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Dual Legal Orders: from Colonialism to High Technology

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Abstract

This article begins by discussing the genesis of a free zone on a small island in the Straits archipelagos, tracing its development from a free port to an export processing zone and most recently to a science park. Throughout its life as a free zone, this island has comprised a transnational commercial domain of a dual legal order. A dual legal order comprises two domains, a transjurisdictional commercial and local political. Here we focus on a particular type of transjurisdictional commercial domain–the free zone. Three historical forms of zone receive attention, the free port, export processing zone and the science park. Various manifestations geographically and temporally are elaborated. In conclusion, a number of observations are then made concerning dual legal orders and free zones.

A. Introduction

In 1786, the British East India Company landed on a small island in the Straits archipelagos. Although the Company encountered inhabitants, the island was deemed *terra nullius*, declared property of the Crown and named Prince William Island. Over time, the island was established as a free port and renamed Penang. Located along the colonial trade routes, Penang offered merchant shippers exemption from tariff duties when they stopped on the island to load, unload or trade goods. With de-colonisation, the island lost its British-legislated free port status. At independence, the newly-formed Malaysian government took control over Penang and transformed the island into an export processing zone (EPZ) and, more recently, it has been reborn once again as 'Silicon Island'.

Post-independence Penang has defined itself as a haven for offshore manufacturing. The government provides factories tailored to the needs of a range of industries, including agriculture, automobile, chemical and fertiliser, metal, paper and printing, pharmaceutical, resource-based, textile and garment and wood processing. Since the late 1960s, high technology companies have increasingly located low-end production processes in Penang. More recently, while maintaining its diverse industrial base, Penang has sought to transform itself from a provider of factory labour to a producer of sophisticated high technology goods.

In 1969 the government established the Penang Development Corporation to cater to foreign companies. The Corporation works closely with foreign companies to identify their needs and, once companies locate operations on the island, to keep them satisfied. To deliver on its promises, the federal government granted the Corporation the power to legislate. The Corporation is also closely intermingled with the state government. For instance, Corporation Chairman, Koh Tsu Koon, serves as the Chief Minister of Penang.[i1]

The government provides a range of options to companies wishing to locate offshore operations in Penang. The industrial infrastructure of the island includes free industrial zones, industrial parks and licensed manufacturing warehouses. A free industrial zone is a geographically delimited territory catering to export-oriented businesses. Geographically more limited industrial parks gear themselves to joint venture projects and to local companies contracted by transnational corporations (TNCs) to provide support services. Licensed manufacturing warehouses are essentially factories that may be located outside of the zones and parks and also provide special privileges to foreign and domestic industries.[ii2]

Throughout its post-independence incarnations, Penang has presented itself as a respite for foreign companies plagued by inefficient and burdensome home state regulation. While Penang puts forth an image of a government-free zone, in reality, the government is proactively involved in serving the needs of companies. The government employs the Development Corporation to cater to foreign companies, using a range of public and private law means. For instance, the Corporation established academic and vocational institutions such as the Penang Skills Development Center 'to provide custom-made workers for industries.[iii3] Also, the Corporation has transformed itself into an 'integrated manufacturing center', offering foreign

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[1] J Chin and LM Keong 'Silicon Island' [9/1999] Asia Inc Malaysian Edn 17. As with many of the high technology government leaders in Malaysia, Koh was educated in the United States.

[2] Asia Inc 'Silicon Island' [9/1999] Asia Inc Malaysian Edition and Ministry of International Trade and Industry *Malaysia: Investment in the Manufacturing Sector: Policies, Incentives and Facilities* (MIDA Kuala Lumpur, Malaysia) 61

[3] J Chin & CY Heong 'Cyber Czar: Othman Yeop Abdullah's vision for Malaysia's Multimedia Super Corridor' (1999) 8(8) Asia Inc 16, 18

companies several links of their production process in one package. So Penang provides not only ready-made factories and cheap offshore labour, but also research and development, design and tooling, financial planning, infrastructure and also sales and marketing.[iv4]

Penang is so integrated into the transnational high technology economy that even during the recent currency crisis, investment into the island grew by an estimate two-point-one billion dollars. This influx came from leading high technology TNCs such as Advanced Micro Services, Hewlett-Packard, Intel, Toray, Motorola, Osram Opto and Seagate.[v5] By catering extensively to foreign companies, Penang has established itself as a transnational commercial domain of Malaysia's dual legal order. Laws and policies are directed at promoting commercial interests.

This island in the Straits archipelagos has been a free zone for several centuries. During colonial times, it was an extra-territorial settlement, a free port, controlled by the British. After independence, it became a transnational commercial domain, an EPZ and then a science park, within the political territory of Malaysia. Throughout its life as a free zone, a different regulatory regime existed on the island than in other parts of proto-Malaysia and subsequently Malaysia. While certain domains of proto-Malaysia and Malaysia were geared towards internal domestic matters, the island was transnational in its outlook. Thus, two regulatory domains, a local political and transnational commercial, existed within the political territory of what is now Malaysia.

The coexistence of two regulatory domains within a unitary sovereign territory is referred to here as dual legal order. Dual legal orders have existed at various historical points and in numerous places. This chapter will first introduce the dual legal order concept, elaborating its contours and providing various examples. Then, we will discuss a particular type of transnational commercial domain--the free zones—of dual legal orders. Here, the evolution of these zones will be traced as they transform from free ports or free cities into EPZs and finally into science parks. In conclusion, we will summarise the argument briefly and then make a number of observations.

B. Dual Legal Orders

1. The Concept

A dual legal order comprises two domains, transjurisdictional commercial and local political. Typically each domain is defined by source and subject matter based criteria. The transjurisdictional domain is defined by composite, foreign and local, inputs and legal processes serving the interests of transjurisdictional commerce. The local political domain is defined by its primarily domestic inputs and legal processes governing internal cultural, economic and political matters. The division between the two domains is highly negotiated. When contest arises, a legal negotiation ensues between the two domains. Through this negotiation, a contested matter either becomes a matter affecting commerce or a local political matter. Although the Penang example provides an example of a territorially defined transjurisdictional domain, domains need not be territorially delimited.

Dual legal orders may take myriad forms, varying according to time and place. While a common template exists, dual legal orders exhibit a range of types, including, colonial, federalist,

[4] *Id* 17-19
[5] *Id* 18

inter-state and supra-national. The two domains may be formally set forth in constitutional documentation or, instead, informally adapted through legislation and contract. The division between the transjurisdictional commercial and local political domains is negotiated and time and place contingent. Given the large number of dual legal orders, this section briefly explores several types and introduces the negotiated nature of the inter-domain division.

2. Variable Types

From colonial to present day transnational legal orders, dual legal orders have varied in form.[vi6] For instance, Dutch colonial policy was premised upon extending sovereignty only to matters affecting its own overseas citizens and their commercial life. According to this policy, to the extent that colonial commerce was unaffected, colonised populations were left free to govern their own lives.[vii7] A very different type of dual legal order came into being when a group of African countries established The Common Market for Eastern and Southern Africa, a customs union devoted to regional commercial integration.[viii8] However, just as the Dutch colonial policy distinguished between transjurisdictional commercial and local political matters, the Common Market adopts a policy of non-interference in the internal affairs of member states.

The following sub-sections discuss colonial, federalist, supra-national, inter-state and informal dual legal orders. The concept of 'dual legal system' was first introduced in the academic literature in relation to colonial orders.[ix9] Colonial administrators have also employed the concept.

a. Colonial Dual Legal Orders

In The Dual Mandate, Sir F. D. Lugard[x10] argued that 'Europe is in Africa for the mutual benefit of her own industrial classes and the native races in their progress to a higher plane."[xi11] At the

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[6] For an application of the dual legal system concept to modern Indonesia *see* DM Trubek, Y Dezalay, R Buchanan and JR Davis 'Global Restructuring and the Law: Studies in the Internationalization of Legal Fields and the Creation of Transnational Arenas' (1994) 44 Case Western Reserve Law Review 407

[7] Colonial dual legal systems drew a sharp distinction between the transjurisdictional commercial domain and the local political domain. The customary laws of local populations were to be left alone. When customary laws violated standards of civilisation, chartered companies or colonial governments were permitted to deem such laws 'void for repugnancy'. While officially customary law represented an off-limits domain, in practice, customary law itself was, in Sally Falk Moore's terms, a 'composite construction' (SF Moore *Social Facts and Fabrications: "Customary" Law on Kilimanjaro 1880-1980* [Cambridge UP Cambridge 1986] 5), the product of a negotiation among companies, government, and local populations.

To pursue their commercial mandate, the companies sometimes commissioned studies of local customary laws. Compilations were then used for the purposes of administration. For this reason, the articulation of customary law by company agents was designed as a mechanism for effectuating change. According to Francis G. Snyder, customary law itself 'belonged to an ideology that generally accompanied and formed part of colonial domination.' (FG Snyder 'Colonialism and Legal Form: The Creation of "Customary Law" in Senegal' [1981] J Legal Pluralism 49). While local customary law was supposed to remain intact in British overseas not only was this customary law collaboratively produced by foreign and local actors, but also, its abridgement was permitted in cases in which such customs conflicted with the principles of civilisation.

[8] *See e.g.* PK Kiplagat 'Legal Status of Integration Treaties and the Enforcement of Treaty Obligations: A Look at the COMESA Process' (1995) 23 Denver Journal of International Law and Policy 259

[9] See eg JS Furnivall Colonial Policy and Practice: A Comparative Study of Burma and Netherlands India (1956).

