Asian Values and the Spirit of Capitalism: Pragmatism and Ideology in Southeast Asian Law Reform

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contract for its services. To resolve this dispute, the company resorted to neither the national courts of Malaysia nor to those of the United Kingdom, but rather to the International Centre for the Settlement of Investment Disputes (ICSID), a commercial arbitration body established under the auspices of the World Bank. However, the ICSID initially declined jurisdiction over the case, despite language in a bilateral investment treaty (BIT) between Malaysia and the United Kingdom which clearly sought to give the ICSID jurisdiction over such investment disputes.[3]

We will return to the case of the *Diana*, which remains unresolved at the time of writing, later in this essay. For now, let it simply illustrate a significant and hotly debated set of problems, and different visions of law and its role in development. Why would Malaysia and the United Kingdom each agree to reduce their sovereignty by giving jurisdiction over important commercial disputes to non-national courts? Who are the arbitrators of the ICSID and on what do they base their legitimacy? Whose interests are promoted by the standardization of international commercial laws, and whose are protected by maintaining a more complex variety of municipal laws?[4] Different answers to these questions mark a significant cleavage in contemporary thinking within the field of law and development (L&D). As Mohamed Shahabuddeen- an ICSID adjudicator who dissented in the case of the *Diana*- wrote, "the cleavage marks a titanic struggle between

[3] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia for the Promotion and Protection of Investments, U.K.-Malay., art. 7, May 21, 1981, 16 U.N.T.S. 5 [hereinafter U.K.-Malaysia. BIT]; *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10 (UK/Malaysia BIT)[hereinafter *Historical Salvors*, and *Historical Salvors Dissent*].

[4] The term "municipal law" is a term used in international law to mean any non-international law. It often means national state law, but also includes state, provincial, and local laws.

ideas, and correspondingly between capital exporting countries and capital importing ones."[5]

This paper is an attempt to understand the struggle of which Shahabuddeen writes. It is an attempt to make sense of the ongoing movement to create a harmonized, global system of commercial law through the establishment of model laws, uniform principles of corporate governance, trade and financial liberalization, and the establishment of international commercial arbitration bodies like the ICSID. Central to this struggle is the set of policies that has come to be known as the "Washington Consensus," and resistance to these policies. The Washington Consensus has become a catch-all phrase for policies that tend to support capital-exporting countries, such as trade liberalization of developing states, privatization of public enterprise and harmonization of commercial laws.

Focusing on Southeast Asia, I will argue that L&D has moved away from the Washington Consensus in recent years and that without completely rejecting it, L&D will continue this trend, resulting in a more pragmatic approach to commercial law harmonization in the region. Two main causes can be identified. The first is that the leading ideas within L&D itself have changed. As John Maynard Keynes famously wrote, "practical men, who believe themselves to be quite exempt from any intellectual influence, are usually the slaves of some defunct economist."[6] And so it is in Southeast Asia, where practical men and women have recently been influenced by a somewhat different set of economists than they were in the past. The second cause is the financial crises of the late 1990s that occurred in Russia, Latin America, and- of particular interest in this paper- in Southeast Asia. The Southeast Asian financial crisis began with the rapid

[5] *Historical Salvors Dissent*, para 62.
[6] Keynes, John Maynard. *The General Theory of Employment, Interest and Money* (New York : Harcourt, Brace & World, 1965), Ch. 24 "Concluding Notes" pg.383.

devaluation of the Thai *baht* in 1997 and spread throughout the region, ending Suharto's thirty-three year reign in Indonesia, bankrupting hundreds of thousands, and permanently shifting the debate about development away from the Washington Consensus. All of these crises were taken by many to be empirical refutations of the Washington Consensus approach to development. It is to be expected that the more recent financial crisis on Wall Street will reinforce memories of the 1990s and remind policy makers of the lessons learned in those years.

This paper is divided into three parts. The first part tells the story of the L&D movement up to the present moment, with a focus on collapse of the Washington Consensus in the past fifteen years and an exposition of the most prominent critiques. The second part explores the Southeast Asian financial crisis and how different schools of thought explained the crisis as supporting their own views of L&D. Some took the crisis as proof that further harmonization was needed, while others saw the crisis as evidence of the need for local solutions. The third part of this paper examines the influence of these debates on the ICSID as an arm of the World Bank. By examining some recent, post-crisis disputes between foreign nationals and Malaysia, I hope to show

Part I: Theories of L&D Since 1960

I submit that it is high time to end this debate about the Washington Consensus. If you mean by this term what I intended it to mean, then it is motherhood and apple pie and not worth debating. If you mean what Joe Stiglitz means by it, then hardly anyone who cares about development would want to defend it.

