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New Transnational Governance and the Changing Composition of Regulatory Pluralism in Southeast Asia

Abstract: Over the past three decades, Transnational Production Regimes (TPRs) have become the main source of technical and regulatory knowledge for Southeast Asia corporations. Typically TPRs transfer knowledge from lead firms located in the industrial North to supplier firms located in Southeast Asia. Regulatory knowledge transferred through TPRs largely bypasses Southeast Asian laws and legal institutions to directly influence the behavior of supplier firms. Although socio-economic studies show that TPRs are responsible for generating much wealth creation in the region, they hardly register in the socio-legal literature. Drawing on ethnographic studies conducted in Vietnam, this paper will attempt to explain why different types of TPRs produce different regulatory responses in Vietnamese firms. Preliminary findings suggest differences in the way that regulatory knowledge transmitted through Northeast Asian and Euro-American TPRs is absorbed and integrated into the organisational fabric of Vietnamese firms. They also shed light on two well-documented phenomena in Vietnam. In conclusion the paper will argue that TPRs displace state commercial laws and are partially responsible for the slow progress of conventional law and development projects in changing regulatory practices. It will contend that the different kinds of TPRs generate regulatory pluralism and the uneven application of state law in different business sectors.

Keywords: Vietnam, regulation, transnational production

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I. INTRODUCTION

Along with ethnic, religious and cultural diversity, legal pluralism is one of the enduring tropes about Southeast Asia.¹ Barry Hooker's pioneering research showed how colonial legal systems overlaid and interacted with pre-existing regulatory systems.² He challenged legal positivism by demonstrating that state legal orders did not displace pre-existing legal orders, but rather co-existed with them in the same geopolitical space. Subsequent research confirms that the massive transfer of global commercial law into Southeast Asia since decolonisation also excited pluralistic patterns of interaction with pre-existing legal and regulatory orders.³

In the last 30 years, there has been a transformation in the global diffusion of legal and regulatory precepts and practices in this region.⁴ Following independence, Southeast Asian countries actively borrowed commercial laws from international treaties and industrialised countries located in and outside Asia. They have enacted commercial legal frameworks comprising property right protection, corporate governance, insolvency and competition laws that replicate the rules-based hierarchies found in Euro-American regulatory regimes. Legal harmonisation projects sponsored by the international development agencies, such as the World Bank and United Nations Development Programme (UNDP), as well as regional organisations such as Association of South East Asian Nations (ASEAN), aim to flatten the remaining regional differences. Harmonisation began modestly in ASEAN countries during the early 1990s with a common customs and tariff regime, but recently broadened to encompass

1 The literature is vast, but see Jane Collier *et al.*, "Editors' Introduction" (1994) 28 *Law & Soc'y Rev.* 417; Andrew J. Harding, "Comparative Law and Legal Transplantation in South East Asia: Making Sense of the 'Nomic Din'" in D. Nelken & J. Feest, eds., *Adapting Legal Cultures* 199–222 (Oxford: Hart Publishing, 2001).

2 See M. B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws* (Oxford: Clarendon, 1975).

3 See, e.g., Bruce Carruthers & Terrence Halliday, "Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes" (2006) 31:3 *Law & Soc. Inquiry* 521 ("Carruthers & Halliday, 2006"); Franz von Benda-Beckmann & Keebet von Benda-Beckmann, "Transnationalisation, Globalisation and Pluralism: A Legal Anthropological Perspective", in Christoph Antons & Volkmar Gessner, eds., *Globalisation and Resistance: Law Reform in Asia since the Crisis* 53–80 (Oxford: Hart Publishing, 2007).

4 See von Benda-Beckmann & von Benda-Beckmann, *ibid.*; John Gillespie, "Developing a Framework for Understanding the Localisation of Global Scripts in East Asia" in Andrew Halpin & Volker Roeben, eds., *Theorising Legal Globalization* 209–232 (Oxford: Hart Publishing, 2009).

an ambitious uniform competition regime and full economic integration of member states in 2015.⁵

Just as colonial laws failed to entirely displace pre-existing regulatory practices, recent legal harmonisation projects are generating variegated regulatory responses throughout Southeast Asia.⁶ To some extent, this plurality is attributable to differences in the legal systems and institutional capacities among and within Southeast Asian countries. But this is only part of the story. In countries like Singapore, where the business community has long integrated legal hierarchies and rights protection into their organisational structures, harmonisation reforms have proceeded smoothly.⁷ At the other extreme, in countries where profound differences remain between state and domestic business regulatory traditions, such as Indonesia⁸ and Vietnam,⁹ legal harmonisation projects struggle to move beyond the statute books and influence deeply embedded self-regulatory practices.

What remains puzzling is that regulatory pluralism remains a defining feature in most Southeast Asian countries, despite the integrative forces of economic development, assimilation into the global economy and unremitting legal harmonisation projects. This article looks at the new transnational governance regimes that are transforming this region for fresh answers to this puzzle.

In the last three decades, a profound change has occurred in the global diffusion of legal and regulatory ideas into Southeast Asia. A new transnational governance has arisen that is autonomous from multi-lateral organisations, such as United Nations agencies, World Trade Organisation and Organisation for Economic Cooperation and Development, and regional organisations, such as

5 See H. Soesastro, "Implementing the ASEAN Economic Community (AEC) Blueprint" in H. Soesastro, ed., "Deepening Economic Integration: The ASEAN Economic Community and Beyond" (2007) 1:2 ERIA Research Project Report.

6 See generally Bruce Carruthers & Terrence Halliday, "Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes" (2006) 31:3 Law & Soc. Inquiry 521; John Gillespie, *Transplanting Commercial Law Reform* (Aldershot: Ashgate, 2006).

7 The World Bank, "Doing Business Report 2013" provides a rough measure of the relationship between business regulation and commercial activity. The Southeast Asian rankings are: 1 Singapore; 12 Malaysia, 18 Thailand, 99 Vietnam, 128 Indonesia and 138 Philippines 138. See World Bank, "Doing Business Report 2013", online: Doing Business: Measuring Business Regulations <<http://www.doingbusiness.org/rankings>> (last accessed 30 April 2013).

8 See Benny Tabalujan, "Why Indonesian Corporate Governance Failed – Conjectures" (2002) 15:2 Colum. J. Asian Law 141.

9 See John Gillespie, "Exploring the Role of Legitimacy in Framing Responses to Global Legal Reforms in a Transforming Socialist Asia" (2011) 28:2 Wis. Int'l L.J. 534 ("Gillespie 2011").

ASEAN.¹⁰ Often responding to regulatory failures by these state-directed organisations, this new transnational governance sets standards for the environment, labour, fair trade and many other forms of commercial regulation.¹¹ New transnational governance is promoted by a plethora of transnational non-government organisations (TNGOs), such as the International Standards Organization (ISO), and consumer-based TNGOs, such as the forest stewardship council and fair trade alliance, which respectively encourage environmental sustainability and fair returns for workers.¹²

Over the same period, lead firms based in the industrialised North developed supply chains and investment networks with supplier firms located in Southeast Asia.¹³ Known in the literature as transnational production regimes (TPRs), these networks transfer goods, capital and regulatory knowledge between lead and supplier firms. Critically for this study, the socio-economic literature shows that TPRs transfer more than technical knowhow; they also convey regulatory knowledge, such as *kaizan* routines, corporate governance and decentralised flexible management practices to supplier firms.¹⁴ Literally meaning improvements, *kaizan* routines were developed in Japan during the 1960s and 1970 to continually improve manufacturing processes in the

10 See Gunther Teubner, “Global Bukowina” in Gunther Teubner, ed., *Global Law Without a State* 3–28 (Brookfield: Dartmouth, 1997) (“Teubner 1997”).

11 See Gunnar Folke Schuppert, “New modes of governance and the rule of law: the case of transnational rule-making” in Michael Zürn, Andre Nollkaemper & Randall Peerenboom, eds., *Rule of Law Dynamics: In an Era of International and Transnational Governance* 90–110 (New York: Cambridge University Press, 2012); Richard Appelbaum, William Felstiner & Volkmar Gessner, *Rules and Networks: The Legal Culture of Global Business Transactions* 159–188 (Oxford: Hart Publishing, 2001).

12 See Benjamin Cashmore, “Legitimacy and Privatization of Environmental Governance: How Non-state Market Driven Systems gain Market Recognition” (2002) 15 *Governance* 502; Tim Bartley, “Certifying Forests and Factories: States, Social Movements, and the Rise of Private Regulation in the Apparel and Forest Products Field” (2003) 31:3 *Politics and Society* 433.

13 The literature is vast, but see Inge Ivarsson & Claes Göran Alvstam, “Upgrading in Global Value-Chains: A Case Study of Technology-Learning Among IKEA-Suppliers in China and Southeast Asia” (2011) 11:4 *Journal of Economic Geography* 731; Timothy J. Sturgeon & Richard K. Lester, *The New Global Supply Base – New Challenges for Local Suppliers in East Asia* (Cambridge, MA: Industrial Performance Centre, Massachusetts Institute of Technology, 2003) (“Sturgeon & Lester 2003”); Fukunari Kimura, “International Production/Distribution Networks in Indonesia” (2005) 43 *The Developing Economies* 17; Beata Javorcik, “Can Survey Evidence Shed Light on Spillovers from Foreign Direct Investment?” (2008) 23:2 *World Bank Research Observer* 139.

