THE VIABILITY OF TRANSPLANTED LAW: KAZAKHSTANI RECEPTION OF A TRANSPLANTED FOREIGN INVESTMENT CODE

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The collapse of the Soviet Union and Soviet hegemony over Central and Eastern Europe, the awakening of Asia to the global economy, and the nascent democratization of Latin America are inseparably intertwined with a phenomenon called globalization, and have contributed to the appearance of a subset of developing countries known as emerging economies. The appearance of emerging economies creates a great number of challenges and intellectual puzzles for sociologists, economists, political theorists, and legal scholars. Among the greatest of puzzles is the tremendous amount of law that is being transplanted\(^1\) into emerging economies. Not since Africa emerged from colonial rule in the 1960s and Latin America attempted reform in the 1970s has so much law been transplanted in such great quantities into so many countries.

Many regard those earlier attempts at transplanting law as

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\(^1\) The terminology in this field of study is the subject of some debate. See Gianmario Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93, 93 n.1 (1995) (referring to this debate). In general, the words "borrowing" and "influencing" are used as verbs to describe process, and the phrases "legal transplant" and "reception" are used as nouns to describe results. See id.; see also Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335, 335 (1996) (explaining how borrowing and reception of foreign laws occurs). This Article uses the word "transplant" as a verb and as an adjective, in order to emphasize the sudden and wholesale nature in which Western law is being incorporated into the legal systems of emerging — and particularly of transition — economies.

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failures. One reason given for the failure is that the transplanted law did not comport with the cultures into which the laws were transplanted. Indeed, although theoretical discussion of legal transplants dwindled after the failure of those prior efforts, a conventional theory emerged concerning the viability of transplants — a theory that emphasizes the relationship between law and culture. That convention holds that transplanted laws that do not comport with the culture of the host country will not be accepted and instead will either be ignored or rejected.

This Article empirically tests the prediction made by the conventional theory concerning transplanted law. It does so by ascertaining the acceptance or rejection of a transplanted law by businesspersons in the Republic of Kazakhstan. The data this Article scrutinizes was obtained in interviews conducted in Kazakhstan. Kazakhstan is an especially suitable polity in which to test the prediction of conventional theory because its culture is very different from that of the West and does not have common roots with that of the West.

This Article finds that although the transplanted law in question did not emerge from the culture of Kazakhstan and does not comport with the culture of Kazakhstan, the law is accepted. In other words, in this particular case the predictions of the conventional theory are not borne out. This finding raises questions as to why this law was accepted, and also supports an argument that law is not simply a product of culture, but also constitutes culture. Before the specific implications of the findings of the research conducted in Kazakhstan can be discussed, however, the more general issue of the relationship among law, transplantation, and culture must be discussed.

1. CULTURE AND THE TRANSPLANTATION OF LAW

"Culture" is recognized as "one of the two or three most complicated words in the English language." The precise definition of culture is the subject of a great deal of debate.

² Raymond Williams, Keywords: A Vocabulary of Culture and Society 76 (1976).

³ At the edges of this debate, some even question whether cultural differences exist. Deconstructionists, for example, argue that cultural identity is a totalitarian tool used to stigmatize others and suppress heterogeneous impulses. See Guyora Binder, What's Left?, 69 Tex. L. Rev. 1985, 2035-40 (1991) (outlining the deconstructionist argument). This argument itself has
Clearly, however, culture include[s] speech, knowledge, beliefs, customs, arts and technologies, ideals and rules. That, in short, is what we learn from other [persons], from our elders or the past, plus what we may add to it. ... Culture might be defined as all the activities and non-physiological products of human personalities that are not automatically reflex or instinctive.

Culture provides a formative context that allows individuals to form groups and allows individuals to function coherently outside of the group. "[T]he fact that a group of people have a common culture means that they have common codes. With the aid of such a common system of codes it is possible to communicate group affiliation to the environment, to the group and to oneself." Cultural identity also plays a significant role in individual identity and in personality formation.

been criticized as ethnocentric. See id. at 2036. The argument that cultural differences do not exist is fairly extreme; the more mainstream argument is not over whether such differences exist but whether they are worth preserving. See Patrick Macklem, Distributing Sovereignty: Indian Nations and Equality of Peoples, 45 STAN. L. REV. 1311, 1312-16 (1993) (outlining the debate between proponents and opponents of preserving cultural diversity within one country). To some extent, this debate is spurious. The eminent anthropologist Claude Lévi-Strauss noted that "if there exists, as anthropologists have always affirmed, a certain 'optimum diversity' which they see as a permanent condition of human development then we may be sure that divergences between societies and groups within societies will disappear only to spring up again in other forms." Claude Lévi-Strauss, Today's Crisis in Anthropology, UNESCO COURIER, May 1986, at 56.