[10] He would later be Lord Lugard.

time, Lugard was British High Commissioner, Governor and Governor-General of Northern Nigeria. He would later be appointed a member of the Permanent Mandates Commission established by the United Nations to oversee decolonisation. The pursuit of these dual goals, according to Lugard, was best carried out through a dual order, leaving local populations 'free to manage their own affairs through their own rulers,' while intervening only to 'preserve law and order, to develop trade and communications in the country, and to protect the interests of the merchants and others who are engaged in the development of its commercial and mineral resources.'[xii12] Realising the policy might breed resentment and lead to unrest among host societies, he advocated adapting the policy to specific circumstances of countries in which business was undertaken. Thus, he argues, '[p]rinciples do not change, but their mode of application may and should vary with the customs, the traditions, and the prejudices of each unit.'[xiii13]

The most fundamental division in colonial legal orders existed between the legal aspects of transnational commerce and matters affecting it, on the one hand, and of local customs, on the other. In practice dual legal orders were highly pragmatic, dependent upon the nature of commercial engagement and peculiarities of local cultures. Colonisers aimed to sustain commercial enterprise by fostering relationships with domestic elites of overseas territories. Maintenance of relationships required acquiescence of local populations. Colonisers instituted 'cooperation' through a mix of force, incentives (commercial and political) and opinion. Often merchants lacked the requisite military might and political will to subdue forcibly local political communities. Thus, control was achieved through processes of bargaining, negotiation and imposition.[xiv14]

Colonial dual orders were pragmatic and commercially-oriented. Commercial interests were often pursued through preexisting political structures. Most colonial powers realised that allowing local laws to remain partially in place solved practical problems. According to official policy, laws affecting commercial interests, criminal law, commercial law and labour law, were replaced while laws governing domestic relations, inheritance and family law, left intact.[xv15] Fiscal and military concerns also drove colonial pragmatism. Colonial expansion required force, which was an expensive and scarce resource. The Crown did not always provide sufficient military backing to chartered companies. Also, while often colonisers possessed naval powers superior to overseas polities, colonial military strength on land typically was inferior.[xvi16]

According to official pronouncements, extension of jurisdiction was highly discretionary and generally extended only as commercial exigencies required. Otherwise, the colonial power left indigenous societies free to manage their own lives according to their own laws. The coloniser nonetheless reinforced powers of chosen local leaders as arbitrators of customary

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[11] FD Lugard *The Dual Mandate in British Tropical Africa* (William Blackwood and Sons London 1922)
[12] *Id*
[13] *Id.* Variation was so extensive that Hall notes, '[t]he powers exercised by Great Britain in the protectorates are singularly various in both form and extent. WE Hall *A Treatise on the Foreign Powers and Jurisdiction of the British Crown* (Clarendon P Oxford 1894) 210
[14] R Gilbert *The Unequal Treaties: China and the Foreigner* (J. Murray London 1929)
[15] TO Elias 'Colonial Courts and the Doctrine of Judicial Precedent' (1955) 18 The Modern L Rev 356 and MB Hooker *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Clarendon P Oxford 1975); and ------ *A Concise History of South-East Asia* (Clarendon P Oxford 1978)
[16] WH-J Leue 'Legal Expansion in the Age of Companies: Aspects of the Administration of Justice in the English and Dutch Settlements of Maritime Asia, c. 1600-1750' in WJ Mommsen and JA De Moor, (edd), *European Expansion and Law: The Encounter of European and Indigenous Law in 19th- and 20th-Century Africa and Asia* (Berg Oxford 1992) 129, 137-139

law.[xvii17] At times the colonising agent abrogated customary laws in the name of civilisation. T. O. Elias notes: 'There is the indigenous system of traditional courts applying mainly customary law or such part of it as is not considered to be repugnant to the principles of 'natural justice, equity and good conscience' or inconsistent with any validly applicable law in the colony.'[xviii18] Customary laws varied according to time and place throughout the overseas territories.[xix19]

The representations of colonial dual legal orders suggest that customary laws, the rules of the local political domain, were determined entirely by local political societies. However, since the 1980s scholars have increasingly questioned this assumption.[20] For instance, Sally Falk Moore has termed customary laws 'composite colonial constructions' in which 'current social/cultural systems like souped-up automobiles are constructions made out of new and used parts.'[21] Similarly, Martin Chanock notes, 'both foreign and indigenous laws are products of the colonial situation, continually being formed in response to new historical circumstances.' He explains:

> This model considers the legal system as one in which the colonial law, itself a specific creation rather than an import, and the new state and economy continually refashion African custom from the materials proffered by the colonized societies. In this perspective both foreign and indigenous laws are products of the colonial situation, continually being formed in response to new historical circumstances.[22]

Francis Snyder explains the making of customary law as follows: 'Though "customary law" implies historical continuity, its origins are actually relatively recent. The notion of customary law in Africa and elsewhere was specific to particular historical circumstances. It belonged to an ideology that generally accompanied and formed part of colonial domination.'[23] The creation of customary law, according to Snyder, was subsidiary to commercial concerns: 'Both the concrete forms and its conceptualization resulted from changes in social relations associated with the transformation of precapitalist modes of production and the sub-sumption of precapitalist social

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[17] WH-J Leue 'Legal Expansion in the Age of Companies: Aspects of the Administration of Justice in the English and Dutch Settlements of Maritime Asia, c. 1600-1750' in WJ Mommsen and JA De Moor, (edd), *European Expansion and Law: The Encounter of European and Indigenous Law in 19th- and 20th-Century Africa and Asia* (Berg Oxford 1992) 129, 142

[18] JDM Derrett 'Justice, Equality and Good Conscience' in Sir JND Anderson *Changing Law in Developing Countries* (Allen and Unwin London 1963) 114-115; TO Elias 'Colonial Courts and the Doctrine of Judicial Precedent' (1955) 18 The Modern L Rev 356, 358 and ------- 'Notes: Form and Contents of Colonial Law' (1954) 3 Intl and Comparative LQ 645, 647

[19] *See e.g.* MB Hooker *Legal Pluralism* (OUP Oxford 1975); and RD Kollewign 'Conflicts of Western and Non-Western Law' (1951) 4 The Intl LQ 307

[20] SE Merry 'Law and Colonialism' (1991) 25(4) L and Society Rev 889, 897-906, ------- 'Legal Pluralism' (1988) 22(5) L and Society Rev 869 & SF Moore 'Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999' (on file with author)

[21] SF Moore *Social Facts and Fabrications "Customary" Law on Kilimanjaro 1880-1980* (Cambridge UP Cambridge 1986) 5, 10

[22] M Chanock 'The Law Market: British East and Central Africa' in WJ Mommsen and J de Moor, (edd), *European Expansion and Law: The Encounter of European and Indigenous Law in 19th- and 20th-Century Africa and Asia* (Berg Oxford 1992) 279, 280. *See also* ML Chanock *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge UP Cambridge 1985)

[23] FG Snyder 'Colonialism and Legal Form: The Creation of "Customary Law" in Senegal' (1981), 19 J Legal Pluralism 49

formation with the capitalist economy.'[24] Thus, what was assumed local was often the product of a collaborative effort between certain foreign and local interests.

At the same time, the mix of foreign and local inputs into local law varied tremendously according to time and place. Also, the colonial power did not absolutely dominate local political socieites. So, even when the overseas power did not recognise the existence of a local political domain, it could exist nonetheless in fact.

Creation of commerce facilitating laws required an alteration or re-creation of local customary law. Intervention occurred explicitly in some cases and more subtly in others. For instance, colonial authorities regularly remodeled customary laws regarding labour relations and land-holding.[25] Local laws not re-fashioned were formally termed customary laws. Matters customary and non-customary alike regularly were remodeled transjurisdictionally.

While local customary laws formally remained intact in British overseas colonies, not only were customary laws collaboratively produced by foreign and local actors, but abridgement was permitted in cases in which customs conflicted with the principles of civilisation.[26] For example, while the introduction of British law into the Straits Settlements was subject to local customs, when customary law operated 'unjustly or oppressively' it was derogated.[27] Further, often the civilising mission was subsidiary to commercial interests. Lugard notes:

> Let it be admitted at the outset that European brains, capital, and energy have not been, and never will be, expended in developing the resources of Africa from motives of pure philanthropy; that Europe is in Africa for the mutual befit of her own industrial classes, and of the native races in their progress to a higher plane; that the benefit can be made reciprocal, and that it is the aim and desire of civilized administration to fulfil this dual mandate.
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> By railways and roads, by reclamation of swamps and irrigation of deserts, and by a system of fair trade and competition, we have added to the prosperity and wealth of these lands. We have put an end to the awful misery of these lands, and checked famine and disease. We have put an end to the awful misery of the slave-trade and inter-tribal war, to human sacrifice and the ordeals of the witch-doctor. Where these things survive they are severely suppressed. We are endeavouring to teach the native races to conduct their own affairs with justice and humanity, and to educate them alike in letters and in industry.[28]

The tension between the civilising mission and respect for local sovereign autonomy must be understood within this broader context of transborder commercial predominance and also a

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[24] *Id*

[25] WJ Mommsen 'Introduction' in WJ Mommsen and J de Moor, (edd), *European Expansion and Law: The Encounter of European and Indigenous Law in 19th- and 20th-Century Africa and Asia* (Berg Oxford 1992) 1, 9

[26] Derrett; D Engels 'Wives, Widows, and Workers: Women and the Law in Colonial India' in WJ Mommsen and J de Moor, (edd), *European Expansion and Law: The Encounter of European and Indigenous Law in 19th- and 20th-Century Africa and Asia* (Berg Oxford 1992) 159-178 and J Fisch 'Law as a Means and as an End: Some Remarks on the Function of European and Non-European Law in the Process of European Expansion' in WJ Mommsen and J de Moor, (edd), *European Expansion and Law: The Encounter of European and Indigenous Law in 19th- and 20th-Century Africa and Asia* (Berg Oxford 1992) 15

[27] PP Buss-Tjen 'Malay Law' (1958) 7 AJCL 248, 255-256

[28] FD Lugard *The Dual Mandate in British Tropical Africa* (William Blackwood and Sons London 1922) 617

customary law which was a composite colonial construction. While the commercial context was often acknowledged in official documents, this was rarely the case with regard to the composite nature of customary law.

As has been demonstrated, colonial dual legal orders varied tremendously according to time and place. Whle in the academic literature the term 'dual legal system' is generally reserved for colonial orders, the concept of dual legal order put forth here includes federalist, supra-national, inter-state and informal order within its ambit.

b. Federalist, Supra-national, Inter-state and Informal Dual Legal Orders

Federalist legal orders are typically dual legal orders in design. At initiation, constituent political jurisdictions associate with one another to develop rules for managing their transjurisdictional commercial affairs. At the same time, parties are keen to maintain sovereign control over their internal political affairs. For instance, the US first established itself on this basis. There federal jurisdiction derived from the Commerce Clause of the US Constitution.

Nation-states may also establish dual legal orders by creating institutions devoted to managing transnational commercial relations. For instance, throughout the post-Second World War period, oligarchic states have created common institutions to promote and manage transnational commercial integration. The relationship between states and the nascent institutions has accorded with the dual legal order design. Following the War, countries gathered in Bretton Woods, New Hampshire to establish the International Monetary Fund, International Trade Organisation and World Bank, to manage the world economy.[29] The role of the international institutions was limited to the transnational commercial domain, as the Articles of Incorporation of the World Bank indicate: 'The Bank and its officers shall not interfere in the political affairs of any member.'[30]

Supra-national institutions such as the European Union also owe their existence to a commercial integration movement. Originally, the European Economic Community was charged with creating the transjurisdictional sphere of a 'Europe', leaving domestic matters to the constituent member states. The reach of the Economic Community extended with the Single European Act and the Maastricht Treaty. Member state laws were to be rearranged only to the extent necessary to facilitate inter-state commerce. Accordingly, the Europe Without Borders initiative was envisioned as identifying those national regulations affecting commerce and to redesign them so as to mature the transnational commercial domain, establishing free movement of capital, companies, goods and workers.