14 See generally Keith Provan & Patrick Kenis, “Modes of Network Governance: Structure, Management, and Effectiveness” (2008) 18:2 *Journal of Public Administration Research and Theory* 229.

automotive and electronic industries. This transfer of regulation is reordering entire industries in Southeast Asia, especially in electronics and vehicle manufacturing.¹⁵ What unifies the otherwise diverse new governance regimes is the transfer of regulatory knowledge that largely, if not entirely, bypasses state legal systems and engages directly with firms in Southeast Asia.

This article explores the under-researched and under-theorised regulatory impact of TPRs on firms located in Southeast Asia. It is argued that this regulatory knowledge shapes the way supplier firms in Southeast Asia order their transactions and interact with state-sponsored commercial laws.

Not only have the number of TPRs in Southeast Asia rapidly increased over the last 30 years,¹⁶ in addition there is compelling evidence that the character of regulatory flows has changed. Thirty years ago, Euro-American firms accounted for over 50 per cent of trade and investment with Southeast Asia; by 2010, East Asian firms controlled more than 70 per cent of production networks and more than 80 per cent of investment.¹⁷ First Japan, then Taiwan and Korea, and now China¹⁸ are using TPRs to export regulatory knowledge into Southeast Asian firms. It is argued that this shift from Euro-American to intra-Asian TPRs has radically reshaped the character of regulatory ideas transferred into Southeast Asia and, as a corollary; it is reshaping regulatory pluralism in Southeast Asia. There are four parts to the argument:

15 See Fredrick Deyo, Timothy J. Sturgeon & Momko Kawakami, “Global Value Chains in the Electronics Industry: Was the Crisis a Window of Opportunity for Developing Countries?” in Oliver Cattaneo, Gary Gereffi & Cornelia Staritz, eds., *Global Value Chains in a Postcrisis World* 245–302 (Washington, DC: World Bank Publications, 2010).

16 See Timothy J. Sturgeon & Richard K. Lester, *The New Global Supply Base – New Challenges for Local Suppliers in East Asia* (Cambridge, MA: Industrial Performance Centre, Massachusetts Institute of Technology, 2003) at 4. See also Mike Peng & Jessie Zhou, “How Network Strategies and Institutional Transitions Evolve” (2005) 22 *Asia Pacific Journal of Management* 321.

17 For example, in 2000, U.S. firms accounted for approximately 30 per cent of trade with Asia, but currently they account for less than 14 per cent. Over the same timeframe, intra-Asian trade has increased from 30 per cent to more than 60 per cent, and intra-Asian investment has increased from around 16 per cent in 1991 to more than 79 per cent in 2005. See Paul Gruenwald & Masahiro Hori, “Intra-Regional Trade Key to Asia’s Export Boom” *IMF Survey Magazine* (6 February 2008), online: IMF Survey Magazine <<http://www.imf.org/external/pubs/ft/survey/so/2008/car02608a.htm>>; Durgesh K. Rai, “Asian Economic Integration and Cooperation – Challenges and Way Forward” *East Asia Forum* (1 July 2010), online: East Asia Forum <<http://www.eastasiaforum.org/2010/07/01/asian-economic-integration-and-cooperation-challenges-and-way-forward/>> (last accessed 18 November 2013).

18 See Tang Haiyan & Zhang Huiqing, “China Reshapes the East Asian Production Network” *China Economist* 4:2 (2009), online: China Economist <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1544327##> (last accessed 18 November 2013).

- First, although regulatory knowledge transferred through TPRs bypasses formal legal institutions and legislative frameworks, Southeast Asian states play a facilitative role in laying the administrative foundations for intra-Asian TPRs. For example, regional treaties such as ASEAN + 3 and bilateral trade agreements with Northeast Asian countries promote intra-Asian TPRs.¹⁹
- Secondly, Southeast Asian firms are more likely to absorb and integrate the regulatory precepts and practices conveyed through intra-Asian TPRs than Euro-American TPRs.
- Thirdly, intra-Asian TPRs promote a different type of regulation to most Euro-American TPRs. For example, Euro-American TPRs are more likely to be juridified than intra-Asian TPRs and consequently are more receptive to rules-based hierarchies and state-sponsored commercial laws. Here the term “juridified” means integrated into state laws and legal institutions. Euro-American TPRs also are more likely to incorporate labour, environment and fair trade standards that reflect consumer demands in their home jurisdictions.²⁰ In contrast, intra-Asian TPRs are more likely to supplant or circumvent price-driven market transactions with particularistic ties rooted in personal and social connections and long-term trust.²¹ They consequently encourage decentralised relational management practices that de-emphasise rules-based hierarchies and state-sponsored commercial laws.
- Fourthly, knowledge that spills over from intra-Asian TPRs is gradually changing the way in which entire industries interact with each other and with state-based regulators.²²

19 See Kozo Kiyota, Yoko Sazanam & Yu Ching Wong, “Intra-regional Trade in Asia: Dynamics of Production Sharing”(2006) [unpublished], online: <https://www.univ-lehavre.fr/actu/itlcsge/kiyota_2.pdf> (last accessed 18 November 2013).

20 See Raphael Kaplinsky & Masuma Farooki, “Global Value Chains, The Crisis and the Shift of Markets from North to South” in Oliver Cattaneo, Gary Gereffi & Cornelia Staritz, eds., *Global Value Chains in a Postcrisis World* 143–146 (Washington, DC: World Bank Publications, 2010).

21 See generally Fredrick Deyo, “Addressing the Development Deficit of Competition Policy: The Role of Economic Networks” in Michael Dowdle, John Gillespie & Imelda Maher, eds., *Asian Capitalism and the Regulation of Competition* 283–300 (Cambridge: Cambridge University Press, 2013); Peter Evens, *Embedded Autonomy: States and Industrial Transformation* (Princeton, NJ: Princeton University Press, 1995).

22 This spill-over effect brought about by commercial interaction and worker mobility. See Luiz De Mell, “Foreign Direct Investment in Developing Countries and Growth: A Selective Survey” (1997) 34:1 *Journal of Development Studies* 1; AnnaLee Saxenian & Jinn-Yuh Hsu, “The Silicon Valley–Hsinchu Connection: Technical Communities and Industrial Upgrading” (2001) 10 *Industrial and Corporate Change* 893.

This article argues in Part II for a re-conceptualisation of legal pluralism that de-emphasises state regulation and re-focuses on the interaction between TPRs and domestic business networks. Next, it contrasts in Part III the regulatory objectives and styles of Euro-American and East Asian TPRs. It then examines in Parts IV and V, four case studies showing how firms in Vietnam responded to Euro-American and East Asian TPRs. Finally, it concludes in Part VI that Euro-American and East Asian TPRs transmit different regulatory messages into Southeast Asia, generating new types of regulatory plurality in this region.

II. RECONCEPTUALISING LEGAL PLURALISM

Although conventional understandings about legal pluralism demonstrate the diversity of legal culture in Southeast Asia and effectively counter state-centred legal narratives, they do not adequately account for the regulatory impact of new transnational governance.²³ There is a pressing need for legal pluralist scholarship to move beyond the celebration of diversity, as a foil to state monism, and refocus on the non-state and hybrid regulators that recognise and give authority to state laws and non-state norms and regulatory traditions.

This article turns to regulatory and systems theory to develop a conceptual framework to understand how new transnational governance is absorbed and integrated by Southeast Asian firms. The framework connects with legal consciousness scholarship about East Asia,²⁴ because both evaluate external regulation from internal epistemic assumptions. Before outlining the framework, it is instructive to point out the shortcomings in conventional legal pluralism.

As used by Hooker, legal pluralism described the co-existence of state and non-state legal systems in Southeast Asia.²⁵ John Griffith²⁶ gave the concept a sociological edge. He borrowed from Sally F. Moore the notion

23 For a discussion about the need for legal pluralism to address new transnational governance, see Ralf Michaels, “Global Legal Pluralism” (2009) 5 *Annual Review of Law and Society* 243.

24 See generally David M. Engel & Jaruwan S. Engel, *Tort, Custom, and Karma: Globalization and Legal Consciousness in Thailand* (Stanford, CA: Stanford University Press, 2010).

25 See Michael Dowdle, “Whither Asia? Whither Capitalism? Whither Global Competition Law?” in Michael Dowdle, John Gillespie & Imelda Maher, eds., *Asian Capitalism and the Regulation of Competition* (Cambridge: Cambridge University Press, 2013) at 306.

26 See John Griffiths, “What Is Legal Pluralism?” (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1 at 2–5.

that state and non-state subsystems function as “semi-autonomous social fields” that are defined by their capacity to “generate rules and coerce or induce compliance.”²⁷ This version of legal pluralism invested non-state “semi-autonomous” social fields with law-like obligatory characteristics and imagined a conceptual architecture in which social space is comprised of stacked state and non-state subsystems. Griffith echoed Eugene Ehrlich’s²⁸ concern that societies are organised around group activities, and since each group has its own self-regulating systems of rules, state law is only one of many governance systems.

