs believe a nation state is generally executing the main terms of the terms attached to the agreement between the nation state and the IFIs.

vii Temporal Delay

Perhaps the least risky and most common tactic is for a country to delay and stall. The government will advise the IFIs that it accepts conditions and recommendations, but then 'drags its feet'—doing as little as possible for as long as possible. Governments, of course, use this strategy with domestic constituencies, by creating commissions and blue-ribbon committees, hoping all the while that the public's interests will wane, or the responsibility will fall to a new government, or other events will have overtaken the problem. The IMF believed this was how Korea had reacted to the IMF's most challenging expectation—the unification of bankruptcy law. The constant extension of completion dates for commitments in the Indonesian Letters of Intent to the IMF reveal a similar pattern. And China suspended the drafting of its bankruptcy reforms for the four years from 1996 to 2000 because domestic concerns were of much greater moment to its leaders than external pressures.

Stalling or slowing implementation is a strong tactic because it avoids direct confrontation and has a surface plausibility as an excuse. It blurs unwillingness and inability to comply. Slow execution of government programmes is also ubiquitous in developed and developing countries. Its effectiveness may increase in two circumstances. One occurs when the IFIs appear reluctant or unable to penalise nation states for non-compliance. Another can be observed paradoxically in those countries where the asymmetry of power between global and local actors is most marked. Weak countries by definition have less administrative and expert capacity to implement programmes.

viii Segmentation of Reforms

A complementary or alternative strategy for stalling can be to break down a larger commitment into innumerable smaller steps. The experience of any one step may then influence the course and pace of later steps. Arguably, this is the strategy adopted by China when it undertook (with SOEs through SETC) a series of progressive experiments in a few and then many cities. This strategy now has the implicit endorsement of the former Chief Economist of the World Bank and Nobel-Prize winner, Joseph Stiglitz (2002), because a gradualist, experimental advance might offer more learning from trial and error, and with less risk. While rational from a government's point of view, this approach gives the government a greater degree of freedom to stall compliance. Korea countered the IFI proposals

for reforms to its bankruptcy system by undertaking a series of modest statutory amendments in annual reform cycles. This might be seen as a strategy for complying minimally in the hope that the maximal demand—integration of all its bankruptcy laws in a single unified comprehensive statute—might vanish.

This strategy can work when IFI pressures are not sufficient to obtain a comprehensive solution at the outset. The salience of a crisis for segmentation of reforms is more complicated. On the one hand, a crisis gives IFIs maximal short-term leverage and thus offers a critical moment in which to obtain a major commitment from a government for comprehensive reform. On the other hand, comprehensive reforms cannot readily be designed in a few short weeks. In these circumstances, IFIs might settle for segmented reforms in the short term and a longer-term commitment for comprehensive reform.

ix Construction of Exclusions and Escape Routes

Governments will anticipate that compliance with IFIs may bring risks or threats to current power relations or forms of market regulation. To preserve these, governments build in 'back-doors', exclusions and escape routes. They:

- Carve out exceptions to the law so that politically troublesome or economically risky prospective subjects of the law are removed from its purview. Thus China showed considerable reluctance to include all state-owned enterprises in earlier versions of its draft bankruptcy law and excluded some 2000 SOEs until 2008 in its final version.
- Create escape routes so that unanticipated consequences of law reform may be mitigated on an ad hoc basis. For instance, in earlier versions of the draft bankruptcy law, the State Council in China was given the right to intervene arbitrarily in particular cases. It appears that the Chinese government feared the consequences of handing over reorganisations or liquidations entirely to courts, especially if a particular case might be politically sensitive or cause widespread economic dislocation. Thus the Chinese government sought to retain a right of intervention, a right which would introduce uncertainty into the legal process (Halliday and Carruthers, 2004b). The final Enterprise Bankruptcy Law permits numerous points at which administration interventions can control access to the law.
- Maintain channels of influence that attenuate the force of reforms. When the Korean government enacted the Corporate Restructuring Promotion Act 2001, its officials knew that the government would still have 'back-door' channels, through its equity interest in banks, and so be able to interfere in the very market processes the Act was intended to promote.