John Williamson (2002)[7]

The PM is….a

understanding of local legal cultures before attempting to transplant laws based on global or Western norms.[11] And developing countries have resisted this project on these same grounds, as well as by drawing on nationalist and anti-colonial sentiments. These sentiments have at times been voiced through the 'Asian Values' discourse, in which some academics and East Asian leaders have asserted that authoritarian regimes and state-controlled markets were not only functionally superior to this Western liberal project, but also somehow more consistent with Asian culture.[12]

The Washington Consensus, which was in effect roughly from 1980-1997, was just one in a series of periods in the history of thinking about development in general, and L&D in particular. We can view this history with the benefit of hindsight, but any discussion of the present and future state of L&D in Southeast Asia must recognize the dangers of interpreting recent events. With these dangers in mind, this section will

legal systems were a vital aspect of social and economic development.[14] During the "Critical Moment" (CM) of 1970's and 1980's, Marxists and dependency theorists criticized this transplantation of laws as a tool of an inequitable global capitalist order, while others criticized the lack of cultural awareness of those practicing legal development work and the inevitable failure of attempts to transplant culturally alien western laws in unique cultures. The fall of the Berlin wall and the collapse of the Soviet Union revived some of the earlier strands of L&D from the IM to new heights in the "Revivalist Moment" (RM). In this period, some scholars heralded "the end of history," and a boom in legal technical assistance was central to an effort to create a global regime of liberal, capitalist democracies and harmonized, efficient and universal laws of commerce.[15] Financial and economic crises in East Asia, Eastern Europe and Latin

The Washington Consensus and the Revivalist Moment:

Contemporary approaches to L&D are in many cases reactions to the failures of the RM. As such, an understanding of the current moment requires a detailed look at the era that preceded it, one in which development was dominated by the Washington Consensus. Even a cursory overview of contemporary development literature shows

problems (inflation, deficits, and macroeconomic instability), at a specific time (the 1980s), in a particular area of the world (Latin America). These policies were later implemented by rote all around the world, in different regions with arguably different sets of problems. This lead many, including Williamson himself, to complain that, "countries ought not to have adopted the Washington Consensus as an ideology."[21] The essential point here is that the principles of the Consensus, particularly property rights, are important and valuable tools for development, but that they are not the only, or even necessarily the most important, aspects. Today, the term 'Washington Consensus' usually connotes an ideological adherence to Williamson's ten principles, rather than a balanced

property rights and to foster the free markets that were seen as so essential to development, it was necessary to have functioning legal institutions, like the ICSID. Newton describes this period as one in which "L&D for the first time acquired an explicitly economic theory of law…this theory recognises the primary function of law as underwriting the efficiency of market exchange."[23] This was a period in which government was seen as an obstacle to development, and bureaucrats as selfish rent-seekers rather than capable technocrats, except insofar as government could enforce legal regimes which facilitated a market economy. There was also a strong current in the RM, based on a reading of Friedrich Von Hayek's *The Road to Serfdom,* of democracy promotion through the promotion of markets.[24]

As with the Washington Consensus approach to development more generally, one of the great failures of the RM was in over-generalizing a set of policy principles for institutional reform. Promoting the rule of law- by most definitions of the term- is a good

there is no such choice [between development paths] available. Western capitalism is the sole power, and the nations of the world must accept it - willingly or unwillingly."[26] It is widely believed today that practitioners of L&D took these policy prescriptions too far in the 1990s, and this begs the question of what went wrong. L&D in the PM has been largely concerned with answering this question, and in learning from the failures of the RM's ambitious project.

The Post-Moment: The Critiques Go Mainstream

In the PM there are many different theories in L&D, leading to a variety of policies among which developing countries can choose, including those that were hegemonic during the RM. The Consensus has come to an end, but the RM approach to L&D has certainly not disappeared. In fact, Newton argues that despite the move to the PM in L&D- that is, in academic thinking about how to use law in development- there has been little change since the 1990s in the applied legal technical assistance as carried out by the IFIs and bilateral aid agencies.[27] David Trubek's history of L&D, which is generally in agreement with Newton's, takes this conclusion so far as to conflate Newton's RM and the PM into a single academic phase; though he writes that "subtle changes can be glimpsed" in recent years.[28] Everybody agrees that the terms of the debate have shifted, but it is unclear just how fundamental a shift has taken place.