Each of these dual legal orders has been organised through constitution drafting. However, dual legal order may also emerge informally. For instance, in Malaysia, the government in 1994 embarked upon the Multimedia Super Corridor, a high technology national development plan and foreign direct investment scheme. This Corridor would be located on a fifteen by forty kilometre strip of land. The Corridor itself is a part of the transnatonal commercial domain of Malaysia's dual legal order.[31] The Corridor has not been constitutionalised, although, functionally two legal domains coexist within the country's

[29] The International Trade Organisation never materialised.
[30] Articles of Incorporation of the International Bank for Reconstruction and Development 12/27/1945, Art. I @10
[31] For a discussion of Malaysia's formal federalist system *see e.g.* A Ibrahim 'Malaysia as a Federation' (1974) 1(1) J Malaysian and Comparative L 1 and LA Sheridan and HE Groves *The Constitution of Malaysia* (4th edn Malaysian Law Journal Singapore 1987)

sovereign territory. Establishing an extra-constitutional dual legal order requires the oligarchising of the state.

While in theory and according to the constitution, Malaysian citizens are to determine the legislative composition of the country, in certain legal realms, foreign actors and government officials have cartelised power over legal decision-making. This transnational community has successfully coordinated and commandeered aspects of the Malaysian legal order in a manner that subverts their intended purpose. In doing so, they have established an informal dual legal order, through contract, legislation and executive action. The legal authority of the government to enter into agreements and the privilege of foreign actors to participate in the Corridor derive from the sovereignty of the Malaysian people. However, while the citizenry are vested with the right to legitimise activities occurring within the Corridor, in practice, they are structurally excluded from decision-making processes.

Not only are the forms of dual legal orders manifold, but also a single form may vary tremendously depending upon time and place.

2. Transitions in Time

As the Penang example illustrates, dual legal orders come into being at historical moments and develop over time. When Prince William Island was first 'discovered', overseas settlers declared the territory *terra nullius*. Since preexisting inhabitants of the island were not recognised in law, at the time, no formal dual legal order was created. From the perspective of indigenous societies, usurpation of control over the island represented an attempt to displace the preexisting order. To the extent that the Company was unsuccessful in monopolising legal power, a dual legal order existed *in fact* on the island. This sub-section examines how dual legal orders change over time and how participants in the transnational commercial domain insure against uncontrolled effects of the local political domain on their undertakings.

While the dual legal order formally assumes a sharp, static and impregnable division between domains, the classificatory task of placing a specific matter in either of the domains is fraught with difficulty and often the subject of controversy. The correct classification of a particular matter will vary according to time, place and circumstance. As the discussion concerning the origins of dual legal orders demonstrates, province and extent of domains are correlative. As one domain expands, the other domain contracts. Also, shifts are rarely tidy and typically the subject of political contest.

A piece of property belonging to the transnational commercial domain may transform into local political property through the action of an insurgent local political community. For instance, in the wake of national independence movements, whether new states could politicise foreign commercial property was the subject of international debate. If politicisation proceeded, transnational commercial property would become local political property. Through its 1962 General Assembly Resolution, entitled Permanent Sovereignty over National Resources, the United Nations resolved the issue: 'Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or national interest which are recognized as overriding purely individual or private interests, both domestic and foreign.'[32] Thus, Resolution

[32] 'Resolution on Permanent Sovereignty Over Natural Resources', GA Res. 1803 (XVII), UN GAOR, 17th Sess., Supp. No. 17

1803 urged that in a case of controversy, the domestic political domain would trump the transjurisdictional commercial.

The International Monetary Fund Structural Adjustment Facility provides a counter example, whereby a local political matter becomes a transnational commercial one. Through this Facility, the Fund 'ties its loans to stabilization programs that ensure the country's financial and political institutions are attuned to the Fund's ideal of sound economic management.'[33] By tying international financial aid to reform of the local political domain, the Fund transforms domestic matters into matters affecting transnational commerce. The Facility is employed typically in times of financial crisis during which control over the local political domain is vulnerable. Thus, through a process of legal negotiation, a contested matter either becomes a matter affecting commerce or a domestic political matter. Importantly, the bargains struck are not only strategically orchestrated, but also vary according to time and place.

For example, take the state of New York in post-independence America after the signing of the federal constitution, but prior to the adoption of the Bill of Rights. At that point, New York enjoyed sovereignty over its internal affairs. However, sovereignty was not absolute and, according to the Commerce Clause of the US Constitution, inter-state commerce fell under federal jurisdiction. Article 1, Section 8 provides Congress with the right '[t]o regulate commerce with foreign nations and among the several states and with the Indian tribes.'[34] Taking an expansive reading of matters falling under the Commerce Clause, transjurisdictional commercial matters occurring in New York were governed by federal law rather than New York state law. Thus, two discernible legal domains coexisted within the territory of New York. These domains were not territorially determined, but instead subject matter based. Additionally, while the legislative source of the transjurisdictional domain, the federal government, included both citizens of New York and foreigners, the local political domain was composed only of New Yorkers.

The border between the two domains in the New York example was negotiated and varied over time. Under an expansive reading of the commerce clause, the province of the local political domain was significantly curtailed as matters affecting the flow of inter-state commerce fell under federal jurisdiction. On the other hand, a conservatively interpreted Commerce Clause meant that matters must be more directly within the stream of transjurisdictional commerce to be governed by Congress. Readings of the Commerce Clause's reach have shifted with time. Generally as the federal government has grown in size, the reach of the Commerce Clause has also expanded.

In the US context, one question that would inevitably arise as the federal government took on increasing power was, in the case in which interstate and intrastate commerce overlap, which domain should be supreme.[35] Throughout the nineteenth century, a system of dual federalism reigned in which the federal and state governments as equals vied for supremacy. According to Edward S. Corwin, 'dual federalism' comprises four postulates: 'The national government is one of enumerated powers only; Also, the purposes which it may constitutionally promote are few; Within their respective spheres the two centers of government are 'sovereign'

[33] S Anthony 'IMF Structural Adjustment Programs: An Econometric Evaluation' (1998) 3 The Georgetown P Policy Rev 133, 135

[34] US Constitution, Article 1, Section 8

[35] Edward S. Corwin asks: 'By what rules are collisions between the respective powers of the two centers of government supposed by the Constitution to be determined.' ES Corwin 'The Passing of Dual Federalism' (1950) 36 Virginia L Rev 1, 13

and hence 'equal'; The relation of the two centers with each other is one of tension rather than collaboration.[36] Similarly, the Commerce Clause recognised the sovereignty of foreign nations and the 'Indian tribes' as external to and independent of the federal government. The laws of 'Indian tribes' were thus generated by norms exterior to the US legal system. Thus, when a US court resolved a dispute by reference to the laws of 'Indian tribes' it looked outside its own legal system to ascertain the appropriate rule to guide decision-making.

In contrast, according to Justice Kirby of the High Court of Australia, 'no dual legal system of law' exists in that country.[37] Whilst the Court acknowledged that indigenous societies may possess their own laws, it did not recognise these laws for the purposes of its own decision-making. Instead, Kirby relates, '[f]or Aboriginal legal rights, including native title, to be enforceable in an Australian court, a foundation must be found within the Australian legal system.'[38] Thus, although Australian legislation 'may protect and reinforce some aspects of traditional laws and customs', this fact was merely incidental. Instead, '[t]he source of the enforceability of native title in this or any other Australian court is, and is only, as an applicable [Australian] law or statute provides.'[39]

In the US context in the 1914 Shreveport Rate Cases the Supreme Court asserted that in a case of inter-domain controversy, the transjurisdictional domain would trump: 'Wherever the interstate and intrastate transaction of carriers are so related that the government of one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule; otherwise the Nation would not be supreme within the National field.'[40] So, in the context of the Commerce Clause, at least according to Shreveport, the dual legal order explicitly provides for the supremacy of the transjurisdictional domain. This rule is the subject of recurring controversy for proponents of state rights who argue that the federal power is secondary to the power of the states. State rights supremacists assert that, since the states created the federal government in the first place for defined purposes, states maintain control over federal institutions.

The power of the federal government extends not only to commerce, but also to matters affecting commerce. In McCulloch v. Maryland, the Supreme Court held in this regard: 'The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities interstate which so affect interstate commerce or the exercise of the power of Congress to regulate interstate commerce.'[41] Just as recipients of international financial aid bemoan the conditions attached, so have various states resisted the ability of Congress to regulate matters that to them appear squarely within the domestic political domain. For instance, in Heart of Atlanta Motel v. United States, the Supreme Court held that an Atlanta motel unlawfully discriminated against African-Americans.[42] The motel objected to this federal intervention into its private commercial affairs. The Court determined that, since the motel solicited guests from other states, its regulation was justified by the Commerce Clause. Further, the Court held that Congress could legislate against private discrimination because the Bill of Rights was applicable to actions falling under the reach of the Commerce Clause. Thus,

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[36] *Id* 4
[37] For a discussion of the contrasting approaches *see e.g.* J Tully *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge UP Cambridge 1995)
[38] Wik Peoples v. Queensland 1996, 187 CLR 1, 214
[39] *Id* 214
[40] Houston v. US (1914) 234 US 342, 351-352
[41] McCulloch v. Maryland (1819) 4 Wheat 316, 421
[42] Heart of Atlanta Motel, Inc. v. US (1964) 379 US 241

engaging in transjurisdictional commercial activity makes a state subject to not only commercial rules, but also to matters deemed to affect the national interest.

Transnational commercial actors often rely upon institutions and resources owned by members of the local political domain. They use these institutions to expand the commercial domain. By exercising control over another domain's property, the transnational actors incur the risk of reassertion of control by the legitimate owners. When it is impossible to translate control into ownership, a modicum of vulnerability becomes unavoidable. The uncertainties and risks inherent in this arrangement have led transnational commercial actors to seek insurance to mitigate the risk that local political actors will disrupt transnational commercial investments.

Various international and national and also public and private institutions have responded to the need to mitigate risk by offering insurance to commercial actors against political risk. This insurance is particularly necessary when undertaking commercial activity in politically contested territories. To meet this need, in 1988 the World Bank established the Multilateral Investment Guarantee Agency (MIGA). The purpose of MIGA is 'to encourage the flow of investment for productive purposes among member countries and in particular developing member countries.'[43] In line with the tenets of the dual legal order, according to the Articles of Incorporation, MIGA 'shall not interfere in the political affairs of any member.'