4 A.L. KROEBER, ANTHROPOLOGY: RACE, LANGUAGE, CULTURE, PSYCHOLOGY, PREHISTORY 253 (rev. ed. 1948); see also CLYDE KLUCKHOHN, CULTURE AND BEHAVIOR 73 (Richard Kluckhohn ed., 1962) ("Culture consists of patterns, explicit and implicit, of and for behavior acquired and transmitted by symbols, constituting the distinctive achievement of human groups . . . .").


6 See RICHARD KOLM, THE CHANGE OF CULTURAL IDENTITY 121-22 (1980) ("[Cultural identity] provides patterns of values and standards in shaping motivational orientation and attributes, and consequently in personality
In short, culture is inseparable from the existential and experiential state of persons. The preeminent anthropologist Clifford Geertz sets out a prosaic description: "Believing, with Max Weber, that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs . . . ." Culture touches all human institutions, including the law.

Culture is not, however, uniform from one region of the world to the next. Indeed, social scientists recognize tremendous amounts of cultural variation around the world. This fact is important when discussing legal transplants because it raises the possibility that the culture into which a law is transplanted will differ from the culture in which that law was created. Thus, the relationship between law and culture must be discussed when contemplating a study of legal transplants.


1.1. Culture and Law

Law is intricately intertwined with culture. "Law, like language or music, is an historically determined product of civilization and, as such, has its roots deep in the spirit of the people." Some social scientists argue that law is so deeply embedded in culture that it is nonsensical to speak of a relationship between law and culture; rather, they argue, one is merely a reflection of the other. While this is an extreme view, it highlights the close relationship between law and culture.

The close relationship between law and culture leads to the obvious conclusion that law must comport with the cultural context in which it is located if that law is to be viable. Oliver Wendell Holmes' famous dictum of over a century ago is no less vigorously espoused today: "If the law is at odds with the values of society, the law falls into disrepute and loses the force it needs to ensure conformity with its precepts."

While many consider the relationship between cultural conformity and legal viability obvious, the relationship between

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11 See OLIVER WENDELL HOLMES, JR., THE COMMON LAW 41 (1881) ("The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.").

cultural conformity and legal legitimacy is less obvious. Ronald Dworkin, for example, has argued that conformity with cultural norms confers legitimacy on law. In countering Dworkin’s argument, H.L.A. Hart finds legitimacy not in reflection of prevailing cultural norms but instead in resonance with a broader moral scheme. This Article does not enter into that or myriad other normative debates concerning the relationship between law and culture; instead this Article focuses on the relatively well accepted observation that legal regimes that do not comport with the culture in which they are located tend to be ineffective or short-lived.

1.2. Culture and the Transplantation of Law

Unlike the general relationship between law and culture, the effect of culture on the viability of legal transplants has engendered heated debate. The seminal debate on this issue was precipitated by Sir Otto Kahn-Freund and responded to by Alan Watson. Kahn-Freund posits that the use of foreign law as a model for domestic law “becomes an abuse only if it is informed

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14 See MICHAEL D. BAYLES, HART’S LEGAL PHILOSOPHY: AN EXAMINATION 185-88 (1992) (outlining the debate between Dworkin and Hart). The obvious criticism of a scheme that declares law legitimate if it comports with cultural norms is that those norms may not themselves be legitimate. See generally Tony Honoré, The Dependence of Morality on Law, 13 OXFORD J. LEGAL STUD. 1, 1-3 (1993) (posing questions raised by Hart’s arguments).
15 See, e.g., GEOFFREY DE Q. WALKER, THE RULE OF LAW: FOUNDATION OF CONSTITUTIONAL DEMOCRACY 27-28 (1988) (noting the validity of this empirical observation). This proposition is not without dissenters. Alan Watson, for example, argues that law is independent of culture. See ALAN WATSON, THE EVOLUTION OF LAW 119 (1985) (arguing that law is autonomous from society).