One reason for the collapse of the Consensus is that there is little historical proof that any country achieved industrialization or development by pursuing strict free-market policies. Economic historians taking a closer look at both European industrial

[26] Mahathir, "Global Viewpoint."
[27] Newton, "Law and Development," 1.
[28] Trubek, "The 'Rule of Law,' " p.81.

development, the successful post-World War II development of the four 'Asian Tigers' (Japan, Taiwan, Korea, and Singapore) and other East Asian States, generally agree that it was targeted state intervention in markets that provided a common thread for all of these development success stories.[29] Even the World Bank, in 1993, identified four areas of state intervention that had been common to all of the nations that had developed since World War II (most notably the Asian Tigers):

> (i) Ensuring *macroeconomic* discipline and macroeconomic balances;
> (ii) Providing physical and social *infrastructure*;
> (iii) Providing good *governance* more generally; and
> (iv) Raising *savings* and investment rates.[30]

With the empirical fact of state-led economic growth in many parts of East Asia, questions arose about the free-market policies being advocated for by global institutions.

One explanation for the failure of L&D prescriptions of the RM to learn from these successful examples of state-led growth is that the RM was a time in which global institutions, and especially the International Financial Institutions (IFIs) like the IMF and the World Bank, adopted this specific set of the policy-prescriptions because it was in the interests of Western commerce and finance to do so. By advocating for harmonized commercial laws based on those in the West, these interests would be able to easily understand the rules of investment- even if locals could not or if these harmonized laws were not in the interests of the state. By advocating for international arbitration bodies, it would be possible to remove the power of national courts to make decisions and

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[29] See, for example: Krugman, Paul, "The Myth of Asia's Miracle," *Foreign Affairs* 1994(6), p.76.
[30] International Bank of Reconstru

companies would not be forced to conduct legal proceedings in languages or in cultures with which they were not familiar. By advocating for fewer restrictions on trade and investment, they would be able to invest and disinvest more easily. Advocating for privatization would create business opportunities for Western capital. On this view, RM policies were not designed primarily to promote development and their value in combating corruption and promoting development, while sometimes real, was incidental. Perhaps the best known advocate of this explanation is the former Chief Economist of the World Bank, Joseph Stiglitz. In his 2003 book, *Globalization and its Discontents*, he turned the tables on the IFIs, suggesting that their own governance structures were in need of reform:

> Underlying the problems of the IMF and the other economic institutions is the problem of governance: who decides what they do. These institutions are dominated not just by the wealthiest industrial countries but by commercial and financial interests in those countries, and the policies of the institutions naturally reflect that….the institutions are not representative of the nations they serve.[31]

Stiglitz begins with an economic critique of the policy prescriptions of the Washington Consensus as practiced by the IFIs, and concludes that the failure of the IFIs to implement positive legal reforms could be explained by the fact that they did not have developing countries' best interests in mind in the first place.

A second, and related, approach to L&D in the PM is what I will call the Cultural Critique. This approach explains the failures of the RM as a result of 'normative

critics would adamantly not. Laura Nader makes this point somewhat sarcastically when she writes that during the RM, it was believed that "what other cultures lacked in law, the West would provide through conscious transfer via culturally unencumbered legal engineers."[33] It is felt that practitioners of L&D during the RM did not adequately understand the legal systems they were reforming, but had a strong belief that the systems should look and function in the way that their own systems did. Those who criticize the RM on these grounds are concerned primarily with the universal nature of the project itself, and advocate for a more diverse, empirical approach to law reform. This is a more complex task than that which was carried out under the RM. This approach requires a detailed understanding of local legal cultures by practitioners who have spent significant time in the country, or even in a particular region. The type of legal assistance envisioned here is incompatible with reform projects carried out by experts from the West on three-week missions to developing countries.

> they once seemed. Critics of the Washington Consensus and the legal orthodoxy it engendered have succeeded in opening up the discourse.[35]

While the RM concerns with corruption, governance, and rule of law, and the associated market-based solutions to these problems, are still with us, the global institutions which pursued the Washington consensus now echo the critics' words back to them in policy documents.[36]

One striking example of this is the change in the approach of prominent American development economist Jeffrey Sachs. In the 1990s, he advised ex-Soviet countries seeking to transition away from central-planning to rapidly liberalize their economies by selling state assets and privatizing industries. This was an archetypal Washington Consensus policy known as "shock therapy." Writing in support of these policies in *Foreign Affairs* at the time, Sachs explained that:

> If the United States and the other industrial democracies act with wisdom, they have a chance to consolidate a global capitalist world system, with profound benefits for both the rich and the poor countries…[but] fractious relations among the industrial democracies are already putting at risk the unprecedented opportunity to create a law-bound and prosperous international system.[37]