Theorists mount two main objections to Griffith’s approach. First, as Brian Tamanaha²⁹ observed, in using “non-state legal systems” “not only does the term ‘law’ thereby lose any distinctive meaning – law in effect becomes synonymous with other forms of normative order, like moral or political norms, or customs, habits, rules of etiquette and even table manners.” Secondly, although Griffith’s architecture of “stacked” subsystems highlights diversity and the autonomy of subsystems,³⁰ it fails to adequately account for the integrative and collaborative forces that bring different regulatory subsystems together to order particular social fields. To understand how the new transnational governance regulates Southeast Asian firms, we need to refocus attention on the hybrid regulators that integrate new knowledge into supplier firms and promote knowledge spill-overs into the business community.³¹

This article draws on recent regulatory³² and systems theory³³ to propose an alternative conceptualisation of legal pluralism. Regulation is used here to

27 See Sally F. Moore, “Law and Social Change in the Semi-Autonomous Social Field as an Appropriate Subject of Study” (1973) 7 *Law & Soc’y Rev.* 719 at 722; Sally F. Moore, “Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949–1999” (2001) 7:1 *The Journal of the Royal Anthropological Institute* 95.

28 See Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (originally published 1936) (New Brunswick, NJ: Transaction Publishers, 2002) at 21, 167–168.

29 Brian Z. Tamanaha, “The Folly of the ‘Social Scientific’ Concept of Legal Pluralism” (1993) 20:2 *Journal of Law and Society* 192 at 193, 195–199. Also see Brian Tamanaha, Caroline Sage & Michael Wilcock, eds., *Legal Pluralism and Development* (Cambridge: Cambridge University Press, 2012).

30 See Sally Engle Merry, “Legal Pluralism” (1988) 22 *Law & Soc’y Rev.* 873.

31 See Kanishka Jayasuriya, “Institutional Hybrids and the Rule of Law as a Regulatory Project” in Brian Tamanaha, Caroline Sage & Michael Wilcock, eds., *Legal Pluralism and Development* 145–161 (Cambridge: Cambridge University Press, 2012) (“Jayasuriya 2012”).

32 *Ibid.* Also see Peer Zumbansen, “Transnational Legal Pluralism” (2010) 10:2 *Transnational Legal Theory* 141.

33 See Richard Noble & David Schiff, “Using Systems Theory to Study Legal Pluralism: What Could be Gained?” (2012) 46:2 *Law & Soc’y Rev.* 265 (“Noble & Schiff 2012”).

describe the system of rules and standards governing the conduct of state and social actors. It does not presuppose any particular institutional or organisational arrangements nor does it assume any techniques or normative standards.³⁴ Regulatory theory draws attention to the institutions (state and non-state) and organisational arrangements that recognise and give authority to laws and unwritten norms and practices. As Kanishka Jayasuriya³⁵ recently noted, it is these “[i]nstitutions, not the diversity of legal culture, which needs to be at centre stage in the study of legal pluralism.”

Taking the analysis further, Richard Nobles and David Schiff³⁶ turned to “systems theory”, which they argued “can provide a basis for studying what is legal within society without either conflating all law with the official law of the state or losing the ability to separate what is legal from the rest of society.”³⁷ They drew on earlier work by Gunther Teubner, who used systems theory to show how state and non-state legal systems come together to regulate particular markets.³⁸

Teubner³⁹ envisioned a world comprised of different regulatory subsystems – state and non-state – that communicate with each other to govern particular markets. This regulatory communication has both an internal and an external dimension. Internally, communication steers members of regulatory subsystems, such as business networks, towards common regulatory objectives.⁴⁰ Externally, subsystems use communication strategically to variously compete and cooperate with other regulators (including the State) to control particular markets. Provided the subsystems share normative and epistemic assumptions – a

34 See Leigh Hancher & Michael Moran, “Organizing Regulatory Space” in Leigh Hancher & Michael Moran, eds., *Capitalism, Culture and Regulation* 271–300 (Oxford: Clarendon Press, 1989).

35 Kanishka Jayasuriya, “Institutional Hybrids and the Rule of Law as a Regulatory Project” in Brian Tamanaha, Caroline Sage & Michael Wilcock, eds., *Legal Pluralism and Development* (Cambridge: Cambridge University Press, 2012) at 145.

36 See Richard Noble & David Schiff, “Using Systems Theory to Study Legal Pluralism: What Could be Gained?” (2012) 46:2 *Law & Soc’y Rev.* 265.

37 *Ibid.* at 268.

38 Gunther Teubner, “Global Bukowina” in Gunther Teubner, ed., *Global Law Without a State* (Brookfield: Dartmouth, 1997); Gunther Teubner, “The Two Faces of Janus: Rethinking Legal Pluralism” (1992) 13 *Cardozo L. Rev.* 1443.

39 This pragmatic approach to systems theory contrasts with Niklas Luhmann’s approach to systems theory. See Michael King, “The Truth About Autopoiesis” (1993) 20 *J.L. & Soc’y* 218 at 224.

40 Richard M. Buxbaum, “Is ‘Network’ a Legal Concept?” (1993) 149 *Journal of Institutional and Theoretical Economics* 702; Hugh Collins, “The Network Architecture of Supply Chains” in Marc Amstutz & Gunther Teubner, eds., *Networks: Legal Issues of Multilateral Co-Operation* 187–210 (Oxford: Hart Publishing, 2009) (“Collins 2009”).

common conceptual grammar – discourse reconciles differences and identifies common objectives.⁴¹ Teubner called this communicative interaction between regulatory subsystems “co-evolution”.⁴²

Teubner used co-evolution to demonstrate how different regulatory subsystems can interact while remaining epistemologically distinct. This insight has two implications for legal pluralism. First, it shows how state and non-state regulatory subsystems can co-operate to regulate markets while retaining their distinctiveness and separation. As we shall see in the case studies, during this interaction they create hybrid regulators. Secondly, it provides a framework for understanding how state regulators and TPRs might, over time, “co-evolve” towards shared regulatory preferences.⁴³ The case studies show that regulatory convergence of this kind is more likely to happen where TPRs share normative and epistemic assumptions with state-sponsored regulation. Conversely, TPRs that do not share normative and epistemic assumptions with state regulators are more likely to promote new hybrid regulatory subsystems and regulatory pluralism.

III. CONTRASTING INTRA-ASIAN AND EURO-AMERICAN TPRs

A core claim in this article is that intra-Asian and Euro-American TPRs influence Southeast Asian firms in different ways. Although these regulatory differences are anchored in long-standing historical practices, during the 1960s and 1970s, a change took place in global production that profoundly influenced intra-Asian TPRs. To meet the demands of consumers in industrialised countries, Northeast Asian manufacturers began designing products for zero defects (*kaizen* routines), high market differentiation and faster rates of innovation.⁴⁴ Beginning with Japanese car manufacturers in the 1960s, producers in Northeast Asia moved from mass production to mass customisation – a transformation that

⁴¹ See Bob Jessop, “Regulationist and Autopoieticist Reflections on Polanyi’s Account of Market Economics and the Market Society” (2001) 6:2 *New Political Economy* 213 (“Jessop 2001”). See also Robert Post, “The Relatively Autonomous Discourse of Law” in Robert Post, ed., *Law and the Order of Culture* (Berkeley, CA: University of California Press, 1991) at vii–ix.

⁴² See Gunther Teubner, “Legal Irritants: How Unifying Law Ends Up in New Divergences” in Peter A. Hall and David Soskice, eds., *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* 417–441 (Oxford: Oxford University Press, 2001) (“Hall & Soskice 2001”).

⁴³ See Bob Jessop, “Regulationist and Autopoieticist Reflections on Polanyi’s Account of Market Economics and the Market Society” (2001) 6:2 *New Political Economy* 213.

⁴⁴ See Michael Piore & Charles Sable, *The Second Industrial Divide: Possibilities for Prosperity* (New York: Basic Books, 1984).

provided variety and rapid responses to satisfy consumer preferences. This change required lead firms in TPRs to take responsibility for the systemic efficiency and responsiveness of their increasingly global suppliers.

To understand why Northeast Asian and Euro-American production networks responded differently to the new consumer markets, we need to know how they were influenced by the regulatory settings in their home jurisdictions.⁴⁵

A. Sketching the Key Regulatory Ideas Informing Intra-Asian TPRs

From the 1950s to the 1980s, countries in Northeast Asia used responsive regulation, sometimes called relational capitalism, to upgrade national competitiveness.⁴⁶ In Japan, for example, a form of collaborative capitalism developed during this high-growth period that consisted of an elite bureaucracy working closely with big business to develop regulatory policy in core industries.⁴⁷ Both state and corporate Japan distrusted command and control regulation, which had been imposed during the US occupation (1945–1952).⁴⁸ Instead of arms-length, top-down, legalistic rules, they sought more fluid relational connections that changed the role of government from dictator of rules to facilitator of agreements with stakeholders. State agencies collaborated and negotiated regulatory outcomes with the leading corporations in each industrial sector. They also encouraged the mobilisation and expansion of “soft social resources”, such as knowledge, social capital, inter-firm collaboration, research and development

⁴⁵ Research shows that firms replicate the regulatory conditions found in their home jurisdiction: see Louis W. Pauly & Simon Reich, “National Structures and Multinational Corporate Behaviour” (1997) 51:1 *International Organization* 1 (“Pauly & Reich 1997”).

⁴⁶ See Robert Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization* (Princeton, NJ: Princeton University Press, 1990).