Focusing on an empirical observation does not constitute abdication of a normative position: cultural differences are not inconsistent with the existence of universal principles. As part of his refutation of the theory of cultural relativism, Thomas Donaldson demonstrates that cultural differences that may appear to be based on differing values may actually spring from differing manners of perceiving or expressing the same underlying value. See THOMAS DONALDSON, THE ETHICS OF INTERNATIONAL BUSINESS 14-19 (1989). In the same vein, Philippa Foot has argued that different cultures may possess and express different values at the periphery, but that all cultures share a core of universal values. See Philippa Foot, Morality and Art, 56 PROC. BRIT. ACAD. 131 (1972).

16 For a summary of this debate see Eric Stein, Uses, Misuses — and Nonuses of Comparative Law, 72 NW. U. L. REV. 198 (1977).
by a legalistic spirit which ignores this context of the law.”17 His emphasis on the context of law is based on the observations of Montesquieu, who opined that it is “un grand hazard” — a great coincidence — if the laws of one nation fit into the legal system of another.18 Kahn-Freund, following Montesquieu, argues that law is closely fitted into its context, which he separates into environmental, cultural, and political factors.19 In Kahn-Freund’s estimation, the importance of cultural factors has diminished, because there has been a “flattening out of economic and cultural diversity.”20 Political diversity, however, represents an “overwhelming” obstacle to the transplant of law.21 He concludes that “Montesquieu’s pessimism [with respect to the transplant of law] has remained valid in all matters.”22

Alan Watson, responding to Kahn-Freund, puts forth a simple thesis. In the real world, law is successfully transplanted. He argues that “Montesquieu badly — very badly — underestimated the amount of successful borrowing which had been going on, and was going on, in his day.”23 As evidence, Watson points to the reception of Roman law in Western Europe.24 Based on his historical assessment, he concludes that even laws deeply embedded in one context “may be successfully transplanted to a country

18 See id. at 6-7 (citing MONTESQUIEU, DE L'ESPRIT DES LOIS Livre I, chapitre 3 (J.P. Mayer & A.P Kerr eds., Gallimard 1970) (1749)) (“[L]es lois politiques et civiles de chaque nation ... doivent être tellement propres au peuple pour lequel elles sont faites, que c'est un grand hasard si celles d'une nation peuvent convenir à une autre.”).
19 See Kahn-Freund, supra note 17, at 7.
20 Id. at 9.
21 See id. at 11.
22 Id. at 22. Spencer Weber Waller opines that Kahn-Freund believes that law is absolutely not transplantable. See Spencer Weber Waller, Neo-Realism and the International Harmonization of Law: Lessons from Antitrust, 42 U. KAN. L. REV. 557, 564-65 (1994). This would seem to be an overstatement of Kahn-Freund's position.
23 Alan Watson, Legal Transplants and Law Reform, 92 LAW Q. REV. 79, 80 (1976). It is interesting to note that Watson often uses the term “borrowing” while Kahn-Freund speaks of “transplants.” See, e.g., Kahn-Freund, supra note 17, at 5 (explicating the term “transplant” and comparing it to the medical use of the term).
24 See Watson, supra note 23, at 80.
with very different traditions."\textsuperscript{25}

The debate over the feasibility of legal transplants found its greatest practical urgency during the law and development movement of the 1960s and 1970s.\textsuperscript{26} The law and development movement was based on the concept that law is essential to economic development because it provides the underpinning for a market system and espoused the notion that there is a certain type of law — Western law — that best facilitates the functioning of a market.\textsuperscript{27} This intellectual foundation lead to the aggressive transplanting of the U.S. legal culture: young lawyers and scholars were sent to Asia, Africa and Latin America to reform legal education and to align the laws of the host countries with those of the United States.\textsuperscript{28} The attempt to transplant U.S. legal culture, however, was made with little regard for the extant cultures of the host countries.\textsuperscript{29}

\textsuperscript{25} Id. at 82.