In a more recent lecture given at New York University in 2010, Sachs returned to this same idea with new eyes and outright rejected this earlier view. Explicitly invoking Hayek, he said that, "we were sold on the idea that the way to preserve democracy is a small state and that if the state is kept small we avoid the road to serfdom…*so that was one theory of economic governance...it's obviously a pathetic failure as a political*

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[35] Trubek, "The 'Rule of Law,'"p.93.
[36] See, for example: International Bank of Reconstruction and Development (2003). *Economic Growth in the 1990s:Learning from a Decade of Reform*. Washington, D.C.
[37] Sachs, "Consolidating Capitalism," p.50.

concept of Asian values is problematic because it promotes the idea that the rule of law, human rights and democracy are inherently colonial structures. There is a significant literature criticizing this discourse, but it is one with which this paper is not directly concerned.[41] For our purposes, Asian Values are simply a strategy to resist international or bilateral pressure to adopt harmonized commercial laws.

As a strategy to resist law reform, the Asian values discourse has both positive and negative elements. We may call it positive when the proposed reforms are poor or misguided, and we may call it negative when the reforms proposed are useful and ought to be implemented. For example, we may call Asian values negative in cases where they have been invoked to justify anti-democratic or authoritarian actions by government, for example when in Singapore in 1987 when a number of political dissidents were arrested.[42] More recently, the former Prime Minister of Thailand Thaksin Shinawatra has been widely accused of disregarding basic corporate governance and democratic

at the time.[44] In implementing the capital controls, the Malaysian leader invoked the themes of sovereignty, national difference, and colonialism that are central to Asian values.[45]

The Asian values discourse is strengthened by an L&D movement that prioritizes culturally appropriate legal reforms and is skeptical about the universal usefulness of laws or legal norms. As such, the PM should make it easier for countries to defend negative practices like corruption and official bribery. It will also provide Southeast Asian policy-makers with more leeway to make their own decisions instead of transplanting out-of-context legal systems promoted by global institutions. One strategy that they may use to do this is to invoke the themes of Asian values, such as anti-colonialism, cultural relativism, and the need for economic growth over institutional reform. In this way, the themes of the Asian Values discourse will continue to be a valuable tool for Southeast Asian states in their movement away from the Washington Consensus and in any attempts to pursue unique paths to development.

[44] Hewison, Kevin (2005). "Neoliberalism and Domestic Capital: The Political Outcomes of the Economic Crisis in Thailand." *The Journal of Development Studies* 41(2).
[45] Mahathir, "Global Viewpoint."

Part II: L&D in Southeast Asia: Boom, Bust and Echo

Malaysian Prime Minister Mahathir became the enfant terrible *of the world financial community by blaming a global capitalist conspiracy. He also imposed capital*

crisis affected Southeast Asian states, are described by Pasuk Phongpaichit and Chris Baker in their 2004 book, *Thaksin*:

> The IMF strategy assumed that debtor companies…would have to go bankrupt in large numbers, and the economy would regenerate through a "fire sale" of cheap distressed assets to foreign buyers. Financial firms were closed down, restrictions on foreign ownership removed, and asset sales orchestrated to favour foreign bidders.[52]

The IMF imposed these bankruptcies on some countries as a condition of the loans used to repay foreign creditors. So the IMF was on the one hand assuring the repayment of foreign creditors as an essential feature to maintain confidence in the local economy, while simultaneously demanding that local companies face bankruptcy in order to avoid moral hazard and to weed out weak and unproductive firms.

That the IFIs- in particular the IMF- continued to recommend the same policies that many felt had caused problems in the first place led to accusations of worse than incompetence. The economic warfare thesis put forward by Mahathir and other Asian commentators is allegation of intent to steal wealth from East Asia. This explanation is that American and European capitalists conspired together to bankrupt Asian firms, so that they could benefit from the later fire sale. In an article that he wrote for the *Bangkok Post* at the time, Mahathir set out this explanation:

> The weapon used by Western capitalists was simple. Their victims' currencies were devalued so that they lost much of their purchasing power. At the same time, the capitalists pulled out their money from the local stock markets, causing local banks, corporations and governments to face the prospect of bankruptcy. Without firing a single shot, the financiers not only destroyed wealth but also precipitated political and social instability. [53]

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[52] Phongpaichit, Pasuk, and Baker, Chris. *Thaksin: The Business of Politics in Thailand*, (Chiang Mai, Thailand : Silkworm Books, 2004), p.75.
[53] Mahathir, "Global Viewpoint."