MIGA has at its disposal a range of mechanisms and offers insurance for a variety of risks. The Agency may:

(a) issue guarantees, including coinsurance and reinsurance, against non-commercial risks in respect of investments in a member country which flow from other member countries;
(b) carry out appropriate complementary activities to promote the flow of investments to and among developing countries; and
(c) exercise such other incidental powers as shall be necessary or desirable in furtherance of its objective.[44]

In line with its role as mitigator of risk arising from the domestic political domain, the Agency offers insurance against the following types of risk:

(i) Currency Transfer -- Any introduction attributable to the host government of restrictions on the transfer outside of the host country of its currency into a freely usable currency or another currency acceptable to the holder of the guarantee, including a failure of the host government to act within a reasonable period of time on an application by such holder of such transfer;
(ii) Expropriation or Similar Measures -- Any legislative action or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from, his investment, with the exception of non-discriminatory measures of general application which governments normally take for the purpose of regulating economic activity in their territories;
(iii) Breach of Contract -- Any repudiation or breach by the host government of a contractor with the holder of a guarantee, when

[43] Convention Establishing the Multilateral Investment Guarantee Agency (MIGA); 11 October, 1985 [1989] UKTS 47, Article 2, Paragraph 1
[44] *Id* Article 2(a)-(c)

(a) the holder of a guarantee does not have recourse to a judicial or abitral forum to determine the claim of repudiation or breach, or
(b) a decision by such forum is not rendered within such reasonable period of time as shall be prescribed in the contracts of guarantee pursuant to the Agency's regulations, or
(c) such a decision cannot be enforced; and

(iv) War and Civil Disturbance -- Any military action or civil disturbance in any territory of the host country to which this Convention shall be applicable as provided in Article 66.[45]

Insurance companies decide whether to insure certain commercial projects on the basis of the perceived political stability of the host country. Insurability is based upon a risk rating calculated by prominent private agencies such as Moody's and Standard and Poor's.[46]

Given the range of dual legal orders manifest in time and place and their protean nature, it is impossible to provide a comprehensive exploration of the topic in the space allotted. However, in the following section the development of a specific form of transjurisdictional commercial domain, the free zone, is discussed. Three types of free zone receives attention, the free port, EPZ and the science park.

C. The Free Zone: A Form of Trans-Jurisdictional Commercial Domain

At the start of the paper, we introduced a particular form of transnational commercial domain manifest on an island in the Straits archipelagos—the free zone. There we discussed three incarnations of the island, as a free port, EPZ and most recently a science park. Now we turn to discuss the concept of free zone more broadly, tracing its historical origins and more fully exploring the three forms, free port, EPZ and science park, introduced at the outset.

1. Free Ports

Throughout history sovereign governments have created transjurisdictional commercial domains within their political territories. As governments expanded their reach extra-territorially, they often negotiated extra-territorial zones within foreign territories. At times, these zones have been negotiated by corporations. Both internal and extra-territorial zones were governed by regulatory regimes distinct from their surrounding political territories. These zones were enclosed by law and, at times, physically by walls and fences. Up until the mid-twentieth century, a specific type of zone, the free port, proliferated transnationally.

a. In Time and Place

Over the last four centuries, European oligarchic states have made extensive use of free ports, a legal enclave, in the creation of the transnational commercial order. Free ports were generally fenced in territories near a seaport. In a maritime-based order, goods and persons travelled via ships. In the process of shipping a good from point A to point Z, a ship might stop at several

[45] *Id* Chapter III: Operations: Article 11, Covered Risks (i)-(iv)
[46] *See* J Barratt 'Financing Projects through the Capital Markets--A South East Asian Perspective' in F D Oditah *The Future for the Global Securities Market: Legal and Regulatory Aspects* (Clarendon P Oxford 1996) 95, 101-103

points between the ports of origin and destination. In order that shippers might avoid paying customs to the political sovereign in whose territory a ship stopped in transit, free ports were established.

To ensure that goods would not leak into the rest of the country, free ports were typically literally fenced in. Guards patrolled the periphery of the port. Customs officials regulated access to and from the hived-off zone. The use of the word 'free' indicated that the port was an extra-territorial domain, unencumbered by the customs laws of the country in whose political territory it resided. However, the term 'free' is misleading. As Dr. Richard S. Thoman indicates,

> it is 'free' and 'foreign territory' only with respect to the application of customs formalities within its boundaries. Directly or indirectly, it is still within the jurisdiction of the customs authorities. This is an extremely important point for. . . the extension of authority of customs officials into the free port tends to negate the basic assumption upon which the device is based--namely that goods within the free port are not subject to customs jurisdictions.[47]

Thus, it is important to recognise that the enjoyment of freedoms by a privileged class within the port necessitated a regulatory regime.

Freedom was possible also as a result of the legally-facilitated and regulated infrastructure within the zones. The customs authority constructed offices, accommodations and warehouses to meet shippers' needs. Traditionally, intra-port processing was limited. For this reason, the government did not need to institute extensive training courses for port workers. Despite the bare-bones nature of many ports, they were a site of merchant trading. So governments not only provided the infrastructure of the ports, but also regulated inter-merchant activities.[48] It is within this context that the supposedly extra-legal character of *lex mercatoria* must be placed. The extensive role of governments in establishing the free port environment in which merchants developed rules to govern their commercial intercourse suggests that the extra-legal theories are indeed romantic in character.

Throughout history, governments have made extensive use of free ports. The free port legal technique dates back to the ancient trade routes of Tyre and Carthage. During the modern era, free ports have existed throughout Europe. For instance, free ports may be found in Bremen, Copenhagen, Danzig, Hamburg and Kiel. As Europeans have travelled outward, governments, sometimes through their merchant agents, have established free ports along their trade routes. Within the British empire of the eighteenth, nineteenth and twentieth centuries, entire territories such as Hong Kong, Singapore and Penang were declared free ports.[49] This section provides a thumbnail sketch of the development and circulation of free ports up until the nineteenth century and then from the nineteenth century to the 1930s.

b. Pre-Nineteenth Century

Governments established free ports domestically and internationally in the period leading up to the mid nineteenth century. When political communities were welcoming of commerce, the

[47] RS Thoman *Free Ports and Foreign-Trade Zones* (Cornell Maritime P Cambridge, MA 1956) 7-8
[48] *Id*
[49] HG Grubel 'Free Economic Zones: Good or Bad?' (1984) *Aussenwirtschaft* 43, 44

ports generally proliferated. However, as political communities grew wary of commercial interests, the use of the ports receded. During this period, each of the major imperial powers created free ports, including the Greeks, Romans, English and Dutch.

The ancient city-states of the eastern and southern Mediterranean Sea used free ports to coordinate and maintain their vast trade routes. Carthage itself controlled over three hundred African cities and numerous Mediterranean islands. These political jurisdictions were often surrounded by communities hostile to foreigners. Thus, the free ports developed as a compromise device. Their proximity to the sea limited the territorial boundaries in need of defence and capitalised on the maritime powers of the city-states. Thus, '[t]rade was closely and jealously regulated, the principle measure being that of granting foreign merchants access only to stipulated ports and ruthlessly prohibiting them from all others.'[50]

The Romans also made use of transshipment centres to expand their empire to Asia.[51] Ports were established in Alexandria and Antioch and also as along the Nile, Red Sea and Gulf of Oman. The Roman free port on the island of Delos is often cited as the progenitor of the modern free port. Delos was a customs-free territory that promoted trade among Asia Minor, Egypt, Greece, North Africa and Syria.[52] At the farthest reaches of the empire, the Romans established enclave territories through capitulation of sovereign foreign rulers.

The use of free ports subsided for a period after the collapse of the Roman Empire. During the Crusades, they regained prominence in international commerce. These ports were used in earnest throughout the seventeenth century. In the Mediterranean, on the way from Europe to the Far East, the town of Livorno in Tuscany was established as a free city.

From the sixteenth to the eighteenth centuries, free ports were formed in a number of cities. In Europe, free ports were found in Ancona, Civita-Vecchia, Fiume, Genoa, Marseilles, Messina, Trieste and Villefranche. The best known of these ports was Genoa. Thoman explains how in Genoa '[b]y an ordinance liberalizing earlier special privileges, a definite free zone--including some port facilities but excluding the residential quarters--was set aside and fenced during the early portion of the seventeenth century. Within the zone were warehouses for storing non-liquidated goods of foreign origin.'[53] Although free ports were used in colonial territories from the sixteenth century onward, it was not until the eighteenth century that they proliferated overseas. The English and Dutch used free ports extensively in their overseas territories from the eighteenth to early nineteenth century. For example, the English established by act of parliament thirty free ports in the West Indies from 1766 to 1822.[54] Also, following the British victory in the Opium Wars, European powers established a series of free ports in China under the 'unequal treaty system'.

c. Mid-Nineteenth Century On

The patterns of free port use change after the mid-nineteenth century. Ports become less prevalent in Europe and more common in colonial holdings.

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[50] *Id* 12

[51] International Labour Organisation and Centre on Transnational Corporations *Economic and Social Effects of Multinational Enterprises in Export Processing Zones* (International Labour Office Geneva 1988) 1

[52] DLU Jayawardena 'Free Trade Zones' (1983) J World Trade L 427

[53] Thoman 14. See also X Chen 'The Evolution of Free Economic Zones and the Recent Development of Cross-National Growth Zones' (1995) 19(4) Intl J Urban and Regional Research 593, 600

[54] Thoman 16

For instance, in France, prior to the French Revolution, free ports were used extensively. With the revolution, the free cities were severely damaged. Napoleon attempted to revive their use in the early nineteenth century. Local political communities were strongly opposed to the capitulation to commerce that they represented. For this reason free ports never regained a foothold in France throughout the century. Instead the French employed a milder network of bonded warehouses, allowing temporary transshipment of goods. Although the use of free ports generally declined in Europe, they continued to be used in Northern Europe, particularly in Denmark and Germany.

During the same period free ports proliferated in colonial and overseas territories. The British and Spanish used free ports for transshipment, exchange of goods and ship chandlering. Free ports existed in Asia, Africa, the Caribbean and South America.

During the late nineteenth century and up until the Depression of the 1930s, free ports gained in popularity in Northern Europe. The period from the end of the First World War until the 1930s saw the largest increase in their numbers on the Continent. As in France, political transition in Germany in the late nineteenth century had significant impact upon the use of free ports. With the creation of the Customs Union, the constituent states ceded their free port status to the centralising authority. In the process of cession, states negotiated widely divergent terms with the Union.

In the formation of the Customs Union, the free port statuses of Hamburg and Bremen were differently affected. Of all the states, Hamburg was most successful in retaining the advantages it enjoyed under the pre-Union regime:

> Hamburg, upon entering the Customs Union, agreed to reduce the customs-free area from the entire city state to an isolated and fenced zone that encompassed all existing port facilities plus ground allotted for future port growth. This zone, termed a 'free port' (Freihafen), was exempt from customs jurisdiction of the Union. It enjoyed essentially unrestricted freedom of import, export, transition, warehousing, ships' provision, manipulating and sorting, etc. (if these last did not lead to advantage in liquidating customs regarding goods later imported into the Union), and even of manufacture (for re-export and transit purposes). Intensive retail trade and private residences were prohibited with certain exceptions. Management of the zones was in the hands of Hamburg officials. [55]

In Europe, Hamburg was unique during this period in permitting the manufacturing of goods within its port. In its agreement with the Customs Union, Hamburg received this privilege by refraining from competition with domestic industries and formed an entirely export oriented port.[56] Cities such as Bremen were not as fortunate. Initially, Bremen was refused free port status by the Customs Union. With time, Bremen expanded its customs free territory and, in 1902, was granted 'out-of-toll territory' status.