C Limitations of the Strong

Given the asymmetries of power, how is it possible for the weak to get away with these tactics? The IFIs are not naïve. They have been in many comparable situations. Their officials have some knowledge of the region or the country. They will have ample access to the best and brightest experts inside the country. They get immediate access to any government officials. And they have their formidable negative sanctions.

In practice, however, it looks rather different. IFIs, and the IMF in particular, operate under severe time constraints in emergency situations. They move from crisis to crisis, their attention span is limited, and their resources are stretched thin, since each lawyer in the IMF Legal Department has responsibilities for many countries on several continents. The World Bank had no lawyer-specialist dedicated to insolvency during the Crisis.

The quality and potential efficacy of 'prescriptions' for ailing economies rely on the accuracy of 'diagnoses'. And those diagnoses depend largely on the abilities of the 'practitioner / diagnostician'. Thus diagnoses may suffer from lack of experienced in-country staff or access to experts in institutions. Indeed, adequate institutional analysis requires skills that IFI experts conventionally do not have (Carruthers and Halliday, 2006). All IFIs are dominated by economists who are neither familiar enough with the political economy of a country nor whose training reflects any sophistication in institutional analysis, including institutional economics. IFI lawyers are trained in substantive law and a mode of reasoning that seldom treats the behavioural and institutional conditions of legal practice. The lawyers do obtain on-the-job training, but the scope of their responsibilities is broad and their targets are constantly moving so that an earnest intent to understand institutional and cultural complexities in a given situation simply cannot be sustained.

Other things can also contribute to a poor outcome. The IFIs draw on precedents from other crises. This seems positive, on the face of it, for it cross-fertilises global learning. But the relevance of the precedent depends on contextual, institutional and cultural conditions that are beyond the usual expertise of IFI professionals to discern. Time pressures also partly account for the failure of IFIs to build support and consensus within countries and political commitment from key constituencies. In bankruptcy law, for instance, the IFIs effectively represent the creditor community, and more accurately the foreign creditor community. Laws based on the preferences of creditor institutions inside and outside a country may run

into vigorous opposition from other parties in the market, including debtors and workers, who then act to subvert the agreement.[34]

Additional problems in transplantation stem from the tension-ridden relations between the global exporters and certain national importers of law. The strongest critics of IFIs charge that some IFIs compel countries to accept a 'one-size-fits-all' solution. Countries are not given enough time to make them work or to craft adaptations that fit with the culture (Stiglitz, 2002). In the heat of emergency negotiations, IFIs can appear careless of national sensibilities, of the loss of face of rulers in sovereign nations, and of the limitations in their powers. The exercise of economic muscle from Washington fuels the presumption that the laws represent the imposition of foreign interests. These in turn engender nationalist resentment that can be appropriated by local constituencies for political capital. In Korea, for instance, the Crisis of 1997 has entered popular usage as the 'IMF Crisis'.[35] Such alienation fosters passive opposition and the resort to stratagems of evasion and non-compliance, not necessarily based on the merits or otherwise of reforms. Resentments are intensified when 'rescue' leads to heavier indebtedness and a sense of perpetual dependency, thus vindicating the premises of dependency theory (Tamanaha, 1995). Nevertheless, it must also be remembered that what alienates one section of a debtor nation may be viewed as an opportunity by another national constituency, especially those constituencies oriented towards Western and global norms and actors.

And in the face of this mounting potential resistance, the real powers of enforcement by the IFIs are diminishing. As one veteran of debt crises observed, the real window for opportunity of successful interventions by IFIs lasts for three, or perhaps six, months from the onset of a crisis. Beyond that, governments know that the IMF and World Bank are extremely reluctant to, and in fact, virtually never do, withhold additional tranches of loans because of non-compliance (Interview 2277).

Finally, alongside the asymmetry of financial power in crisis situations there is an asymmetry of expertise. IFIs have access not only to their own expertise but to experts and expert organisations worldwide, who can be mobilised very quickly. Developing nations usually have limited expertise and limited resources to mobilise it from elsewhere. The more extreme that asymmetry, the less local resistance can rely on technical expertise. But in countries, such as Korea, where the asymmetry is much less pronounced, a national technocratic elite can buy itself significant degrees of freedom by countering external experts with national experts, especially when the latter have similar credentials to the former.

[34] This is also true in the United States and Britain (Carruthers and Halliday, 1998).