This explanation, while dramatic, does not meet the test of Occam's razor. In order to adequately explain the crisis, it is not necessary to believe that there was an international conspiracy of financiers- many of whom are daily engaged in frantic battles against each other in the stock and bond markets of the world- to loot and pillage Southeast Asia's assets in a systematic fashion. It is enough to say that the reforms implemented during the RM were usually well-intentioned, but that they were misguided; that they were developed by people who did not represent those in the states subject to reforms. Stiglitz makes a distinction between the political capturing of IMF staff by financial interests and the ideological capturing of the institution. It is on these grounds that he refutes Mahathir's thesis, believing that IFIs were ideologically captured, and that "there was a far simpler set of explanations" than those proposed by Mahathir. Stiglitz believes instead that "the IMF was not participating in a conspiracy but it was reflecting the interests and ideology of the Western financial community" of which it was a part.[54]

While other Southeast Asian countries followed the IMF's prescriptions for dealing with the crisis, Malaysia took an unorthodox path. The country rejected IMF loans and undertook its own program for economic recovery. It imposed capital controls- making it illegal to withdraw currency from the country for a short period of time- and pursued an expansionary fiscal and monetary program to stimulate domestic demand.[55]

crisis-affected countries, many of which followed IMF prescriptions to slash government spending and further deregulate capital markets. According to Stiglitz:

> In retrospect, it appears that Malaysia's capital controls, so roundly condemned at the time they were imposed- with political leaders like Secretary

In voting out Chuan and replacing him with Thaksin in 2001, Thailand was voting out a leader who had followed the RM prescriptions of the IMF for one who promised to use the government to build a stronger Thailand. Lingering anger over the post-crisis sales of Thai businesses to foreign investors is likely one reason that the subsequent sale of Thaksin's communications company to a subsidiary of the Singapore government was so controversial.[58] Part of the explanation for the angry response to the selling-off a key Thai company to foreign interests is the fact that it stirred memories of the 1990s and betrayed Thaksin's nationalist mandate.

It is to be expected that Thailand's neighbor, Malaysia, would have reacted similarly. The expected result of the capital controls debate between the IMF and Malaysia's government under Mahathir is that the Malaysian government would use the experience as an excuse to deepen its involvement in the economy, and a lesson in why doing so is sometimes necessary. But the PM is a messy time in L&D, and the legal technical advice being given by aid agencies has not yet caught up with current thought in the field. Newton writes that while "Legal [Technical Assistance] has not changed significantly since the 1990s, L&D has emphatically done so!"[59] In other words, and despite the encouraging language found in some recent World Bank reports, the RM still dominates in legal technical assistance. And it is highly influential in Malaysia, which has recently given signs of a stronger free-market approach to development by rolling back its foundational bumiputera affirmative-action policy.

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[58] See, for a discussion of this controversy in the popular press: Ten Kate, Daniel, "Thailand's Thaksin Freeze-Out," *Asia Sentinel*, Thursday, June 14 2007.
[59] Newton, "Law and Development," 1.

The bumiputera policy privileges the ethnic Malay majority in Malaysia by, for example, requiring that some companies listed on the Kuala Lumpur stock exchange have 30% ownership by ethnic Malays.[60] This affirmative-action policy was a response to the historical domination of commerce by ethnic Chinese, though it also had a significant effect on global investors seeking to establish companies in Malaysia. The policy is inconsistent with RM goals, as it involves active redistribution of wealth and distortion of markets through government action. These RM themes were invoked in a recent comprehensive announcement of a new development model for Malaysia, one in which the bumiputera policy will play a lesser role. This *New Economic Model* recognizes that affirmative action was effective at reducing wealth inequality, but recommends a shift towards more market-based mechanisms:

It is now accepted that the past affirmative action programmes have ogras

However, while this official government document couches the policy-shift in pro-market language, the shift can also be explained by domestic political considerations. Malaysia's ruling coalition, the Barisan National, suffered a serious setback in the 2008 general election. While the coalition still has a dominant majority of seats, it failed for the first time in the country's history to achieve the 2/3 supermajority necessary to amend the constitution. As a result of this decline in electoral support, and facing the possibility of being removed from government with further declines, this shift in policy may be an attempt to stem the losses of non-Malay support to the opposition coalition. Without this support, UMNO, the main party in the ruling coalition, "might find its base confined to pockets of the Malay heartland while its non-Malay partners suffer total annihilation."[63] Despite its utilization of RM-style rhetoric, it is not clear that any move away from state intervention and affirmative action in the economy is driven by either academic L&D or by advice from global institutions. Rather, it seems that the Barisan National is basing its policies on domestic political considerations.