\textsuperscript{27} An important work promoting these ideas is David M. Trubek, \textit{Toward a Social Theory of Law: An Essay on the Study of Law and Development}, 82 YALE L.J. 1 (1972). Another important work, by Marc Galanter, places this concept directly within the school of legal evolution that was founded by Sir Henry Maine. See Marc Galanter, \textit{The Modernization of Law}, in MODERNIZATION 153, 156-57 (Myron Weiner ed., 1966) ("[D]evelopments in Europe and elsewhere should be seen as phases in a world-wide transformation to legal systems of this 'modern' type. This sort of modernization continues today in both new and old states."); cf. SIR HENRY SUMNER MAINE, ANCIENT LAW 164-65 (Dorset Press 1986) (1861) (arguing that the inexorable progression of law has been from status to contract). Both Trubek and Galanter later criticized the law and development movement as a failure. See infra note 30.


\textsuperscript{29} See David M. Trubek, \textit{Back to the Future: The Short, Happy Life of the Law and Society Movement}, 18 FLA. ST. U. L. REV. 1, 37 (1990) (noting that the law and development movement attempted to transplant law from the West to developing countries with little regard for the cultures of Africa, Asia, or Latin America).
The law and development movement did not enjoy a long life. Within a fairly short period of time the movement was proclaimed a failure. Its failure was attributed directly to the cultural differences between the Western donor countries and the developing recipient countries. The perceived failure of the law and development movement seemed to render a verdict against the viability of legal transplants.

Alan Watson, who is the most prolific writer in the field of legal transplants, continues to argue that legal transplants are viable and constitute the most important source of change in legal systems. Watson's arguments, however, have failed to re-ignite the passion of the law and development movement. Moreover, it is the empirical failure of that movement, rather than Watson's intellectual argument, that has most shaped mainstream theoretical thinking on legal transplants. Although scholarly discussion of transnational legal transplant has waned, from the end of the 1970s through the 1980s and into the 1990s, a mainstream theory is both consistent and identifiable: law is transplantable, but legal transplants that do not comport with the culture into which they are transplanted will fail.

30 See David M. Trubek & Marc Galanter, Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States, 1974 Wis. L. Rev. 1062, 1080 (arguing that the law and development movement failed because it was ethnocentric).

31 See Maria Dakolias, A Strategy for Judicial Reform: The Experience in Latin America, 36 VA. J. INT'L L. 167, 229-30 (1995) (arguing that law and development movement failed because it tried to transplant legal codes from developed countries into Latin America without taking into account culture and extant legal systems); Jane Kaufman Winn, How to Make Poor Countries Rich and How to Enrich Our Poor, 77 IOWA L. REV. 899, 922 (1992) (reviewing HERNANDO DE SOTO, THE OTHER PATH (June Abbott trans. 1989)) (arguing that the law and development movement failed because the U.S. system was resisted by local cultures).

32 Brian Tamanaha argues that important intellectual founders preordained the failure of the law and development movement and that the movement may not have really failed. See Tamanaha, supra note 28, at 472.

33 See, e.g., Watson, supra note 1, at 335 ("In most places at most times borrowing is the most fruitful source of legal change."). Watson is speaking of borrowing from both internal (from one branch of law to another branch within the same legal system) and external (from one polity to another) sources.

34 See, e.g., Ross Cranston, The Transplant of Commercial Law; Security Law in Sri Lanka, 19 CANADIAN BUS. L.J. 296, 298 (1991) (stating that without correspondence to the host society a transplanted law will not "survive as a living, working instrument"); Liana Fiol-Matta, Civil Law and Common Law in the Legal Method of Puerto Rico: Anomalies and Contradictions in Legal
The demise of Soviet hegemony has revived interest in legal transplants, and, indeed, the conventional wisdom with respect to legal transplant is especially pertinent in the context of the transition economies. Transition economies are a subset of emerging economies; they are the countries that are in transition from socialist, command economies to market-oriented economies. The void left by the collapse of command-oriented institutions has resulted in rapid transplantation of massive amounts of law into these countries.