Hamburg's ability to manufacture was unique and not shared by Bremen or other pre-Second World War ports. However, this manufacturing privilege became an important characteristic of a mid-twentieth century legal enclave, the EPZ.

2. Export Processing Zones

[55] *Id* 18
[56] DLU Jayawardena 'Free Trade Zones' (1983) J World Trade L 427

After the War, free ports were often superceded by EPZs. The inclusion of manufacturing within zones and the decolonisation movements both figured prominently in this shift. An important continuity was the rhetoric of 'freedom' pervading the discussion of each enclave. While the public assumption was that the enclaves were regulation-free offshore havens, in fact, they were heavily regulated. The regulation favoured commercial interests.

a. A New Form

Unlike the free port, EZPs allow manufacturing. The World Bank relates:

> The export processing zone (EPZ) is a relatively recent variant of the widely used free trade zone (FTZ) -- a designated area, usually in or next to a port area, to and from which unrestricted trade is permitted with the rest of the world. Merchandise may be moved in and out of FTZs free of customs, stored in warehouses for varying periods and repackaged as needed. Goods imported from the FTZ into the host country pay the requisite duties; their storage in FTZ warehouses permits rapid delivery to order, meanwhile saving interest in customs payments.
>
> EPZs, more specifically, also provide building and services for manufacturing, i.e. transformation of imported raw materials into finished products, usually for export out but sometimes partially for domestic sale subject to the normal duty. The EPZ is thus a specialized industrial estate located physically and/or administratively outside the customs barrier, oriented to export production. Its facilities serve as a showcase to attract investors and a convenience for their getting established, and are usually associated with other initiatives.[57]

However, this distinction between free ports and EPZs requires qualification. For instance, Hamburg included manufacturing. Also, during the 1950s industrial estates permitted manufacturing.[58] While manufacturing was exceptional in free ports, in EPZs manufacturing is the norm.

The EPZ is conceived as a territorially delimited jurisdiction governed by a distinct regulatory regime. Often the EPZ is literally fenced in and typically ranges from ten to three hundred hectares in size.[59] Like the free port, the borders of the zone are guarded. Customs officials regulate the passage of goods in and out of the territory. The boundaries are so sharply drawn, that the zones are often understood as a country within a country. Some commentators

[57] *Quoted in* A Basile and DA Germidis *Investing in Free Export Processing Zones* (Development Centre of the Organisation for Economic Cooperation and Development Paris 1984) 20

[58] Industry Development Division, Industry and Energy Department and Trade Policy Division Country Economics Department *Export Processing Zones* (Policy, Research and External Affairs, The World Bank 20 The World Bank Washington, DC 1988) 24

[59] *Id* 7

have focused on their militaristic aspects, highlighting that zones may be surrounded by barbed wire fences, 'a new form of foreign settlement adapted to the new situation.'[60]

Unlike free ports, EPZs include extensive infrastructure. Because EPZs act as segments of a multi-chained manufacturing process, facilitative infrastructure is required. In addition to factory buildings, the infrastructure might include communications lines, electricity, transportation, and waste disposal. Often, as is the case in the electronics industry, the power and water needs are tremendous. Also, various secondary services are required such as banks, hospitals, hotels, restaurants, and shipping agents. Successful EPZs progress through at least two distinct phases:

> With a newly created EPZ, one of the critical economic problems is to fill up the vacant space as rapidly as possible so as to recoup the large infrastructural costs. With all the facilities already in place (water supply, electricity, telephones, access roads, etc.) and the factory buildings already constructed, or at least constructable at very short notice, investors can get their manufacturing operations off the ground in record time and occupy the territory very rapidly. Adding to this is the fact that one [sic] an EPZ has got off the ground, and proven itself a viable alternative for foreign investors, the word gets out very quickly in the international community concerned. This is the second stage when the real take-off occurs. Because of these sociological links between the main firms in any given industry, and because of this possibility of 'occupying the territory' within a very short time, investment will tend to take place in waves of rather homogenous nature.[61]

Also, firms locating in EPZs require workers.[62]

Low labour costs are a prime motivator for TNCs to base segments of their production processes in the zones. Folker Frobel, Jurgen Heinrichs and Otto Kreye argue the proliferation of zones has created a 'world factory system'.[63] This system arises out of a process of global restructuring. Kathryn Ward explains: 'Global restructuring refers to the emergence of the global assembly line in which research and management are controlled by the core or developed countries while assembly line work is relegated to semiperiphery or periphery nations that occupy less privileged positions in the global economy.'[64] Generally, the most labour intensive and least sophisticated segments of production processes are located in EPZs. Advanced segments are maintained in fully-industrialised countries. Wages are dramatically lower in developing countries and the factory operators generally provide all of the training and 'disciplining' of the zone work force. The majority of EPZ factory workers are women.

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[60] T Takeo 'Introduction' in *Free Trade Zones & Industrialization of Asia: Special Issue AMPO Q Rev* (Pacific-Asia Resource Center Tokyo 1977) 1

[61] International Labour Organisation and Centre on Transnational Corporations *Economic and Social Effects of Multinational Enterprises in Export Processing Zones* (International Labour Office Geneva 1988)

[62] United Nations Conference on Trade and Development *Export processing free zones in developing countries: Implications for trade and industrialization policies: Study by the UNCTAD secretariat* (United Nations New York 1985) 10

[63] F Frobel, J Heinrichs, and O Kreye *The New International Division of Labour: Structural Unemployment in Industrialised Countries and Industrialisation in Developing Countries* (Cambridge UP Cambridge 1980)

[64] KB Ward 'Introduction and Overview' in KB Ward, (ed), *Women Workers and Global Restructuring* (Cornell U Ithaca 1990) 1

The relocation of segments of production processes to the zones is often characterised as a shifting of production from a regulated to an un-regulated environment. In reality, the zones themselves are heavily regulated. As with the free ports, the regulations simply favour a particular set of interests.

b. Rhetoric and Reality

According to most commentators, EPZs institute a liberal regulatory environment.[65] The image is often of a partially deregulated space existing within a highly regulated environment. Along these lines, Grubel highlights that activities take place within the EPZs 'without some of the government taxation and regulation that applies to them in the rest of the country.'[66] Similarly, Jayawardena indicates that the zones have an 'extraterritorial status, which enables them to enjoy a de facto immunity from domestic civil laws and government controls.'[67] So clear is this demarcation between the zone and the rest of the country that, according to Jayawardena, 'for all intents and purposes movement to and from free trade zones and domestic tariff areas (DTAs) constitute movements between two countries.'[68] This picture of a free, liberalised and deregulated territory within a country is misleading.[69]

The EPZ is a heavily regulated zone.[70] Its autonomous character is the product of a sharp delineation of its regulatory boundaries. Extra-zone domestic and foreign legislative actions play a role in constituting the zone. International organisations and foreign governments promote EPZs through tariff and finance laws and the creation of arbitration tribunals. The hosting state creates facilitative infrastructure and development corporations to lend support to foreign enterprises.

c. Promotion

The Shannon Free Trade Zone in Ireland is generally credited as reinvigorating the free port in the modern era.[71] Faced with a declining economy and endowed with an airport, government officials in Shannon decided to promote the local economy as an offshore haven for manufacturing companies. While the nineteenth century international economy had depended upon maritime travel, the Shannon Zone's airport allowed international connectivity through air travel. Companies could ship in, upgrade, and ship out goods with little hassle. This dissociating of the enclave from the seaport represented a major innovation on the free port.

Success of the Shannon Zone spurred the international circulation of EPZs throughout the developing world. The United Nations Industrial Development Organisation (UNIDO) took the

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[65] Industry Development Division, Industry and Energy Department and Trade Policy Division Country Economics Department *Export Processing Zones* (Policy, Research and External Affairs, The World Bank 20 The World Bank Washington, DC 1988) 7

[66] HG Grubel 'Free Economic Zones: Good or Bad?' (1990) 39 Aussenwirtschaft 43

[67] DLU Jayawardena 'Free Trade Zones' (1983) J World Trade L 427, 428

[68] *Id*

[69] *See e.g.* X Chen 'The Evolution of Free Economic Zones and the Recent Development of Cross-National Growth Zones' (1995) 19(4) Intl J Urban and Regional Research 593, 595-596

[70] *See e.g.* D Wall 'Export Processing Zones' (1976) 10 J World Trade L 478

[71] International Labour Organisation and Centre on Transnational Corporations *Economic and Social Effects of Multinational Enterprises in Export Processing Zones* (International Labour Office Geneva 1988) 1 ('The modern EPZ should rightly be considered as an Irish invention')

lead in promoting the EPZ technology. Since its founding in 1967, UNIDO has offered assistance to countries seeking to establish EPZs. To this end, UNIDO has issued reports and provided feasibility studies. In its promotional activities, UNIDO has worked closely with the United Nations Conference on Trade and Development, the World Bank and the original creators of the Shannon Zone. The Shannon Zone representatives were initially commissioned by UNIDO to write a 'how-to' report on starting an EPZ. The United Nations Center on Transnational Corporations has also furnished technical assistance through its Advisory and Information Services Division.[72] In addition, in 1976 various zone authorities with the help of UNIDO established the World Industrial Free Zone Association.[73]

Governments of developing countries responded favourably to the promotion of the EPZ technology. With de-colonisation, foreign governments no longer maintained the colonial free ports. With the nationalisation of foreign property and based on a concerted strategy to develop internal economies of their own, many new states embarked on strategies of import substitution. The goal of import substitution was to reduce reliance on imports by fostering local industrial production processes. To do so, nation-states instituted a customs regime which discouraged foreign imports through the imposition of tariffs. The goal was to insulate nascent domestic industries from direct foreign competition. Indigenous industries did not develop as planned and during the 1960s many countries began to shift towards a strategy of export-led growth. To facilitate this shift, governments established EPZs.[74]

Developing countries created EPZs to attract foreign TNCs to locate segments of their production processes within the zones. For this reason, the zones are typically more integrated with foreign economies than the rest of the country.[75] EPZs arose with the ascendancy of the new international division of labour.[76] In the 1960s, European, Japanese, and US automobile, clothing, electronics, optics, plastics, sporting goods, textiles and toy manufacturers restructured their production processes. These commodities are manufactured through assembly line production. Thus, as long as transportation is quick and reliable, segments of production may be geographically dispersed.[77] To evade high labour costs in industrialised countries and stringent environmental regulations, companies shipped production segments overseas. Low labour costs and less stringent environmental regulations in developing countries allowed companies to offset shipping costs.