⁴⁷ See Ulrike Schaede, *Cooperative Capitalism: Self-Regulation, Trade Associations and the Antimonopoly Law in Japan* (Oxford: Oxford University Press, 2000); Frank Upham, “Privatized Regulation: Japanese Regulatory Style in Comparative and International Perspective” (1997) 20 *Fordham Int’l L.J.* 396. See also John Ohnesorge, “Law and Development Orthodoxies and the Northeast Asian Experience” in Gerald McAlinn & Caslav Pejovic, eds., *Law and Development in Asia* (London: Routledge, 2012) at 7, 16–30.

⁴⁸ See Chalmers Johnson, *MITI and the Japanese Miracle: The Growth of Industry Policy* (Stanford, CA: Stanford University Press, 1982).

networking, increased capacities for technology transfer and collective learning.⁴⁹ Different iterations of this responsive regulatory model evolved to reflect the dominance of the family-controlled *chaebols* in Korea and the comparative lack of large firms in Taiwan.⁵⁰

Like European and American firms before them, Northeast Asian firms developed TPRs that reflected the regulatory conditions in their home jurisdictions.⁵¹ Japanese *keiretsu* and Korean *chaebol* business networks set out to defuse the traditionally adversarial relationship between buyers and suppliers.⁵² Patterns of cross-ownership gave network members access to information that inculcated a sense of mutual benefit. The cross-ownership involved not only mutual shareholding, but in some cases joint ownership of assets such as factories, warehouses and transportation. The complex inter-firm networks imbued the exchange of market information and technical knowhow with rich social relations of a non-economic character. Networks avoided costs associated with legalistic regulation, such as documentary and compliance fees, by keeping contractual arrangements among members implicit and by using personal monitoring.⁵³ This type of responsive regulation aimed to strengthen personal ties among firms to achieve low-cost flexible production.

When Northeast Asian firms moved into Southeast Asia during the 1970s and 1980s, they incorporated low-cost suppliers into TPRs that replicated home-grown business networks.⁵⁴ Firm specific standards were introduced into the networks to foster the capabilities of the suppliers. These standards were developed by the lead firms from their experiences in Northeast Asia, but were endogenous to the TPRs. In some ways, the intra-Asian TPRs built upon the much older intra-regional ethnically based trading and finance networks that emerged out of centuries of Chinese and other Asian Diasporas.⁵⁵

49 Bob Jessop has labelled this regulatory focus on human relationships the “competition state”. See Bob Jessop, *The Future of the Capitalist State* (Cambridge: Polity Press, 2002) at 96.

50 See Tain-Jy Chen, “The Emergence of Hsinchu Science Park as an IT Cluster” in Shahid Yusuf, Kaoru Nabeshima & Shoichi Yamashita, eds., *Growing Industrial Clusters in Asia: Serendipity and Science* 67–90 (Washington, DC: World Bank Publications, 2008).

51 See Louis W. Pauly & Simon Reich, “National Structures and Multinational Corporate Behaviour” (1997) 51:1 *International Organization* 1; Henry Yueng, *Transnational Corporations and Business Networks* (London: Routledge, 1998) at 5–6.

52 See James R. Lincoln, Michael L. Gerlach & Christina L. Ahmadjian, “Keiretsu Networks and Corporate Performance in Japan” (1996) 61:1 *American Sociological Review* 67.

53 See James R. Lincoln & Michael L. Gerlach, *Japan's Network Economy: Structure, Persistence, and Change* (Cambridge: Cambridge University Press, 2004) at 147–204.

54 Vertical networks lacked the cross ownership that typified the horizontal keiretsu in Japan. See Ronald Gilson & Mark J. Roe, “Understanding the Japanese *Keiretsu*” (1993) 102 *Yale L.J.* 871.

55 See Gordon Cheng, “The Significance of Overseas Chinese in East Asia” in Mark Beeson & Richard Stubbs, eds., *Routledge Handbook of Asian Regionalism* 77–89 (London: Routledge, 2012).

Although the regulatory composition of intra-Asian TPRs varies considerably, a unifying feature is their low reliance on rules-based hierarchies. In place of rules, intra-Asian TPRs encourage tightly knit relational communities that design and coordinate their own operational environments.⁵⁶ To promote flexibility and innovation, lead firms gave suppliers considerable latitude to develop their own regulatory processes.

Studies show that lead firms conveyed their regulatory expectations not only through written documents and training courses but also, and more importantly, through close relational connections – through tacit knowledge. Studies distinguish two types of shared knowledge – tacit and explicit knowledge. “Tacit knowledge is personal, context-specific, and therefore hard to formalize and communicate while explicit knowledge refers to knowledge that is transmittable in formal, systematic language.”⁵⁷ Much of the knowledge required by network members to coordinate their activities – regulatory knowledge – is tacit in nature.

It turns out that this emphasis on relational connections and tacit knowledge has two important regulatory implications. First, tacit knowledge is personal, context-specific and therefore difficult to communicate through formalised processes.⁵⁸ Secondly, as the institutional learning literature demonstrates, tacit, rather than the explicit knowledge associated with formal rules and hierarchies, is vital to the coordination of complex and innovative production networks. Lead firms in TPRs can codify and temporally simplify complex specifications and production routines, but suppliers need deep tacit knowledge about the lead firms’ design and quality requirements to creatively reinterpret this codified information.⁵⁹ Procedural rules and legal hierarchies are easily communicated through formal systematic language, but research shows that only “thick”

56 See Fredrick Deyo, “Addressing the Development Deficit of Competition Policy: The Role of Economic Networks” in Michael Dowdle, John Gillespie & Imelda Maher eds., *Asian Capitalism and the Regulation of Competition* 283–300 (Cambridge: Cambridge University Press, 2013); Chi-Nien Chung, “Beyond Guanxi: Network Contingencies in Taiwanese Business Groups” (2005) 27:4 *Organisational Studies* 461.

57 See Chung-Jen Chen, “The Effects of Knowledge Attribute, Alliance, Characteristics, and Absorptive Capacity on Knowledge Transfer Performance” (2004) 34:3 *R&D Management* 311 at 312.

58 The literature is vast, but see *ibid.* at 314; Shahid Yusuf, “Intermediating Knowledge Exchange between Universities and Businesses” (2008) 37:8 *Research Policy* 1167.

59 See Raphael Kaplinsky, *Easternization: The Spread of Japanese Management Techniques in Developing Countries* (London: Frank Cass, 1994); Caliss Baldwin & Kimberly Clark, *Design Rules: Unleashing the Power of Modularity* (Cambridge, MA: MIT Press, 2000).

relational linkages convey the deep tacit knowledge required to standardise the interpretation of codified information across TPRs.⁶⁰

To summarise, intra-Asian TPRs developed a type of responsive or collaborative regulation that mirrored the dominant mode of governance in Northeast Asia during the high-growth period.⁶¹ There is mixed evidence that some Northeast Asian firms now embrace a more legalistic internal regulatory style.⁶² Nevertheless, as a recent Asia Development Report concluded⁶³:

A high degree of trust among firms is increasingly regarded by MNCs as a critical ingredient for developing market-led production networks. Among other things, high levels of trust encourage positive collective behaviour among firms – such as sharing of sensitive information, pooling of technical knowledge, and joint production and marketing activities – which is critical in technologically intense, efficient production networks.

Despite considerable variation among intra-Asian TPRs, most continue to rely on close relational connections to convey the tacit knowledge required by supplier firms to flexibly and rapidly respond to markets.⁶⁴

B. Sketching the Key Regulatory Ideas Informing Euro-American TPRs

A key difference separating the regulatory environments in Northeast Asia and Europe and America is the role of formal legal institutions and statutory commercial rights. In both practice and legal mythology,⁶⁵ formal law plays a significantly more prominent role in ordering commercial transactions in

⁶⁰ See Fred Selnes & James Sallis, “Promoting Relationship Learning” (2003) 67 *Journal of Marketing* 80 at 83.

⁶¹ Research shows that firms replicate the regulatory conditions found in their home jurisdiction. See Louis W. Pauly & Simon Reich, “National Structures and Multinational Corporate Behaviour” (1997) 51:1 *International Organization* 1.

⁶² See Luke Nottage, “Perspectives and Approaches: A Framework for Comparing Japanese Corporate Governance” in Luke Nottage, Lean Wolf & Kent Anderson, eds., *Perspectives and Approaches Corporate Governance in the 21st Century: Japanese Gradual Transformation* (Cheltenham: Edward Elgar, 2008) at 21–52.

⁶³ Ganeshan Wignaraja, “Engaging Small and Medium Enterprises in Production Networks: Firm-level Analysis of Five ASEAN Economies” Asian Development Bank Institute, Working Paper Series, No 361 (June 2012), online: <http://www.adbi.org/working-paper/2012/06/01/5076_engaging_small_medium_enterprises/> (last accessed 18 November 2013).

⁶⁴ See, e.g., Bruce Aronson, “Learning from Toyota’s Troubles: The Debate on Board Oversight, Board Structure, and Director Independence in Japan” (2010) 15:30 *Journal of Japanese Law* 67.

⁶⁵ See Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992).