Indeed, the rapidity with which Western law is imported into transition economies evokes a warning from scholars who study the relationship between law and culture. They warn that

Discourse, 24 CAP. U. L. REV. 153, 206 (1995) (stating that successful legal transplants depend on selecting laws that are culturally compatible); Tamar Frankel, Foreword: A Recipe for Effecting Institutional Changes to Achieve Privatization, 13 B.U. INT'L L.J. 295, 305 (1995) (stating that without cultural similarity a transplant “will most likely fail to take roots”); Mattei, supra note 8, at 7 (noting that transplants are often really “legal imperialism” when cultures differ and stating that such transplants are usually rejected); Edward A. Mearns, Emerging Trends in International Constitutionalism: A Comparative Approach, 28 CASE W. RES. J. INT'L L. 1, 1 (1996) (“Most scholars now know that legal institutions cannot simply be ‘transplanted.’ Nations, like living organs, have mechanisms that reject the transplanting of foreign law into their legal systems.”); William T. Pizzi, Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform, 54 OHIO ST. L.J. 1325, 1327 (1993) (stating that law that works well in one environment is not likely to work well in a different environment and noting particularly that a law that is ideologically different will not be supported in the host environment); James F. Smith, Confronting Differences in the United States and Mexican Legal Systems in the Era of NAFTA, 1 U.S.-MEX. L.J. 85, 92 (1993) (arguing that a transplant in a different culture is “destined to fail”); Ronald St. J. Macdonald, Book Review, 86 AM. J. INT'L L. 192, 197 (1992) (stating that cultural similarity is very important to successful transplant of law).


A particularly interesting account of that collapse can be found in JEANE J. KIRKPATRICK, THE WITHERING AWAY OF THE TOTALITARIAN STATE . . . AND OTHER SURPRISES (1990).

imposing law that differs significantly from the host culture causes a counterproductive tension between the law and that culture.38 The resulting confusion may constitute a greater problem than the problem that the transplanted law is intended to address.39 In other words, these scholars warn that ignoring culture when transplanting law may not simply result in the ignoring or rejecting of that law, but may also actively contribute to a worsening of the situation.

1.3. A Test of the Theory

Mainstream theoretical convention can be summarized briefly as follows. Culture and law are closely intertwined; law can be transplanted, but there is a significant risk of rejection that is tremendously increased if the law does not comport with the culture of the recipient country.

The transplant of law into transition economies presents scholars with an unusual opportunity to empirically test a theoretical convention. An enormous quantity of law is being transplanted into Central Europe, Eastern Europe and the former Soviet Union, often with very little regard for the host country cultures.40 Not all advisers, of course, are insensitive to culture,

38 See Guy Yonay, Book Note, 8 HARV. J.L. & TECH. 537, 541 (1995) (describing the “considerable tension between the ideals of preserving Chinese legal culture on one hand and conforming it to American culture on the other”).

39 See Tahiri L. Lee, Risky Business: Courts, Culture, and the Marketplace, 47 U. MIAMI L. REV. 1335, 1338 (1993) (arguing that transplant of law may increase “chaos” because the transplanted law was created to deal with different cultural problems); Curtis J. Milhaupt, The Market for Innovation in the United States and Japan: Venture Capital and the Comparative Corporate Governance Debate, 91 NW. U. L. REV. 865, 897 (1997) (noting that transplants to foreign cultures may have unintended negative results); Guy Yonay supra note 38, at 541 (concluding that the transplant of law is “perhaps deleterious”).

40 For criticisms by insiders of U.S. aid to Kazakhstan, see Matt Bivens, Aboard the Gravy Train: In Kazakhstan, the Farce that is U.S. Foreign Aid, HARPER’S MAG., Aug. 1997, at 69 passim (former National Media Coordinator for the U.S. Agency for International Development in Kazakhstan and current editor-in-chief of the St. Petersburg Times criticizing the effectiveness of the aid program); see also Barnabas Johnson, The Role of the United States in the Erosion and Collapse of Constitutional Governance in Kazakhstan, CENT. ASIA MONITOR, 1995, no. 6, at 14 (arguing that the U.S. aid program is driven by U.S. domestic concerns rather than considerations of Kazakhstan).
and not all laws are imported wholesale from Western systems.\textsuperscript{41} However, the portion of transplanted law that disregards culture is large enough to supply legal scholars with sufficient data for several lifetimes of study.\textsuperscript{42}

Central Asia presents a particularly interesting opportunity for the study of transplanted law for two reasons. The first is its cultural difference from the West. Whereas Central and Eastern Europe and many other parts of the former Soviet Union have cultural affinities to the West,\textsuperscript{43} Central Asia developed and maintained an entirely distinct culture.\textsuperscript{44} Thus, any law that is transplanted wholesale from the West is unlikely to comport with Central Asian culture, or even with the historical roots of Central Asian culture.