Home governments of foreign TNCs play a role in legally-constituting EPZs. As the Organisation for Economic Cooperation and Development (OECD) notes: ' the opportunities offered to foreign enterprises to invest in developing countries are largely dependent upon tariff provisions in force in the investor's country of origin, more specifically when the proposed

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[72] *Id* 3

[73] T Takeo 'Introduction' in *Free Trade Zones & Industrialization of Asia: Special Issue AMPO Q Rev* (Pacific-Asia Resource Center Tokyo 1977) 4

[74] International Labour Organisation and Centre on Transnational Corporations 53-54; FA Rabbani (ed) *Economic and Social Impacts of Export Processing Zones* (Asian Productivity Organization Japan 1983) 46 and K Hamada 'An Economic Analysis of the Duty-Free Zone' (1974) 4 J Intl Economics 225, 226

[75] M Webber and Z Ying 'The Role of Export Processing Zones in Industrial Development' *Working Paper 93-2* (Monash Melbourne Joint Project on Comparative Australian-Asian Development) 7

[76] F Frobel, J Heinrichs, and O Kreye *The New International Division of Labour: Structural Unemployment in Industrialised Countries and Industrialisation in Developing Countries* (Cambridge UP Cambrdige 1980)

[77] *See e.g.* G Gereffi 'Capitalism, Development and Global Commodity Chains' in L Sklair, (ed), *Capitalism and Development* (Routledge New York 1994) 211; G Gereffi and M Korzeniewicz (edd) *Commodity Chains and Global Capitalism* (Praeger London 1994); F Snyder 'Governing Globalisation' in MB Likosky, (ed), *Transnational Legal Processes* (Butterworths London forthcoming)

activity consists of assembly operations with a view to re-export to the country of origin.'[78] For example, the US has promoted the internal restructuring and internationalisation of its companies' production processes through amendments to its tariff and finance laws.

When a US company exports a partially finished good abroad and then re-imports the finished product, US tariff law determines the customs owing by the TNC to the government. According to Tariff Items 806.30 and 807.00, the customs inspector is charged with valuing the foreign value-added to the to-be-imported good. The customs official calculates the value-added abroad and charge duties only on that portion of the product. This calculation appears straightforward.

However, in practice valuation is a discretionary exercise. Customs officials typically defer to company valuations for efficiency reasons.[79] When a customs official values an upgraded good, it is not always clear how to calculate sunk costs. For instance, a company may ship an unfinished good overseas for further manufacturing. While the upgrading may occur in an overseas factory, in the home state the company may undertake contemporaneous research and development influencing the processes by which the offshore good is upgraded. A TNC may then adjust its internal balance sheet, either attributing the home state research and development to overseas production or treating it as a home state-produced good. The same goes for market research, financial decision-making and product design conducted in the home state.

Another way foreign governments contribute to EPZ growth is by legislating tariff breaks for less industrialised countries. When certain developing countries export a good to the US market, this good is granted preferential status in the form of relief from paying duties.[80] If a foreign company locates its production processes within a preferred status country, then the company finds itself the beneficiary of this inter-state income redistribution device. When a TNC re-imports its processed good into its home state, the good is considered a preferred-status country product.

Fully-industrialised governments amend laws to facilitate the financing of TNC operations in developing countries. Typically the Securities Exchange Commission (SEC) requires disclosure of information, which is often not readily available in developing countries. It is difficult for a company undertaking production in an EPZ to meet reporting requirements when borrowing money from capital markets. To allow companies to borrow money in these circumstances, the SEC amended its reporting requirements. Specifically, the SEC passed Rule 144(A) to minimise requirements.[81]

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[78] A Basile and DA Germidis *Investing in Free Export Processing Zones* (Development Centre of the Organisation for Economic Cooperation and Development Paris 1984) 18

[79] The focus in US law has shifted towards 'informal compliance' and 'reasonable care'. LA Glick *Guide to United States Customs and Trade Laws after the Customs Modernization Act* (Second edn Kluwer International London 1997) 2. *See also Id* 37-44

[80] Under the Lome Convention the European Union grants a similar set of tariff breaks to poor countries. On this Convention *see* N Kofele-Kale 'Title V of the 2nd Lome Convention Between the EEC and ACP States: A Critical Assessment of the Industrial Cooperation Regime as it Relates to Africa' (1983) 5 J Intl Business 352; WW Leirer 'Rules of Origin Under the Caribbean Basin Initiative and the ACP-EEC Lome IV Convention and their Compatibility with the GATT Uruguay Round Agreement of Rules of Origin' (1995) 16 U Pennsylvania J Intl Business L 483; and IK Minta 'The Lome Convention and the New International Economic Order' (1984) 27 Howard LJ 953

[81] V Kokkalenios 'Note: Increasing United States Investment in Foreign Securities: An Evaluation of SEC Rule 144A' (1992) 60 Fordham L Rev 179; C Rovinescu and G Thieffry 'Cross-Border Marketing' in F Oditah, (ed), *The Future for the Global Securities Market: Legal and Regulatory Aspects* (Clarendon P Oxford 1996) 31, 51-57; KY

Businesses locating in EPZs have infrastructure needs beyond simply factories to store or add value to goods. The OECD notes:

> legal guarantees become pointless if the foreign investor has misgivings about the host country's economic system. The concern here is not so much the risk of nationalisation, expropriation or exchange controls as the need for assurance that the backdrop services essential to the enterprises are efficient.
>
> Such services including banking, sea transport, consultancy, legal and accounting services, telecommunications, etc., none of which can be improvised and all of which presuppose a certain business tradition which is not easy to find in countries where State control is highly developed, irrespective of the efforts made by the governments of such countries.[82]

Governments produce facilitative infrastructure through extra-enclave legal reforms. The OECD does not acknowledge that a trustworthy national investment climate depends upon the willingness of that oligarchic state to use its domestic legal order to cater to foreign businesses. Catering to foreign business needs often requires a strong and proactive state.

In the 1980s countries built much of the EPZ infrastructure through a transnational wave of privatisation programmes. Privatisation occurred contemporaneous to the process of globalisation. As fully-industrialised countries privatised strategic industries, the resultant companies transnationalised, selling their products overseas. These industries included telecommunications and transportation. When developing countries privatised they opened themselves up to foreign TNCs. In partnership with developing country TNCs, governments and private industries in developing countries built the facilitative infrastructure for the EPZs.

Given the competition among developing countries for foreign TNCs, as TNCs require more sophisticated labour pools, countries revamp their educational systems to meet demands. Since education in developing countries is typically provided by the state, the upgrading requires active intervention by governments in the extra-zonal sector of the economy. Intervention includes amending education laws, reorganising ministerial departments and hiring foreign university consultants to remodel colleges and universities.

Governments create administrative agencies to oversee EPZ development. These agencies promote EPZs internationally, catering to the needs of foreign TNCs and suggest amendments to legislation to make the domestic environment more appealing to TNCs. These development corporations serve a dual function, promoting foreign investment and ensuring that such investment also advances domestic development goals.[83] With reference to EPZs, the OECD speaks about how the dual goals interact:

> The increasing interest by many developing countries in policies to attract export-oriented investment, which is expected to produce foreign outlets, create jobs, transfer technology, and know-how, generate inflow of foreign exchange, etc.,

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Testy 'Note: Capital Markets in Transition: A Response to New SEC Rule 144A' (1990) 66 Indiana L J 233; and S Wolff 'Recent Developments in International Securities Regulation' (1995) 23 Denver J Intl L and Policy 347

[82] A Basile and DA Germidis *Investing in Free Export Processing Zones* (Development Centre of the Organisation for Economic Cooperation and Development Paris 1984) 32

[83] *See* CHIII(D)

> and on the other hand, to promote a whole process of specifically national industrialisation in a protected domestic market. It contains an inherent basic contradiction, insofar as the host country, in dissociating the domestic market from the export market, is not certain to obtain from the foreign investment which it could legitimately expect.[84]

Development strategies certainly associate themselves with the domestic market. The drawing of labour from the extra-zone territory to a serve foreign company needs is the prime example. However, in contradistinction to the OECD position, association is selective and structurally advantages foreign companies over domestic actors. Development companies privilege the needs of foreign companies. Thus dissociation from the domestic market is partial and selective.

TNCs are often wary of subjecting themselves to host state courts and often demand that their business disputes be resolved by arbitration tribunals. The channelling of EPZ disputes into arbitration tribunals further distinguishes the transnational commercial domain from the local political domain of dual legal orders. Parties to an international arbitration often choose the laws of a third party state to govern the resolution of their disputes. The choice of a specific state does sometimes mean that the arbitration tribunal will be located in the state whose law governs the transaction.[85] Many countries prefer to have disputes heard in their own countries and develop laws geared to international business concerns.[86]

In sum, despite its enclave reputation, the EPZ is in fact reliant upon domestic and international forces. Whilst the EPZ benefits from the sovereignty of the host government, companies opt out of sovereign responsibilities. High technology companies also participate in the zones. Governments compete for these companies, believing that the future of the world economy lies in information technology. To this end, governments use EPZs and a later generation enclave, the science park, to attract high technology TNCs. Manuel Castells and Peter Hall adopt the French term for science parks; technopoles; and provide the following definition:

> Generally, technopoles are planned developments. Some are pure private sector real-estate investments, and these happen to be among the most numerous but least interesting. A significant number, however, have resulted from various kinds of cooperation and partnership between the public and private sectors. They are promoted by central or regional or local governments, often in association with universities, together with private companies that occupy the resulting spaces. And these technopoles, the most interesting ones, are invariably more than just plots to rent. They also contain significant institutions of a quasi-public or nonprofit type, such as universities or research institutes, which are specifically implanted there in order to help in the generation of new information. For this is the function of the technopole: it is to generate the basic materials for the informational economy.[87]

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[84] *Id* 11

[85] *See e.g.* G Bernini 'Foreign Investment and Arbitration in the Frame of Globalization of World Economy' (1997) 4 Croatian Arbitrational Yearbook 83

[86] *From conversation with* PM North

[87] M Castells and P Hall *Technopoles of the World: The Making of 21st Century Industrial Complexes* (Routledge London 1994) 1

Science parks have proliferated around the globe. Parks exist in Germany, France, Japan, Malaysia, Russia, Taiwan, Texas and the UK, among other places. Recipes for 'home growing' a 'Silicon Valley' travel in the briefcases of consultants.

3. High Technology Zones

Almost since inception, the high technology economy has been transnationally-constituted. Japanese and US companies dominate the high technology economy.[88] Companies locate production processes throughout the world. Governments tailor EPZs and science parks to meet high technology companies' needs.

a. US/Japanese Duopoly

Japan and the US dominate the transnational high technology economy, although European companies have recently increased their market share. At the outset, the US companies took an early lead. However, intense competition from Japanese semi-conductor companies forced a more cooperative relationship between industries of the two countries. In 1986, Japan and the US signed a bilateral agreement governing semiconductor production.[89] Recently this duopoly has shown signs of weakening.[90] The success of both the US and Japanese high technology economies has depended upon the extensive intermingling of oligarchic states and corporations.