Explanations for the crisis have had important political and academic impacts. If the crisis could be blamed on international financial speculation (the herd mentality thesis), this would lend support to more state regulation. However, if it was the nature of East Asian develop0.2 (c) 0.2 (a82 (s) -0.(nd s) 1 i) 0.2 () 0 0.2 () 0 03 (ore) 0.2 (s) -0..2 (l) 0.2 (f) -0.5(s)

of the RM led to the over-exposure. The contrast between the Malaysia's and Thailand's initial responses to the crisis is strong evidence for this conclusion and, with the rise of Thaksin in the wake of the crisis, there were indications that this lesson could lead to a larger role for the state in Southeast Asia. Malaysia, however, may be moving the other direction. More likely, and just as it was during the crisis, Malaysia's government may be relatively unconcerned about the advice being given by global institutions, focusing instead on pleasing domestic constituencies.

It is clear that global institutions exert some level of influence on the policies of these Southeast Asian states, however, and that the nature of that influence has changed since the financial crisis. Even the IMF has recently endorsed capital controls as a legitimate tool of state policy. In a recently released position note on the usefulness of capital controls, the IMF wrote that the "use of capital controls—in addition to both prudential and macroeconomic policy—is justified as part of the policy toolkit to manage [capital] inflows."[64] This reversal of its longstanding position is something that many will see as a far too-late

Julian Mortenson has written about the lack of such an exception in the Washington Convention, "this is an international Full Faith and Credit Clause without peer outside the supranational European arrangement," and it is this aspect of the ICSID that has made it particularly controversial.[68]

While its creation predates the RM, the ICSID is an institution firmly in line with RM goals. Like other instruments of international commercial law, it is meant "to clarify, to fill gaps, and to reduce the impact of peculiarities of individual countries' laws."[69] But by attempting to remove the power to resolve important disputes with foreign investors from national courts, the ICSID has opened itself to much controversy during the PM. Moreover, and unlike the decisions of most national court systems, many ICSID awards are unpublished- raising further concerns about its adherence to the rule of law. Despite the private nature of many disputes, and while the two cases considered here involve relatively small sums, the ICSID is known to decide cases of significant monetary and political importance. Mortenson writes that:

> ICSID tribunals now resolve disputes with valuations that run to hundreds of millions of dollars and with subject matters that range from contract disputes and regulatory corruption to confiscatory tax policy and outright nationalization. Despite the high political and financial stakes of its caseload, ICSID has evolved into a notably well-functioning mechanism for adjudicating international economic disputes.[70]

The ICSID, while obscure, is a competent adjudicative body which decides high-profile international disputes. In support of Mortenson's conclusion that the ICSID is well-

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U.S.T. 2317; T.I.A.S. 6997; 330U.N.T.S. 38 [hereinafter cited as the New York Arbitration Convention]. Article V(2)(b).

[68] Mortenson, Julian Davis, (2010). "The Meaning of 'Investment:' ICSID's *Travaux* and the Domain of International Investment Law." *Harvard International Law Journal* 51, p.265.

[69] Lowenfeld, Andreas. "Lex Mercatoria: An Arbitrator's View," in Thomas Carbonneau (ed) *Lex Mercatoria and Arbitration* (Yonkers, NY: Juris Publishing, 1998).

[70] Mortenson, "The Meaning of Investment," p.267.

functioning are the following examples in which ICSID adjudicators have confronted the controversy over its privative clause by narrowly interpreting the jurisdiction of the body.

An ICSID tribunal has jurisdiction only over an 'investment' in a contracting state, but the Washington Convention does not define the term 'investment.'[71] An additional restriction on its jurisdiction is that the ICSID can intervene only where the state has consented to have the dispute arbitrated by the ICSID, either in a clause of a contract, on an *ad hoc* basis for a particular dispute, or through a Bilateral Investment Treaty (BIT) with a state of which the claimant is a national. [72] This jurisdictional provision, contained in Article 25 of the Washington Convention, has been used in recent years as a kind of a stand-in for the absent public policy exception. Mortenson writes disapprovingly of the practice of narrowly construing ICSID jurisdiction, but he gives an able description:

> It likely stems from a version of the hydraulic relationship between right and remedy….essentially it appears that tribunals may be cutting back on their jurisdiction in an ill-formulated (and perhaps even unconscious) effort to communicate modesty to their state-constituents and *avoid applying what some view as the investment regime's increasingly overbroad substantive rules.*[73] [Italics added].