Europe and America than in Northeast Asia. Differences in market regulation between America and Europe are relatively insignificant compared to differences with East Asia.⁶⁶ As Stewart Macaulay famously demonstrated 50 years ago,⁶⁷ U.S. corporations use relational networks to build and maintain commercial transactions but then pass the deals to in-house lawyers who spin a protective legal web around the relational connections. Although practices vary considerably among Northeast Asian firms, in general intra-Asian TPRs are less likely to use legal hierarchies to formalise and subordinate relational connections with suppliers.⁶⁸

This core difference is illustrated by the way Euro-American firms adopted Northeast Asian manufacturing regimes. During the 1980s and 1990s, the flexible production and zero-defects systems (*kaizan* routines) developed in the Japanese car industry spread beyond East Asia to Europe and America. By the end of the twentieth century, this regime became embedded in some Euro-American TPRs. Firms as diverse as Chrysler, Virgin Airways and the Zara clothes chain adopted their own versions of vertical *keiretsu* networks.⁶⁹

Significantly for this discussion, flexible production and zero-defect systems operated differently in Euro-American TPRs. Rather than privileging mutual cooperation as the key objective, Euro-American TPRs used flexible production networks to relocate different parts of the manufacturing process to capture comparative advantages in diverse geographical locations. They also tended to exhibit more top-down management and centralised control over suppliers. Another key difference was the reliance on legal and organisational hierarchies to convey regulatory knowledge.⁷⁰ For example, corporate governance and intellectual property rules in Euro-American TPRs tended to constrain the flow

66 See Peter A. Hall & David Soskice, *Varieties of Capitalism: The Changes Facing Contemporary Political economies* (Cambridge: Cambridge University Press, 2000).

67 See Stewart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study" (1963) 28 *American Sociological Review* 55.

68 See generally Henry Yueng, *Transnational Corporations and Business Networks* (London: Routledge, 1998) at 6; Richard Appelbaum, William Felstiner & Volkmar Gessner, *Rules and Networks: The Legal Culture of Global Business Transactions* (Oxford: Hart Publishing, 2001) at 159–188.

69 See, e.g., Jeffrey Dyer, "How Chrysler Created an American Keiretsu" *Harvard Business Review* (July–August 1996); Hugh Collins, "The Network Architecture of Supply Chains" in Marc Amstutz & Gunther Teubner, eds., *Networks: Legal Issues of Multilateral Co-Operation* (Oxford: Hart Publishing, 2009).

70 See Tetsuo Abo, "Hybridization of Japanese Production Systems in North America, Newly Industrialized Economies, South East Asia and Europe: Contrasting Configurations" in Robert Boyer et al., eds., *Between Imitation and Innovation* (Oxford: Oxford University Press, 1997) at 216–230.

of tacit knowledge that enabled lead and supplier firms to collaboratively order production.

To sum up, Euro-American lead firms used structured meetings, hierarchical organisational systems, training courses and organisational manuals to convey explicit knowledge about rules and standards. Contrasting with Northeast Asian firms, they failed to communicate the tacit knowledge that enabled suppliers to creatively interpret formal standards and yet still meet the lead firms' quality and logistic expectations.⁷¹

What emerges from this literature is a regulatory continuum along which there are many points representing different types of TPRs. Rules-based Euro-American TPRs occupy one end of the continuum, while responsive intra-Asian TPRs are at the other end. The literature further suggests that the differences in the way intra-Asian and Euro-American TPRs promote internal learning influences the regulatory architecture of supplier firms in Southeast Asia. In the next section, a series of case studies are examined to compare how Southeast Asian firm absorb, integrate and replicate the regulatory signals transmitted through intra-Asian and Euro-American TPRs.

IV. CASE STUDIES

A. Data and Methods

The four case studies discussed in this article form part of a larger investigation into business networks in Vietnam. Over a seven-year period, from 2005 to 2012, the author conducted more than 400 in-depth interviews⁷² with the managers and/or owners of business networks operating in eight industries (copper wire, battery and sunglasses trading, footwear, furniture and computer manufacturing, construction and industrial park management) in north and south Vietnam. Vietnamese law firms organised the first contact with the interviewees and selected the firms. Subsequent interviews with other members of the firms were usually arranged by the initial interviewees through their personal

⁷¹ See Mee Shew Cheung, Matthew B. Myers & J. Thomas Mentzer, "The Value of Relational Learning in Global Buyer-Supplier Exchanges" (2011) 32:10 *Strategic Management Journal* 1061 at 1064–1065.

⁷² The interviews were conducted in association with N.H. Quang and Associates, a Vietnamese law firm, and with other Vietnamese law firms and research assistants who wished to remain anonymous. Most interlocutors wished to remain anonymous, but some agreed to the identification of their firm name and commercial associations.

connections. Interviews with the cooper wire, battery trading, sunglasses, furniture and computer manufacturing firms were conducted in Vietnamese, while interviews in the footwear, construction and industrial park management firms were conducted in both Vietnamese and English.

Given the sensitive nature of some of the information supplied, only the interviewees who gave their consent have been identified and to protect sources the names of some Vietnam and foreign firms have not been supplied. The quotations used in the case studies are based on interviews that are described in more detail in the studies.

B. Intel Case Study

Intel established a factory in the Sai Gon Hi-tech Park (SHTP)⁷³ in 2006. To attract this high-profile tenant, SHTP entered into a TPR that obliged them to follow Intel's Code of Conduct (CoC),⁷⁴ which stipulated ethical standards and transparent business practices.⁷⁵ Intel was concerned about the high levels of corruption in Vietnam and wanted SHTP to insulate them from local business suppliers.⁷⁶

According to interviews with Intel staff,⁷⁷ Intel ran a series of training courses with SHTP staff to introduce the anti-corruption principles embedded

73 "Intel talks about investment environment in Vietnam" *Vietnam Economic Times* (24 January 2008) ("Intel nói về môi trường đầu tư Việt Nam" *Vietnam Economic Times* (24 January 2008)) ("Vietnam Economic Times 2008").

74 The CoC contains five principles: Intel conducts business with honesty and integrity; Intel follows the letter and spirit of the law; Intel employees treat each other fairly; Intel employees act in the best interests of Intel and avoid conflicts of interest; Intel employees protect the company's assets and reputation. See Intel Corporation, *Intel Code of Conduct*, online: <<http://www.intel.com/content/www/us/en/policy/policy-code-conduct-corporate-information.html>> (last accessed 18 November 2013).

75 See VnExpress, "A state agency signs a commitment refusing bribes" *Vietnamnet Bridge* (7 September 2007) ("Một cơ quan nhà nước ký cam kết từ chối việc hối lộ" *Vietnamnet Bridge* (7 September 2007)), online: <<http://search.vnexpress.net/news?s=M%E1%BB%99t+c%C6%A1+quan+nh%C3%A0+n%C6%B0%E1%BB%9Bc+k%C3%BD+cam+k%E1%BA%Bft+t%E1%BB%AB+ch%E1%BB%91i+vi%E1%BB%87c+h%E1%BB%91i+l%E1%BB%99&g=0B439851-C644-4B23-904E-9D7B068D05F7&butS=yes>> (last accessed 18 November 2013).

76 "Intel talks about investment environment in Vietnam" *Vietnam Economic Times* (24 January 2008) ("Intel nói về môi trường đầu tư Việt Nam" *Vietnam Economic Times* (24 January 2008)).

77 Interviews Lam Vu Thao, In-house counsel, Intel Vietnam, Ho Chi Minh City, 14 October 2008 and 3 July 2009 (conducted by Nguyen Hung Quang) and 17 and 22 February 2012 (conducted by the author).

in the CoC. Some CoC provisions were already familiar to SHTP staff, since government and media reports routinely criticised bribery and kickback commissions. Other aspects of the CoC generated confusion. For example, SHTP staff did not understand the rationale for conflict of interest provisions designed to avoid the appearance of corruption. Business in Vietnam is conducted through relational networks, and without personal connections with regulators, firms struggle to enter new markets.⁷⁸ The absolute prohibitions against giving and receiving gifts also seemed inappropriate to SHTP staff, because Vietnamese traders made finely calibrated distinctions between gifts designed to show respect and develop goodwill and bribes disguised as gifts.

Training courses conducted by Intel were delivered in English and then translated into Vietnamese. Subsequent meetings were conducted in Vietnamese, unless senior American executives were present. Intel employees were encouraged to avoid conflicts of interest that might arise from socialising with SHTP staff. According to Intel staff, Intel insisted that the CoC be applied by their employees and SHTP “regardless of local business practices or social customs.” Intel staff were instructed to ensure that personal interaction with SHTP staff did not “ripen into close personal relationships and the informal exchange of business information.” In following these instructions, Vietnamese staff who worked for Intel were unable to explain the CoC using local idioms and practices familiar to SHTP staff. Formal exchanges conveyed explicit knowledge about business codes and protocols, but did not communicate the epistemic assumptions (tacit knowledge) that underpinned the CoC, such as respect for the rule of law, market competition and rules-based business transactions.

Despite the limited personal interaction, Intel staff noticed changes in the regulatory outlook of SHTP staff. Initially, SHTP staff were reluctant to discuss corruption, which is considered a politically sensitive topic (*te nhi*) in Vietnam. Public discourse about corruption is usually conducted using metaphorical and figurative language because detailed exchanges of the kind promoted by Intel are considered blunt and insensitive. Over time, SHTP staff began to openly engage with the Intel staff and publicly promote the CoC.