US science parks developed with government subsidy. For instance, when in the 1950s Silicon Valley and Route 128 were established, they depended upon the military contracts. Also, the internet itself was a government funded endeavour.[91] Although popular representations of the high technology economy focus on its private nature, as Ernst and O'Connor relate:

> It is important to note that developments in computer architecture as much as in software design and in the miniaturisation of electronic components would have been inconceivable without heavy US government expenditures, first on military and later on also on space programmes. The heavy government involvement in funding computer research in the early years of development helped to spread the basic ideas about digital computers to a great variety of research laboratories, thus turning much of this knowledge into a quasi-public good. The same applies to the major innovations in semiconductor technology where, without exception, military funds have been involved. In addition, anti-trust suits against AT&T and IBM forced both industry leaders to adopt quite open and liberal attitudes towards the diffusion of crucial patents and production know-how to other firms.[92]

Stories of garage entrepreneurs dominate popular representations. These narratives downplay the role of government subsidies for universities and lucrative government contracts with

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[88] D Ernst and D O'Connor *Competing in the Electronics Industry: The Experience of Newly Industrialising Economies* (Organisation for Economic Co-operation and Development Paris 1992) 53-69
[89] *Id* 41
[90] *Id* 54-60
[91] HH Perritt, Jr. *Law and the Information Superhighway*: Privacy, Access, Intellectual Property, Commerce, Liability (Wiley Law Publications New York 1996)
[92] Ernst and O'Connor 61

businesses in nurturing the high technology economy. Government money allowed companies and universities to develop high technology products insulated from the disciplining forces of the market. As Ernst and O'Connor note:

> A very active industrial policy was required, both to promote the emergence of semiconductor merchant firms and to break the inertia and technological conservatism of the market leaders. This is an important point to stress which conventional wisdom tends to neglect: in the United States as much as in Japan, industrial policy has played a central role in the development of the electronics industry.[93]

Further, governments imposed information sharing requirements on companies, permitting the circulation of intellectual property, which would otherwise have been protected as private company property under law.

Although, the government was involved at the early stages of the high technology industry, over time, defence contracts dried up and companies commercialised publicly-financed goods. Many commentators assume that Silicon Valley is presently a government-free capitalist enclave. Private entrepreneurs compete for private financing of the next innovative idea. However, the government has not left the scene. For instance, the federal government works closely with industry, developing regulatory structures tailored to its fast paced production process. Intel has negotiated with the government a self-regulatory approach to its environmental compliance.[94]

Japan has undertaken a comprehensive plan to make the country a leading figure in information technology by establishing nineteen science parks. To do so, the government mobilised all sectors of the society in the service of the plan. As Laffitte indicates:

> This plan and its accompanying fiscal measures involve every Ministry and all prefectures with Technopolis sites. All resources are mobilized including the media, industry and local authorities. Television, radio and local newspapers lend significant and permanent support to the actions taken by the prefectures, while their role in supplying the public with information as an opportunity for ongoing dialogue has made people aware that a new industrial era, featuring the synergetic interplay of education, research and industry, is now dawning.[95]

While the development of the US high technology industries was rooted in defence industry applications, in Japan development was commercially driven.[96]

Japanese companies have dispersed their production processes throughout East Asia where they dominate the semi-conductor market.[97] Offshoring has reduced costs by capitalising on comparatively low wages. Also, Japanese companies have circumvented quotas on the importation of Japanese semiconductor products by the US. To do so, Japanese companies

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[93] *Id*
[94] L Siegel and J Markoff *The Dark Side of the Chip: The High Cost of High Tech* (Harper & Row New York 1985)
[95] P Laffitte 'Science Parks in the Far East' in JM Gibb, (ed), *Science Parks and Innovation Centres: Their Economic and Social Impact: Proceedings of the conference held in Berlin, 13-15 February 1985* (Elsevier Oxford 1985) 25
[96] Ernst and O'Connor 64
[97] *Id* 146

export partially finished goods to Southeast Asian states. Then, the goods are directly shipped to the US from these states rather than to the quota-ridden Japan. In this way, Japanese firms also benefit from the tariff-based income redistribution device elaborated earlier in the paper.[98] Effectively, customs restrictions are circumvented as finished goods are identified as products of non-Japanese countries when they arrive in the US.[99]

b. Transnationality

Since the 1960s, high technology firms have located segments of their production processes in overseas factories. Most of these factories have been located in EPZs. TNCs have invested primarily in Southeast Asian countries such as Hong Kong, Malaysia, Singapore, South Korea and Taiwan.[100] Other preferred sites include Brazil and China. Typically, companies transfer low-end labour intensive segments of their production processes overseas. Higher value added segments generally remain at their headquarters.[101]

The outsourcing has been effectuated through various legal techniques. For example, companies have established joint ventures, located wholly owned subsidiaries in the EPZs and entered into contractual relationships. Another very popular means of legally structuring the relationships between companies and their East Asian suppliers is through original equipment manufacturer (OEM) agreements. Henderson describes these agreements:

> Under such an arrangement the purchaser supplies the designs, many of the components, oversees production quality and markets their own brand names. The OEM tends merely to assemble the final product. The benefits to the purchaser lie largely in the cost reductions (both labour costs and over-heads) while for the OEM they lie in the relatively easy and cheap access to overseas markets and in theory represent a useful conduit for technology transfer.[102]

Agreements are typically justified on the basis of their ability to effectuate technology transfer.

Companies have also shifted production overseas to opt out of environmental regulations in their home countries. The high technology industry is generally put forth as a cleaner industry than its predecessors. However, many segments of the high technology economy are environmentally-damaging. For example, the largest cluster of Environmental Protection Agency superfund sites are located in Silicon Valley.[103] The negative environmental impact of high technology has been brought to the public's attention by local environmental groups. In response to environmental campaigns and government intervention, Silicon Valley firms have cleaned up their act locally. One way they have improved their domestic environmental record is by shifting the most environmentally damaging segments of their production processes overseas

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[98] *See* (C)(3)

[99] J Henderson 'Electronics Industries and the Developing World: Uneven Contributions and Uncertain Prospects' in L Sklair, (ed), *Capitalism and Development* (Routledge New York 1994) 258, 265

[100] High technology companies also use factories in Ireland and Israel.

[101] Although Silicon Valley retained some low-wage labour intensive work. *See e.g.* KJ Hossfeld '"Their Logic Against Them": Contradictions in Sex, Race, and Class in Silicon Valley' in KB Ward, (ed), *Women Workers and Global Restructuring* (Cornell U Ithaca 1990) 149

[102] J Henderson 'Electronics Industries and the Developing World: Uneven Contributions and Uncertain Prospects' in L Sklair, (ed), *Capitalism and Development* (Routledge New York 1994) 258, 268

[103] L Siegel and J Markoff *The Dark Side of the Chip: The High Cost of High Tech* (Harper & Row New York 1985)

or to other regions in the country. Many polluting chip fabrication plants have been transferred to Southeast Asia or the US Southwest.

For certain countries, offshoring has created an opportunity for economic development. In the mid to late 1980s, several countries began to move up on the high technology value chain. Notably, Hong Kong and Singapore shifted away from labour intensive production and towards circuit design, computer controlled testing operations and wafer fabrication. As these countries upgraded, a regional division of labour in Southeast Asia emerged. Not only did other countries shoulder a greater number of labour intensive production needs, but Hong Kong and Singapore began to outsource their own low end high technology labour needs to countries such as Indonesia, Malaysia, the Philippines and Thailand.[104]

c. Promoting Science Parks

Although most discussions of science parks focus on their comparative aspects, the global phenomenon of science park proliferation must be understood transnationally. When a government hires a consultant to advise it on developing a science park, the consultant often acts as an intermediary. The consultant provides a basic recipe for success to its government client. This recipe comprises tried and tested ingredients from other science parks. At the same time, recipes must include local ingredients. Importantly, governments also go to consultancy firms for information on current trends in the high technology industry.

Consultants typically work for high technology TNCs in the most advanced sectors of the information economy and thus possess privileged knowledge of their leading companies' business needs. When a government hires a consultancy, it purchases this knowledge. Often the government client also purchases from the consultancy a business connection with specific foreign firms. So a government might design a science park to cater to the needs of specific TNCs or clusters of them.

Through EPZs, countries actively pursue the dual goals of catering to high technology TNCs and also to moving up on the international value chain. While the EPZ provides low end labour, upgrading generally accompanies the development of science parks, which aim to solve a problem faced by countries pursuing development through EPZs. United Nations Conference on Trade and Development relates:

> technically sophisticated production processes are not normally to be found in EPZs. The pre-assembly stages which may require advanced technology remain located in industrialized countries. For instance, in semi-conductor manufacturing, the two high technology processes, mask-making and wafer fabrication, are undertaken in developed home countries. Hence, the EPZs have not offered developing countries access to modern product or process technology. Moreover, foreign investors, in particular transnational corporations, centralize research and development activities of their production sites in developed countries.[105]

[104] J Henderson 'Electronics Industries and the Developing World: Uneven Contributions and Uncertain Prospects' in L Sklair, (ed), *Capitalism and Development* (Routledge New York 1994) 258, 263

[105] United Nations Conference on Trade and Development 17. *See also Export Processing Zones and Science Parks in Asia* (Asian Productivity Organization Tokyo 1987)

Science parks are conscious attempts to break into higher value-producing aspects of high technology production. J. A. Schumpeter posits a theory of creative destruction, whereby new products drive an older generation of productions out of the market.[106] In the case of EPZs and science parks the old technology, the EPZ, does not disappear. Instead the EPZ maintains itself as a distinct entity, while contributing to the growth of science parks. Alternatively, the EPZ is incorporated into the science park. Similarly, as the 'new' infrastructure, eg telecommunications, of the high technology economy is laid, the old infrastructures increase in importance. The goods promised over telecommunications lines must often be delivered over roads, through air transport or by train.

Labour markets also pose a challenge to Schumpeter's theory. Many argue that the science parks drive a shift in domestic labour markets towards a more skilled population base. The average income of a country expands with a successful science park. The International Labour Organisation (ILO) argues:

> Export processing zones were created in order to generate new employment opportunities and foster exports of manufacturing goods, and the growth of employment and exports, was assumed, rightly or wrongly, to contribute to the host country's development. What was apparently largely overlooked is that a country's success on the development front--success being measured here, for want of a better indicator, on the basis of the rise in average per capita income, would ultimately undermine the very foundations of an EPZ industrialisation strategy based on low labour costs.[107]

However, the ILO does not acknowledge the contemporaneous existence of EPZs and science parks. The worker base of EPZs is generally female, while the science park is promoted as providing a more trained and male workforce. So, the coexistence of EPZs and science parks is not inherently contradictory.

As discussed above, since their beginning, Silicon Valley and Japanese firms have relied upon EPZs abroad to outsource much of their low end semiconductor production. As metropoles transform themselves into almost entirely high end and high value producing regions, firms cede other elements of their production processes to overseas competitors. Cession is in part the result of the ability of overseas governments and their firms to offer foreign companies not just factory labour. Through industrial strategies, developing countries have begun to establish themselves as niche suppliers for certain types of high technology goods.