While Mortenson takes the position that the ICSID has been led to an error of law by inappropriately considering broader policy considerations, the following two disputes show that the practice of narrowly construing the ICSID's jurisdiction is sound on both legal and policy bases. This narrow construction of jurisdiction is a sign that the ICSID is responsive to recent shifts in L&D, and the growing discomfort with global legal harmonization.

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[71] Mortenson argues, based on the *Travaux Preparatoires* of the Washington Convention, that a broad definition was intended, but this raises the question of why a broad definition is not in the language of the Convention. There was a dispute at the time of drafting between developed and developing countries on whether to adopt a narrow or a broad definition. Eventually, a compromise was reached to leave the term undefined. Mortenson's position is that this leaves the term open to broad interpretation.
[72] Mortenson, "The Meaning of Investment," p.268.
[73] Mortenson, "The Meaning of Investment," p.272.

Philippe Gruslin v. Malaysia

One case engaging this debate over jurisdiction is *Philippe Gruslin v. Malaysia* [*Gruslin v. Malaysia*], in which a Belgian national attempted to sue the government of Malaysia, through the ICSID, over the capital controls that it imposed in response to the Southeast Asian financial crisis. Mr. Gruslin had invested U.S. $2.3 million in Malaysian stocks through a company in Luxembourg. This company then invested in a portfolio of stocks listed on the Kuala Lumpur Stock Exchange. These stocks lost 52% of their value during the financial crisis and Mr. Gruslin claimed that the cause of his loss was the capital controls.[74]

Under the New York Convention, the Malaysian government may have relied on the public policy clause as a defense. However, with the absence of a public policy exclusion in the Washington Convention, their best option was to make the jurisdictional argument; to argue that an indirect investment in stocks did not qualify as an 'investment' for the purposes of Article 25 of the Washington Convention. In making this argument, however, they were faced with the problem of a broad definition of investment in a Malaysia-Belgium BIT. That BIT provided that any investment dispute between a national of one state and a national of the other could be arbitrated by the ICSID. The BIT also stipulated that "the term 'investment' shall comprise every kind of assets [*sic*] and more particularly," a variety of specific types of investment.[75] Despite this, counsel for Malaysia argued that "Malaysia intended to limit the encouragement and protection of foreign investment made in its territory to investment made in *projects that contributed to*

[74] *Gruslin v. Malaysia*,, at 8.3.
[75] *Gruslin v. Malaysia*, at 10.1.

the manufacturing and industrial capacity of the country"[76][Italics addes]. This argument was successful. The ICSID tribunal found in favour of Malaysia, deciding that because Mr. Gruslin made "mere investments in shares in the stock market" rather than carrying out an approved development project of his own, his claim could not be heard by the ICSID.[77]

Malaysian Historical Salvors:

While the tribunal in *Gruslin v. Malaysia* couched its decision in the language of strict statutory interpretation, *Historical Salvors* explicitly engages the debate about harmonization of laws and the proper role of the ICSID in promoting development. Introduced at the beginning of this paper, *Historical Salvors* involves the dispute between a British Salvage Company and the Malaysian government over the shipwreck of the *Diana.*[78] Like *Gruslin v. Malaysia*¸ this dispute turns on whether the dispute qualifies as an investment, which is not defined in the Washington Convention. After a sole arbitrator decided in favour of Malaysia on much the same grounds as in *Gruslin v. Malaysia*, the case was appealed to a higher ICSID tribunal. Overturning the sole arbitrator's decision, the majority in *Historical Salvors* decided that the word investment is open to virtually any definition in a BIT.

Their position, however, fails to recognize the historical role of the ICSID as an arm of the World Bank, and the fact that this role affects the definition of the word investment. As Shahabuddeen wrote in his dissent, "the term 'investment' bears some

[76] *Gruslin v. Malaysia.*, at 17.1.
[77] *Gruslin v. Malaysia*, at. 25.5.
[78] *Historical Salvors*

meaning: it is not meaningless."[79] In searching for some meaning of this word, it is important to remember that the preamble of the Washington Convention provides that the ICSID is "established under the auspices" of the World Bank, the formal name of which is the International Bank of Reconstruction and *Development*. This preamble further confirms this commitment to development, beginning with the words, "considering the need for international cooperation for *economic development*."[80] Extending the jurisdiction of the ICSID- and its blanket privative clause- to every type of dispute over any kind of asset, is unjustified. The mandate of both the World Bank and the ICISD is to promote development, and assets or projects that do not do so may be protected by national courts or by alternate international agreements- but they should not fall within the jurisdiction of the ICSID.