During three follow-up interviews, it emerged that SHTP staff used the CoC as a marketing strategy to attract more foreign investment to the industrial park. Although SHTP staff developed fluency with, and paid “lip service” to, the CoC, they did not fundamentally change their epistemic assumptions about business

78 See John McMillan & Christopher Woodruff, “Interfirm Relationships and Informal Credit in Vietnam” (1999) 114:4 *Quarterly Journal of Economics* 1285; John Gillespie, “Exploring the Role of Legitimacy in Framing Responses to Global Legal Reforms in a Transforming Socialist Asia” (2011) 28:2 *Wis. Int’l L.J.* 534.

regulation. For example, they could not persuasively explain why the core ideas underlying the CoC, such as market competition or avoiding conflicts of interest, might contribute to a desirable regulatory regime.

This unfamiliarity with market principles and regulation is consistent with the SHTP managers' background. They spent their formative years working in government departments or state-owned enterprises (SOEs) and thought of themselves as state officials. They clearly preferred the discretionary personalistic regulation associated with "state economic management" (*quan ly nha nuoc kinh te*) to the immutable and universal CoC standards. They remained sceptical about whether the arms-length legalistic hierarchies promoted by Intel were appropriate for Vietnamese business conditions.

This case study suggests that Intel failed to effectively communicate the tacit knowledge needed to decode and absorb the CoC. Intel presented the CoC as a *fait accompli* and prevented their Vietnamese staff from acting like "cultural intermediaries"⁷⁹ in flexibly adapting and explaining the CoC in a local, contextual language. Although SHTP staff leveraged the CoC to attract new investors, they were unpersuaded by the epistemic assumptions underpinning the CoC. In short, the CoC did not fundamentally change the regulatory attitudes of SHTP staff or predispose them towards the rules-based hierarchies found in state commercial law.

C. Footwear Case Study

A foreign investor established a footwear manufacturing business in northern Vietnam in 1996. This case study is compiled from interviews with the firm's senior managers.⁸⁰ The firm grew rapidly and employed more than 6,000 workers. It supplied footwear through a series of TPRs to sporting goods firms headquartered in the United States of America and Japan. Initially, the foreign investor ran the firm along conventional Vietnamese familial lines. He assumed the pivotal role in the firm, acting as the father and benefactor. Vietnamese managers acted as his lieutenants, and the employees were treated as members of a rather large extended family. Storylines told by the managers attributed the

⁷⁹ The term "cultural intermediary" is used to describe a person who uses cross-cultural knowledge to adjust one regulatory system to the particularities of another system. See Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History 1400–1900* (Cambridge: Cambridge University Press, 2002) at 3–9.

⁸⁰ Over 50 Interviews with six senior managers of a sporting goods and footwear firm were conducted by the author with the assistance of N.H. Quang and Associates and research assistants between July 2004 and April 2012 in Hanoi, Vietnam.

firm's success to "good heart" (*tam*), compassion (*thong cam*) and sentiment (*tinh cam*) between the managers and staff.

Nike, one of the main buyers, decided in 2001 to push more responsibility onto the footwear firm to reduce costs and increase production flexibility. This involved changing from a subcontracting arrangement whereby Nike supplied designs, materials and processes to a modular production network where the footwear firm assumed greater responsibility for producing the footwear.⁸¹ To maintain control over production and quality, Nike insisted that the firm adopt a logistic coordination and management system that increased efficiencies in the supply chain, reduced lead times, standardised production processes and improved the transparency of inventory.

The corporate governance rules embedded in this regime required the firm to develop internal management rules that clearly identified organisational positions and responsibilities. For example, the managers and staff were given detailed job descriptions, and internal review processes were grounded on output-oriented standards. These hierarchical organisational rules contrasted sharply with the pre-existing loosely structured relational lines of control.

Senior managers conceded that they were initially reluctant to accept the new rules. As one manager explained, "we were encouraged to share our knowledge and expertise with everyone in the organisation and lost private knowledge that gave us an advantage in asking for bonuses." The managers agreed that, without daily interaction with the foreign investor over a two- to three-year period, they would have treated the logistics regime as a mere formality (*hinh thuc*) and not fundamentally changed their organisational practices.

Importantly for this discussion, the investor explained the logistics regime in a conceptual language that the managers understood. For example, the investor pointed out deficiencies in the existing organisational system that generated overlap and unnecessary internal rivalry, and he showed how the imported logistics regime could create more precise lines of accountability that might resolve long-standing power struggles. Eventually, the managers saw for themselves that the new system reduced the interaction time

81 In 1999, Nike responded to global pressure about poor labour conditions in Vietnamese factories manufacturing Nike products and introduced an "Internal Code of Conduct" modelled on International Labour Organization (ILO) conventions for the establishment and protection of workers.

with employees who previously “got into the habit of asking us about everything.” It gave them more time to develop policies that improved quality and production times.

Although the managers could not remember consciously deciding to change their managerial style, they agreed that the rules-based regime had extensively, although not entirely, displaced relational management practices. More significantly, they linked this change to a shift in their identity. The logistics regime gave them a new set of values that reconceptualised their role within the firm. Incrementally, they changed from being leaders of an extended family to acting like professional managers who regulated through plans, rules and hierarchies.

In tandem with this cognitive shift, the senior managers increasingly acted out the role of modern, cosmopolitan professionals and began to socialise with other global business managers in tennis clubs and on golf ranges. They sent their children to international schools, holidayed overseas and generally assumed the lifestyle of the expatriate business community. Their new identity not only shaped who they were, but also how they conceptualised business regulation. But this shift was incomplete. As members of Vietnamese family networks, the managers were obligated to give family preferential treatment within the firm.

A key difference between this case study and the Intel case study is the role played by the foreign investor. He acted like a cultural intermediary in conveying the tacit knowledge required by the senior managers to imaginatively reconstruct the logistic management regime to meet the requirements of Nike and family members. The managers also changed their approach to state-based laws. They replaced the firm’s double accounting system with a taxation law compliant reporting structure. The firm began to hold director’s meetings and comply with corporate reporting requirements. Of equal significance, the managers insisted that Vietnamese suppliers should adopt a version of the logistic management regime. In the process the imported regulatory knowledge spilled over into other firms in the textile and footwear industry.

D. Construction Case Study

In 2005, 10 members of a family joined together to form a construction company in Hanoi.⁸² As one founding manager put it:

⁸² This case study is based on over 20 interviews with three managers of the firm conducted from 2008–2013.

We decided to focus on construction for foreign investors because we saw a large potential for foreign investment in our country. We did not worry about our lack of experience. We were young people and had nothing to lose and decided to go ahead.

The construction firm entered into a series of TPRs with lead contractors from Japan, Taiwan and Korea. Although the learning environments differed among the TPRs, the following case study illustrates the core regulatory themes.

In 2005, the construction firm began working as a subcontractor for a large Japanese construction company that specialised in building factories for foreign investors. The Japanese constructor provided the plans, specifications and materials and supervised the projects, while the construction firm provided labour for specialised jobs, such as concrete pours and car park construction. The Japanese constructor only wanted to deal with the division heads of the construction firm. At this initial stage in the relationship, the firm had not yet developed a formal internal management structure, and the managers searched the internet for appropriate-looking position descriptions to use in dealings with the Japanese constructor. During this start-up phase, the managers had little contact with the senior Japanese executives and primarily interacted with the Filipino and Indonesian site managers.

This arms-length relationship changed dramatically in 2008 after the managers recruited a friend who had worked in Japan and spoke fluent Japanese. Acting as a cultural intermediary, he transformed the working relationship with the Japanese contractor. As one manager later recalled, “our friend was a trustworthy guy who gained the respect of the Japanese. He improved the way the Japanese saw the firm. He raised our *sy dien*.⁸³”

The managers began to socialise with the senior Japanese executives, visiting karaoke bars and dance clubs, playing golf and travelling to tourist destinations in Vietnam. At the same time, the Japanese executives began a process of learning through testing. They changed designs and technical specifications to test the managers’ knowhow. If the managers could not respond, rather than applying penalties, the Japanese executives brought in outside expertise. The managers were then closely questioned to ensure they had absorbed the information and upgraded the technical knowledge. The Japanese lead firm also sent the managers to observe and assimilate design and quality assurance procedures in Malaysian and Singaporean construction projects. Gradually, the Japanese pushed more design responsibility onto the

83 “*Sy dien*” literally means “face keeping” but connotes “reputation”.

managers and relied on their local knowledge to ensure that building plans satisfied the complex Vietnamese administrative requirements.

During a group discussion, some of the managers later reflected that “[we] don’t understand how it happened, but over time we changed the way we thought about management and working with the lead contractor.” They also thought that the Japanese executives had adjusted their working style to suit Vietnamese conditions: “They [the Japanese] said that we reminded them of the Japanese after the war. We are young, work hard but lacked expertise and opportunities.” The managers went on to describe the emergence of a sentimental relationship in which the Japanese acted like older brothers who were responsible for teaching their younger brothers. Similar asymmetric personal relationships developed in Taiwanese, but not Korean, TPRs. Although on the surface the Japanese TPRs appeared legalistic, replete with written contracts and performance bonds, the managers described a quite different relationship. Contracts were rarely drafted by lawyers. They outlined a starting position, rather than prescribing a legally enforceable template for the life of the project. The real substance of the relationship consisted of close personal connections that communicated tacit knowledge to the managers about the standards and design preferences of the lead firms. Without this knowledge, the managers could not have taken control over the local design and construction processes.