Science parks are often designed as leapfrogging mechanisms. Unlike the primarily factory-based EPZs, the infrastructure of science parks is far more ambitious. Since the goal of the science park is to move up on the international value chain, governments have either built new universities or refashioned old ones to produce a greater number of engineers. Also, governments amend banking laws to encourage venture capital funding. In addition, science parks are typically much larger geographical undertakings and required significant amendment to land laws. F. M. Eul relates: 'While the property or real estate element may be of secondary importance in a successful innovation centre, it could well be that debt charges arising from capitalising of the building may be as great, if not greater than the cost of management and

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[106] JA Schumpeter *Capitalism, Socialism, and Democracy* (6th edn Unwin Paperbacks London 1987)

[107] International Labour Organisation and Centre on Transnational Corporations *Economic and Social Effects of Multinational Enterprises in Export Processing Zones* (International Labour Office Geneva 1988) 94

operation of the innovation centre itself.'[108] As well, the infrastructure of science parks is often funded by insurance companies, investment banks and pension funds. Further, as the Japanese projects demonstrate, governments mobilise multiple sectors of the economy to advance their science park objectives.

This broad-based mobilisation of society and focus on extensive infrastructure provision sets the science park apart from the EPZ. While science parks remain geographically isolated, for success, they depend upon intervention in the extra-park zone. In fact, the science park represents the partial de-enclaving of the EPZ. The success of a science park requires mobilising an entire country or region to view high technology as the national priority and to make sacrifices accordingly. For this reason, it is import to focus on the linkages between the science park and its surrounding environment, both domestically and internationally. The OECD refers to these processes as 'disenclavement' and remarks '[t]he enclave nature of FEPZs has been stressed at length in all the economic literature on the subject, though without the actual possibility of "economic" as opposed to "institutional" or "legal" disenclavement having been examined, at least systematically.'[109]

To speak of disenclavement is to address the relationship between the free zone and the local political domain. As we have seen, the nature of this relationship has been the subject of recurring controversy throughout the history of free zones in their various manifestations as free ports, free cities, EPZs and science parks.

D. Conclusion

We began this chapter by discussing the genesis of a free zone on a small island in the Straits archipelagos, tracing its development from a free port to an EPZ and most recently to a science park. Throughout its life as a free zone, this island has comprised a transnational commercial domain of a dual legal order.

A dual legal order comprises two domains, a transjuridictional commercial and local political. Here we focused on a particular type of transjurisdictional commercial domain—the free zone. Three historical forms of zone received attention, the free port, EPZ and the science park. Various manifestations geographically and temporally were elaborated. A number of observations may now be made concerning dual legal orders and free zones.

First, despite similarities across time and place, zones are distinguishable on a number of grounds. Parties involved in specific zones vary tremendously. For instance, when Prince William Island first came into being, the United States was not yet in existence. So, as the United States holds a dominant position in science parks in many parts of the world, one can immediately distinguish between the zones on the basis of those actors involved in them. This is also true when comparing zones in East Asia to zones in Central Europe.

Second, the transnational structures of power have shifted in composition throughout the life of the free zone. European powers no longer dominate the transnational order. As indicated,

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[108] FM Eul 'Science parks and innovation centres--Property, the unconsidered element' in JM Gibb, (ed), *Science Parks and Innovation Centres: Their Economic and Social Impact: Proceedings of the conference held in Berlin, 13-15 February 1985* (Elsevier Oxford 1985) 162. On property and science parks *see also* CSP Monck, RB Porter, P Quintas, DJ Storey and P Wynarczyk *Science Parks and the Growth of High Technology Firms* (Routledge London 1990) 250-251

[109] A Basile and DA Germidis *Investing in Free Export Processing Zones* (Development Centre of the Organisation for Economic Cooperation and Development Paris 1984) 43

the United States wields tremendous political power. However, it is a relative newcomer. At the same time, certain zones may be dominated by European and others by Japanese companies.

Third, power relationships among participants within zones vary widely. For instance, the labour standards in a zone in California may be higher than those in Malaysia. Also, a factory worker occupies a very different position in the structures of power within a zone than does a foreign corporate executive.

Fourth, the proactive role of governments in each form of free zone calls into question the empirical basis of claims that the transnational commercial order is inherently extra-legal or a 'global law without a state'[110]. Instead, we see a strong public law basis to this transnational order.

Finally, as was stressed in the discussion of the dual legal order concept, a transnational commercial domain is established at a particular historical point. Further, once established, it must be maintained. We also saw how historically transjurisdictional commercial domains have been subject to challenges from the local political domains. For instance, we saw how free cities were overtaken by local political communities in nineteenth century France. Also, in the wake of decolonisation, local political domains established new states, which in turn expropriated the property of transnational commercial domains.

Today, in many parts of the world, we are witnessing demands made upon transnational commercial domains of various dual legal orders. For instance, protests in the United States led Nike to change its policies regarding the labour practices in EPZs in developing countries in which the company has factories. Also, when Malaysia set up a science park to cater to Hollywood production companies, studios sought to take advantage of comparatively low worker wages. Studios thus opted out of unionised California. However, the presence of these studios in Malaysia led workers in the country to expect and subsequently demand 'western' wages for their work on a particular film. These Malaysian workers, thinking that the same wages for the same work should be paid everywhere, demanded higher wages for film work. In response, the government squelched protests to enure a business-friendly science park.

This then leads us to ask what will become of the present-day free zones. Will they be publicised by the local political domains? Will local political domains in various parts of the world coordinate their efforts and overtake several transnational commercial domains collectively? Will science parks deliver on their high technology promises of liberty and equality, peacefully expanding their reach into local political domains? Regardless of the answers to these questions, the boundaries between domains of dual legal orders are contested. They are sites of negotiation in the context of transnational power disparities.

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[i] J Chin and LM Keong 'Silicon Island' [9/1999] Asia Inc Malaysian Edn 17. As with many of the high technology government leaders in Malaysia, Koh was educated in the United States.

[ii] Asia Inc 'Silicon Island' [9/1999] Asia Inc Malaysian Edition and Ministry of International Trade and Industry *Malaysia: Investment in the Manufacturing Sector: Policies, Incentives and Facilities* (MIDA Kuala Lumpur, Malaysia) 61

[iii] J Chin & CY Heong 'Cyber Czar: Othman Yeop Abdullah's vision for Malaysia's Multimedia Super Corridor' (1999) 8(8) Asia Inc 16, 18

[iv] *Id* 17-19

[v] *Id* 18

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[110] G Teubner '"Global Bukowina": Legal Pluralism in the World Society' in G Teubner, (ed), *Global Law Without a State* (Dartmouth Aldershot 1997) 3-30, 3

[vi] For an application of the dual legal system concept to modern Indonesia *see* DM Trubek, Y Dezalay, R Buchanan and JR Davis 'Global Restructuring and the Law: Studies in the Internationalization of Legal Fields and the Creation of Transnational Arenas' (1994) 44 Case Western Reserve Law Review 407

[vii] Colonial dual legal systems drew a sharp distinction between the transjurisdictional commercial domain and the local political domain. The customary laws of local populations were to be left alone. When customary laws violated standards of civilisation, chartered companies or colonial governments were permitted to deem such laws 'void for repugnancy'. While officially customary law represented an off-limits domain, in practice, customary law itself was, in Sally Falk Moore's terms, a 'composite construction' (SF Moore *Social Facts and Fabrications: "Customary" Law on Kilimanjaro 1880-1980* [Cambridge UP Cambridge 1986] 5), the product of a negotiation among companies, government, and local populations.

To pursue their commercial mandate, the companies sometimes commissioned studies of local customary laws. Compilations were then used for the purposes of administration. For this reason, the articulation of customary law by company agents was designed as a mechanism for effectuating change. According to Francis G. Snyder, customary law itself 'belonged to an ideology that generally accompanied and formed part of colonial domination.' (FG Snyder 'Colonialism and Legal Form: The Creation of "Customary Law" in Senegal' [1981] J Legal Pluralism 49). While local customary law was supposed to remain intact in British overseas not only was this customary law collaboratively produced by foreign and local actors, but also, its abridgement was permitted in cases in which such customs conflicted with the principles of civilisation.

[viii] *See e.g.* PK Kiplagat 'Legal Status of Integration Treaties and the Enforcement of Treaty Obligations: A Look at the COMESA Process' (1995) 23 Denver Journal of International Law and Policy 259

[ix] See eg JS Furnivall Colonial Policy and Practice: A Comparative Study of Burma and Netherlands India (1956).

[x] He would later be Lord Lugard.

[xi] FD Lugard *The Dual Mandate in British Tropical Africa* (William Blackwood and Sons London 1922)

[xii] *Id*

[xiii] *Id.* Variation was so extensive that Hall notes, '[t]he powers exercised by Great Britain in the protectorates are singularly various in both form and extent. WE Hall *A Treatise on the Foreign Powers and Jurisdiction of the British Crown* (Clarendon P Oxford 1894) 210

[xiv] R Gilbert *The Unequal Treaties: China and the Foreigner* (J. Murray London 1929)

[xv] TO Elias 'Colonial Courts and the Doctrine of Judicial Precedent' (1955) 18 The Modern L Rev 356 and MB Hooker *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Clarendon P Oxford 1975); and ------ *A Concise History of South-East Asia* (Clarendon P Oxford 1978)

[xvi] WH-J Leue 'Legal Expansion in the Age of Companies: Aspects of the Administration of Justice in the English and Dutch Settlements of Maritime Asia, c. 1600-1750' in WJ Mommsen and JA De Moor, (edd), *European Expansion and Law: The Encounter of European and Indigenous Law in 19th- and 20th-Century Africa and Asia* (Berg Oxford 1992) 129, 137-139

[xvii] WH-J Leue 'Legal Expansion in the Age of Companies: Aspects of the Administration of Justice in the English and Dutch Settlements of Maritime Asia, c. 1600-1750' in WJ Mommsen and JA De Moor, (edd), *European Expansion and Law: The Encounter of European and Indigenous Law in 19th- and 20th-Century Africa and Asia* (Berg Oxford 1992) 129, 142

[xviii] JDM Derrett 'Justice, Equality and Good Conscience' in Sir JND Anderson *Changing Law in Developing Countries* (Allen and Unwin London 1963) 114-115; TO Elias 'Colonial Courts and the Doctrine of Judicial Precedent' (1955) 18 The Modern L Rev 356, 358 and ------- 'Notes: Form and Contents of Colonial Law' (1954) 3 Intl and Comparative LQ 645, 647

[xix] *See e.g.* MB Hooker *Legal Pluralism* (OUP Oxford 1975); and RD Kollewign 'Conflicts of Western and Non-Western Law' (1951) 4 The Intl LQ 307