[35] It should be said that Korean officials are prepared to admit this appellation is grossly unfair, since many of the problems were of Korea's own making.

D Intentional Foiling of IFIs or Institutional Constraints?

The most elusive problem in foiling hegemonic institutions concerns intentionality. To what extent is the frustration of IFI goals a function of deliberate efforts to derail reforms or a result of constraints of inertia that accompanies change anywhere? And how is it possible to tell the difference? The distinction is more than academic. It is theoretically and pragmatically meaningful to differentiate between resistance, which implies a deliberate effort by nationals to forestall exogenous influence (albeit with local allies), and ineffectiveness, which implies a positive intention but an inability to execute. The issue is even more complex because the most sophisticated strategies by governments will be to disguise intentional non-compliance as unanticipated institutional inertia, that is to say, to convince outside powers that limited outcomes are beyond the control of a government.

The excuse, of course, has a surface plausibility. No matter how great the pressure, states may be too over-burdened, politics too contentious, institutions too fragile, costs too high, resistance too entrenched for reforms to be implemented effectively. The issue becomes one less of unwillingness than of inability. And where countries are simultaneously undergoing many transformations simultaneously (for example, economic, political, and legal), the inability exception seems plausible.

Nevertheless, Scott (1987; 1990) would suggest that precisely because the developing countries are weak, they must adopt strategies that limit their culpability and therefore their vulnerability. The 'inability' move offers a strong defence. The most artful of governments will tailor its compliance to an 'inability' defence, predicting that through its design, intervention or neglect compliance will be subverted in practice. This suggests that scholars and practitioners alike might proceed on the premise that all circumstances that forestall IFI compliance are within the control of the government. While this premise is manifestly wrong, it serves as a useful heuristic in order to avoid the mistake too often made about the weak—that they are powerless.

It may also be the case that law reform lends itself to being foiled rather more than economic reforms. The latter are relatively easy to measure and the immediacy of their impact can readily be evaluated. Economic levers, such as interest rates, seem far simpler to manipulate than law reforms. Moreover, long time-lags occur before the effectiveness of law reforms become apparent.

Then, again, transplants of law entail far more than law itself. On the surface, it appears rather simple to enact statutes, issue regulations, or even erect new institutions. But the advocates of law reform, especially in an area such as bankruptcy law, with its enormous distributive implications,

may fail to understand how extensively law reform reaches to the fundamental institutional order of a society. It potentially threatens deeply entrenched power elites. It demands extensive changes in market relations (for example, in the prevailing concept of the firm) and political institutions (for example, the operation of political parties). It may demand a recalibration of the balance of power among a society's central institutions (for example, substitution of market for hierarchy).

Thus the imposition of a 'Western' bankruptcy system penetrates far into economic, social and political life. By so doing, it confronts the heavy weight of path dependence, institutional inertia and historical momentum. Successful reform in this putatively technical area of commercial law, therefore, entails not simply debt-restructuring but institutional restructuring (Halliday and Carruthers, 2004a).

The IFIs are not unconscious of this problem and might well respond that it substitutes a maximal for a minimal criterion of success. Of course, as Malaysia demonstrated, countries are not compelled to accept their capital or prescriptions. But even for those countries that do, 'old hands' at the IFI reconstruction game strive for bold changes, but will settle, albeit reluctantly, for something much less. For the most hardened realist, *any* movement whatsoever can be considered a small victory, for without IFI intervention, no movement at all might have occurred. For champions of more comprehensive reform, such as those pursued in Indonesia, a window of opportunity has opened, complete with new indigenous champions, and shells of institutions and laws now exist that might be completed and made effective over time. For these IFI officials, therefore, the Crisis provided an opening. Subsequent IFI leverage kept up a momentum. Over the longer term, lessons will be learnt on all sides about the limits of IFI power and the extent of indigenous resistance. For the IFIs, the bridgehead has been established. For the developing nations, the choice remains whether to repel, resist, co-opt or appropriate the options through IFI interventions. The evidence from corporate bankruptcy law makes plain that developing nations do have choice and, if they so choose, they may significantly foil the financial hegemons, even in the most extreme of circumstances. That foiling of the intentions of the financial hegemons, of course, may be a rearguard action. Whether it can be sustained in the long term remains to be seen.

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