Adhering to this logic, the initial sole arbitrator in the dispute over the proceeds from the *Diana* found that the term investment included some aspect of development. In so doing, he followed a line of tribunal decisions that includes *Gruslin v. Malaysia*.[81] In overturning this decision, the majority in

arbitrator's decision, without making a decision about whether the contract was actually breached or if damages were to be awarded. The salvage company is now free to pursue another decision against the Malaysian government, as the original decision has been annulled.

Returning to the earlier discussion of the broader debates within L&D, we can view the majority *Historical Salvors* decision as emblematic of perspectives from the RM. It is concerned with providing a coherent international framework of laws. The decision protects the freedom of contract by allowing governments to define 'investment' however they desire in BITs. The arbitrators' over-riding concern is that of certainty for the investor. Without the ICSID, they write, "the investor is left without international recourse altogether."[83] In dissent, however, Shahabuddeen speaks for the critics of the PM:

> It is difficult to see how a purely commercial entity, intended only for the enrichment of its owners and not connected with the economic development of the host State, is entitled to bring before ICSID a dispute concerning an investment in the host State. [The] ICSID would seem to have lost its way: it is time to call back the organization to its original mission.[84]

Shahabuddeen is willing to accept that some state sovereignty must be conceded in order to provide for a safe investment atmosphere, but he is not as concerned as the majority with providing international recourse for investors in all circumstances. His belief in the role of the ICSID to protect investors is tempered by a belief that this protection is limited to projects which have some benefit for developing states. He writes of the 'original mission' of the ICSID, in which a state agrees to receive something- namely, economic development- in return for a diminution of its sovereignty. Like many in the PM,

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[83] *Historical Salvors*, at 62.
[84]

Shahabuddeen does trust international tribunals- even the one on which he sits- to decide what is in the best interests of states with which they have little contact and in which they have little stake. Remembering Stiglitz's and Nader's criticism that the IFIs often had too little empirical knowledge of the states to which they provided legal technical assistance, Shahabuddeen's dissent is a display of humility and deference to local control in line with PM values.

Conclusion:

The project of creating and deepening a globally interdependent market, linked by mutually recognized and recognizable legal systems, continues. In the past, this project often provoked either unanimous approval or excited dissent. In the development discourse of the 1990's, there was a divide between those "confident, largely right-wing first worlders for whom 'development' was a project of technical adjustment and economic management" on the one hand, "and equally confident, if often angrier left-wing students from developing societies for whom the term development brought to mind the entire field of national- and international- political struggle" on the other.

views, in which developing countries adopt Western commercial legal norms in fits and starts, and in which an ICSID tribunal invokes opposite sides of this great debate in respectfully disagreeing about the proper disposition of a case. This is a more explicitly political period in L&D, one in which grandiose ideology is disdained in favour of the recognition that different legal systems favour different domestic and foreign interest groups. It should no longer be possible to design a legal system in a developing country without being cognizant at every step of "whose ox should be gored in the name of which development path."[86] Hopefully, we can now recognize that markets are not inherently good or evil, but that they are a tool which we should use and consider carefully when designing legal systems.

Southeast Asia has long taken such a practical approach to the transplantation of foreign legal norms, even where extreme pressure was applied to choose a particular path. Considering Malaysia's success in combating the worst effects of the 1997 financial contagion, and the general direction of academic L&D today, it is likely that Southeast Asia will continue to adopt Western-style legal systems in a selective fashion. Andrew Harding describes the region's approach to law transplantation in these terms, and the description applies to PM approaches to L&D more generally:

> If the rule-of-law is a "Western" concept, which is now clearly debatable, I would beg to point out that we do not ask of the internet or satellite television whether they will work because they are Western concepts. The issue is simply whether they serve society's interests.[87]

Following from this principle, we can predict that Malaysia will use the tool of affirmative action quotas for as long as it serves the dual interests of reducing wealth inequality and maintaining support for UMNO and the Barisan National coalition.

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Similarly, Thailand shifted towards a more interventionist approach under Thaksin in the wake of apparent failure of the free-market to serve Thai interests. The ICSID has struggled with its interference in state sovereignty. If there is a uniting theme in all of the post-crisis examples considered in this paper, it is this: in each case, it has been difficult to see a clear stance in favour of or against markets as an ideal. Instead, we see a complex and ambivalent approach, with a careful weighing or debating of the merits of the specific issue. If this piece-meal approach to legal development, of deciding policy on a case-by-case basis, is the contemporary approach to L&D, then the PM is to be welcomed. The polarized approaches of the past, focused as they were on the market-

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