The shared regulatory knowledge fell into two broad categories. One, the managers came to understand how the Japanese contractors designed factories. This knowledge included technical details about engineering and material costings, as well as standards governing environmental and workplace safety design. Two, the managers also learnt about Japanese labour management. This regulatory knowledge included labour hiring standards and workplace governance, such as site instructions for work practices.

It is instructive to compare the construction firm with the footwear manufacturers. Although the construction firm grew to more than 400 employees, the managers paid little regard to corporate governance or other aspects of state-based commercial law. For them profit lay in understanding the nuances of Japanese construction standards and practices and using this tacit knowledge to creatively reconcile Japanese expectations with Vietnamese conditions. The Northeast Asian lead contractors did not encourage rules-based hierarchies or legal compliance, and instead emphasised tightly knit networks in which parties could learn from each other and co-evolve towards shared regulatory preferences. Having learnt from the intra-Asian TPRs, the managers now attempt to construct their own relational learning networks with local suppliers and subcontractors.

E. Copper-Wire Case Study

During the mid-1980s, four household enterprises formed a transnational business network that now controls approximately 70 per cent of the wholesale market for copper wire in northern Vietnam.⁸⁴ Members of this distribution network are bound together by decades of business collaboration and intermarriage. Operating out of small shop fronts in Hang Bong Street in central Hanoi, their distribution network controls warehouses on the city outskirts and employs more than 400 family members and staff. The network links South Korean copper-wire manufacturers with Vietnamese electrical transformer and appliance manufacturers in an intra-Asian TPR.

Since the value of copper wire resides primarily in the price of copper, profit lay in rapidly responding to commodity markets. To remain competitive, the copper-wire TPR needed to match demand by the Vietnamese end-users with supply from the Korean manufacturers. Close collaboration enabled members of the copper-wire TPR not only to minimise inventory costs but also to take advantage of market fluctuations in the value of copper.

The copper-wire network differed from the chains of contracts used by rival firms. It created a coordinating entity that existed outside of the member firms and yet linked them together for mutual benefit. Its chief advantage was a form of multi-party coordination without the hierarchical rules and contracts that impeded knowledge flows in rival copper-wire distribution networks. A Korean member of the copper-wire TPR with wide experience with other distribution networks opined that “firms which rely on contracts do not work as hard in maintaining close relationships. Too much faith is given to the contract to control the transaction.” He went on to explain that contracts create a mental construct that distances transacting parties and constrains knowledge flows.

Vietnamese members described the copper-wire TPR as following an “Asian business style.” They rather vaguely described this style as “meeting frequently with members to swop information in *câu lạc bộ người lính*,⁸⁵ over dinner, in karaoke bars and at weddings and funerals.” Although some international transactions were complex and worth millions of US dollars, the members insisted that sales agreements were only formalised into writing to comply with customs regulations. The underlying transactions were recorded in

84 This study is based on over 30 interviews with three managers of the Vietnamese cooper wire distributors and a Korean cooper wire manufacturer. The interviews were conducted from 2005–2011 in Hanoi.

85 Literally “soldier clubs”, a term referring to early morning trading circles.

handwritten notes that captured the basic transactional details without reference to internal network rules, much less external legal or regulatory systems.

Network members developed their own language to coordinate the distribution of copper wire. They communicated in basic Vietnamese, but many of the terms concerning regulation and technical knowledge were borrowed from Korean and, to a lesser extent, English. For example, members used the Vietnamese term *tuong tro lan nhau* to describe the mutual assistance that cemented their trading network, *mang luoi* to signify the relational network, and *tin cam* to describe the sentiment that allowed them to exchange sensitive information without worrying about opportunistic behaviour. Korean terms were used to describe the technical specifications of the copper wire and English terms for international shipping documents and customs declaration forms.

The regulatory knowledge communicated through the TPR primarily concerned the manufacture and distribution of the copper wire. For example, practices developed to share price sensitive information and to coordinate the production and supply of copper wire. The terms of the trade, such as the timing of payment, responsibility for shipping and customs were also tacitly agreed. Finally, the network members developed methods of resolving disputes through informal dinners held at regular intervals.

Members of the copper-wire TPR identified closely with their network and did not think of themselves as cosmopolitan business professionals. Instead they constructed their identity around a loosely defined “Asian business style.” Members were encouraged to resolve cultural and regulatory differences through close personal collaboration. They also used personal networks to come together and collectively respond to rapidly changing market conditions. Despite the growing size and increasing complexity of the TPR, members did not turn to rules-based hierarchies to resolve problems. On the contrary, members attributed their success to the lack of formal legal hierarchies that might impede their ability to rapidly absorb and integrate new knowledge. They relied on relational connections to order business relationships and rarely referred to state-based laws and processes.

V. TRANSNATIONAL PRODUCTION REGIMES AS REGULATORS

The case studies establish that shared tacit knowledge facilitates the absorption of new regulatory ideas – a finding that is consistent with the institutional learning literature discussed in this article. What this study adds to the extant literature is the insight that Euro-American TPRs tend to create fewer

opportunities to share tacit knowledge than intra-Asian TPRs. Both the Intel and footwear case studies demonstrate that Euro-American TPRs emphasise the transfer of explicit rules-based knowledge, without creating the personal, informal connections required to communicate tacit knowledge. In fact, anti-corruption codes of practice (the CoCs) and strong intellectual property protection, which featured prominently in the Euro-American TPRs, constrain knowledge-sharing and collaborative learning. Without the intercession of a “cultural intermediary”, who conveyed tacit knowledge, the footwear managers were unlikely to have made the cognitive shift required to adopt Nike’s logistic management regime. Studies show that cultural intermediaries play a similar role in transmitting tacit knowledge across cultural boundaries in the Thai auto industry.⁸⁶

As members of the rising class of global managers in Asia,⁸⁷ the footwear managers identified themselves as bicultural and cosmopolitan. Rather than adopting a fixed identity, they oscillated between global and local identities, drawing on a diverse repertoire of norms and practices to deal with the globalised and domestic regulatory domains. Other studies have found that this kind of “cultural switching” generates emotional stress which can constrain how Asian managers function in Euro-American organisations.⁸⁸

Contrasting with Euro-American TPRs, the regulatory architecture of the Intra-Asian TPRs assisted the communication of tacit knowledge. For example, the close, quasi-familial relationships⁸⁹ in the construction case facilitated collaborative learning about Japanese quality and design preferences. The learning environment in the copper-wire network was less familial and more symmetrical than the construction TPRs. The members treated each other as equals and did not assume to hierarchal roles of a family members observed in the construction case. Network members were encouraged to look beyond their scripted

86 See Frederic C. Deyo & Richard F. Doner, “Dynamic Flexibility and Sectoral Governance in the Thai Auto Industry: The Enclave Problem” in Frederic C. Deyo, Richard F. Doner & Eric Hershberg, eds., *Economic Governance and the Challenge of Flexibility in East Asia* (Lanham, MD: Rowman & Littlefield Publishers, 2001) at 107–136.

87 See Andrew Molinsky, “Cross-Cultural Code-Switching: the Psychological Challenges of Adapting Behavior in Foreign Cultural Interactions” (2007) 32:2 *Academy of Management Review* 622.

88 See Noriko Yagi & Jill Kleinberg, “Boundary Work: An Interpretive Ethnographic Perspective on Negotiating and Leveraging Cross-Cultural Identity” (2011) 42 *Journal of International Business Studies* 629.

89 Quasi-familial relationships are widely reported in Southeast Asian business networks. See Benny Tabalujan, “Why Indonesian Corporate Governance Failed – Conjectures” (2002) 15:2 *Colum. J. Asian Law* at 141.

responsibilities and immediate tasks and create new pathways to achieve regulatory objectives. This type of unscripted coordination was only possible because members shared a large reservoir of tacit knowledge about how the network should respond to external trading conditions. Internal tensions concerning organisational functions and roles and competing commercial objectives were resolved through routines and negotiations that drew on mutual tacit understandings.

Despite their differences, the construction and copper-wire TPRs shared some common features. In both cases the emphasis on unstructured dialogue made tacit practices explicit. Dialogue enabled members to learn from each other in a co-evolutionary process where the meaning of regulatory norms and processes changed over time.⁹⁰ Although members rapidly responded to new trading conditions, co-evolution guided members towards common regulatory outlooks and regulatory stability. Empirical studies about intra-Asian TPRs in the Vietnamese wood-processing industry also reveal a close link between “collaborative attitudes” and flexible and responsive networks.⁹¹

Both the construction and copper-wire TPRs used relational connections to overcome cultural differences within their networks. While arguably less pronounced than in Euro-American TPRs, cross-cultural complexities were still evident in the intra-Asian TPRs. Rather than radically changing their identities, TPR members used unstructured dialogue to bring themselves into physiological sync with each other. For example, they repeated similar story-lines about how the network developed and differed from rival businesses. They manufactured sentimental connections that smoothed the friction caused by cultural difference. Significantly, they did not require cultural intermediaries to bridge their regulatory worlds.

Another key finding is that the TPRs shaped how Vietnamese firms conceptualised and engaged with state-based laws. The case studies show that regulatory knowledge is mediated and negotiated as it passed along the TPRs, a process that generated new regulatory hybrids. For example, although SHTP officials stripped the Intel CoC of its North American ethical meanings, they saw value in transparent market relationships and began anchoring SHTP’s

90 For a discussion about co-evolutionary changes to regulatory outlooks, see Benjamin Cashmore, Graeme Auld & Stefan Renckens, “The Impact of Private, Industry and Transnational Civil Society Regulation and their Interaction with Official Regulation” in Christine Parker & Vibeke Nielsen, eds., *Explaining Compliance: Business Responses to Regulation* (Cheltenham: Edward Elgar, 2011).

91 See Huynh Thi Thu Suong, “Influential Factors on Supply Chain Collaboration in Vietnam’s Wood Processing Industry” (2011) 208 *Economic Development* 36.

transactions on formal, well-documented foundations. This shift required SHTP officials to pay more attention to law-based procedures and compliance regimes, without fundamentally changing their views about rights protection and other tenets of the commercial legal system.

In order to implement Nike's logistics management regime, the footwear managers gradually changed the way they thought about themselves and how best to regulate their transactional world. This identity change accompanied and enabled the cognitive shift to rule-based hierarchies. As global professional managers, they raised awareness within the firm about domestic laws and legalised their dealings with staff, corporate regulators, taxation officials and suppliers.

Members of the construction and copper-wire networks were embedded in self-referential regulatory systems. They were unreceptive to state laws and procedures that contradicted their tacit regulatory understandings. Their networks provided a coherent regulatory world replete with norms, monitoring and compliance. They felt little compulsion to deal with the expatriate business world, portray themselves as global professionals or model their regulatory systems on state-based commercial laws. Their interaction with the state primarily consisted of personal, often corrupt relationships with officials.⁹²

VI. CONCLUSION

This study provides a missing piece in the puzzle of regulatory pluralism in Southeast Asia. Law and development scholars have long argued that the expenditure of hundreds of millions of dollars on legal harmonisation projects has not flattened regional differences or standardised market regulation in many East Asian countries.⁹³ Instead, studies show formal convergence with global “best practice” commercial laws, without meaningful functional convergence by

⁹² For a detailed discussion about regulatory compliance in Vietnam, see John Gillespie, “Testing the Limits to the ‘Rule of Law’: Commercial Regulation in Vietnam” (2009) 12:2 *Journal of Comparative Asian Development* 245.

⁹³ See Michael Trebilcock & R. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Cheltenham, UK: Edward Elgar Publishing, 2008) at 37–42; John Ohnesorge, “Law and Development Orthodoxies and the Northeast Asian Experience” in Gerald McAlinn & Caslav Pejovic, eds., *Law and Development in Asia* (London: Routledge, 2012) at 7, 16–30.

large sections of the business community.⁹⁴ Various reasons are advanced to explain this regulatory pluralism, such as incomplete laws and institutions, limited regulatory capacities⁹⁵ and low demand for formal laws by the business community.⁹⁶ This article posits an additional explanation: the intra-Asian TPRs studied either do not encourage or actively discourage Vietnamese firms from looking to state-based commercial laws for regulatory guidance. Further detailed empirical research is needed to determine conclusively whether TPRs are producing similar regulatory effects in other Southeast Asian countries. However work by Fed Deyo⁹⁷ and others in Thailand and Indonesia points to analogous findings elsewhere in Southeast Asia.

Drawing from regulatory and systems theory, it has been possible to develop a conceptual framework that accounts for the observed interaction between TPRs and Southeast Asian firms. The framework places state agencies in a regulatory space together with non-state regulators such as TNGOs, TPRs and domestic business networks. In this space, Euro-American TPRs struggle to convey the deep tacit knowledge that underpins legal hierarchies and law-based regulation. Intra-Asian TPRs have, on the other hand, proved remarkably adept in promoting informal, relational forms of regulation.

Further adding to regulatory pluralism, the case studies show that intra-Asian TPRs are not co-evolving with the other major regulatory subsystems – state-based commercial laws and Euro-American TPRs. In fact, their unscripted coordination provides a coherent and stable regulatory subsystem that is capable of governing large and complex transnational businesses without the need for external rights-based state law. Although more research is needed in this area, the findings also suggest that the regulatory norms and practices ordering intra-Asian TPRs spill over and influence other domestic suppliers. This spill-over effect has been observed elsewhere in Southeast Asia.

94 See Bruce Carruthers & Terrence Halliday, “Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes” (2006) 31:3 *Law & Soc. Inquiry* 521.

95 See Randal Preenboom, “Rule of Law, Democracy and the Sequencing Debate: Lessons from China and Vietnam” in John Gillespie & Albert Chen, eds., *Law Reform in Communist Asia: Comparing China and Vietnam* 29–50 (London: Routledge, 2010); Michael Dowdle, “The Geography of Regulation” in David Levi-Faur, ed., *Handbook on the Politics of Regulation* 576–589 (Cheltenham, UK: Edward Elgar, 2011). (Oxford: Oxford University Press, 2012).

96 See Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, “The Transplant Effect” (2003) 51 *Am. J. Comp. L.* 163 at 167.

97 See Fredrick Deyo, “Addressing the Development Deficit of Competition Policy: The Role of Economic Networks” in Michael Dowdle, John Gillespie & Imelda Maher, eds., *Asian Capitalism and the Regulation of Competition* (Cambridge: Cambridge University Press, 2013).

The case studies further suggest that a shift in identity is required for Vietnamese businesses to absorb and integrate the regulatory hierarchies transmitted through Euro-American TPRs – a cognitive transformation that often requires the intercession of cultural intermediaries. In contrast, intra-Asian TPRs can develop high levels of unscripted coordination without dramatic cognitive shifts and cultural intermediaries. This finding has far reaching implications for regulatory pluralism in Vietnam and in comparable Southeast Asian countries. First it suggests that intra-Asian TPRs are likely to have a greater regulatory influence over Southeast Asian businesses than Euro-American TPRs. Second, and as a corollary, intra-Asian TPRs are likely to increase, or at least reinforce, regulatory pluralism by creating viable regulatory alternatives to state rights-based commercial regulation.

A crucial question for future research is whether some kind of meta-regulation might integrate new ideas from TPRs into an overriding domestic regulatory system? It is clear from existing research that new transnational governance challenges state legal supremacy and the capacity for state sponsored meta-regulation. With limited success some States use administrative measures to discourage transnational governance that might interfere with industry development plans.⁹⁸ For example, the Vietnamese Government opposes Forest Stewardship protocols on sustainable forestry timber because they might disrupt industry development plans by increasing the importation of plantation timber.⁹⁹ New transnational governance thus has the potential to mitigate state instrumentalism and industry policies that favour political elites and protected industries, but it also places important segments of commercial regulation beyond the reach of political and statutory processes designed to increase public participation in law-making.

New transnational governance also has the potential to undermine legal sovereignty from below. Intra-Asian TPRs, for instance, are negotiated and localised in forums outside state control. They rely on soft, relational forms of regulation that contrast with, and partially displace, state-sponsored rights-based legislative programs aiming to increase legal predictability and transparency. As we have seen, the intra-Asian TPRs coordinate business transactions without resort to codified contractual and property rights. They displace, rather than interact with rights-based law. Further research is required to ascertain

⁹⁸ See Lars H. Gulbrandsen, “Dynamic Governance Interactions: Evolutionary Effects of State Responses to Non-State Certification Programs” (2012) *Regulation & Governance* doi:10.1111/rego.12005, online: <<http://onlinelibrary.wiley.com/doi/10.1111/rego.12005/full>> (last accessed 25 November 2013).

⁹⁹ Interviews Pham Minh Thang, Director P & Q Solutions, Hanoi, April 2013.

how they interact with other types of state law, such as public administrative and commercial criminal law.

Knowledge transmitted through intra-Asian TPRs also irritates and perturbs existing regulatory settings, generating in the process new regulatory settings and new types of hybrid regulators. These hybrid regulators straddle the intersection between global and local regulatory regimes. They mediate competing norms and practices in multiple epistemic settings within and beyond the state orbit. In some settings they displace state regulators, because they decide which state laws and non-state norms and regulatory traditions should have authority and receive recognition. In other settings they negotiate and mediate regulatory outcomes with state regulators.

The question remains whether state rights-based regulation and intra-Asian TPRs are likely to “co-evolve” and converge in the future. To some extent, regulatory plurality and hybridity is a regulatory response to social, political and market fragmentation in rapidly developing societies.¹⁰⁰ This would suggest that, as markets integrate and standardise, businesses will come under increasing pressure to harmonise their regulatory practices. Yet there are factors in some Southeast Asian countries that actively work against “co-evolution” of this kind. Chief among these is the insistence by some governments on “command and control” regulation that dictates from above rather than responsively interacting with business networks. Currently this interaction takes place by default at the local level in corrupt relational connections between officials and firms. There are encouraging signs that member-directed business associations move dialogue with the State outside secretive private negotiations into a public area where discourse promotes the common good.¹⁰¹ It is this kind of “co-evolution” that is most likely to promote a formal and functional convergence of commercial law in Southeast Asia.

100 See Jerrold Long, “Private Lands, Conflict and Institutional Evolution in the Post-Public Lands” (2011) 28:3 *Pace West Environmental Law Review* 670.

101 See John Gillespie, “Localizing Global Rules” (2008) 33:3 *Law and Soc. Inquiry* 673.