The second reason that Central Asia is interesting is its physical isolation. Geographic location has important, but often

\textsuperscript{41} In the legal literature, an example of a proposed law crafted with the host country’s culture in mind can be found in Bernard Black & Reinier Kraakman, \textit{A Self-Enforcing Model of Corporate Law}, 109 HARV. L. REV. 1911, 1928-29 (1996), in which the authors suggest that corporate law in Russia must take account of the cultural, social and legal conditions of post-Soviet Russia.


\textsuperscript{43} See Ajani, \textit{supra} note 1, at 94 (noting that before socialism Europe and Eastern Europe were deeply influenced by Roman-Germanic law and by the scholarship and models of the French, German, Austrian, Italian and Swiss systems). John Henry Merryman characterizes socialist law as a “temporary deviation” from Western law. John Henry Merryman, \textit{The French Deviation}, 44 AM. J. COMP. L. 109, 109 (1996).

\textsuperscript{44} See \textit{infra} notes 54-90 and accompanying text (discussing the distinct culture of Central Asia). Michael Mandelbaum highlights the cultural gulf between Central Asia and the West:

Of all the parts of the former Soviet Union, Central Asia is the one where the presence of Western institutions and values is the thinnest. It is one of the most distant from the West both geographically and culturally. The new states have no experience of democracy and almost none with market economies. All parts of the former Soviet Union — the Baltic, the Slavic states, the Caucasus, and Central Asia — have embarked, at least according to the rhetoric of those who now govern them, on the path to Western political and economic practices. Central Asia is the region for which that path will be longest and hardest.

overlooked, effects on the development of law.\textsuperscript{45} For example, the laws of both England and Japan differ significantly from those of their mainland neighbors in part because channels of water separate and protect them from the mainland legal systems.\textsuperscript{46} Central Asia is protected by far more than a channel: Central Asia is ringed by two of the world's highest mountain chains,\textsuperscript{47} two enormous and almost lifeless deserts,\textsuperscript{48} frozen steppes,\textsuperscript{49} and by tribes engaged in seemingly perpetual vicious civil wars.\textsuperscript{50} Once the sea routes between Europe and Asia were opened, merchants saw little reason to battle these obstacles and Central Asia fell into relative isolation.\textsuperscript{51} This isolation was compounded in Soviet times, when Central Asia housed strategic nuclear and space facilities and also constituted a militarily sensitive border with China.


\textsuperscript{46} See \textit{id.} at 1512-13.

\textsuperscript{47} The Pamir-Alay range and the Tien Shan range, each of which rivals the Himalayas.

\textsuperscript{48} The Kara Kum and the Kyzyl Kum.

\textsuperscript{49} Siberia. For the discussion of the physical geography of the borders of Central Asia, see G.M. MIR, \textit{REGIONAL GEOGRAPHY OF CENTRAL ASIA} 15-42 (1993) and Peter Signet, \textit{The Physical Geography of Soviet Central Asia and the Aerial Sea Problem}, in \textit{GEOGRAPHIC PERSPECTIVES ON SOVIET CENTRAL ASIA} 74, 76-82 (Robert A. Lewis ed., 1992). The geography of the borders of Kazakhstan itself is discussed in \textit{NATIONAL TECHNICAL INFORMATION SERVICE, KAZAKHSTAN: AN ECONOMIC PROFILE} 1 (1993).

\textsuperscript{50} At the moment, Afghanistan and Tajikistan are involved in civil wars, thus blocking overland travel from Central Asia to South Asia. See \textit{Barnett R. Rubin, The Fragmentation of Afghanistan: State Formation and Collapse in the International System} (1995) (discussing the intertribal wars in Afghanistan); Steve LeVine, \textit{Strongest Rebel in Tajikistan is Reported Missing After Attack}, \textit{N.Y. Times}, Aug. 22, 1997, at A9 (discussing the five-year-long civil war among various factions as well as exiles in Tajikistan); Steve LeVine, \textit{Taliban Forces Seize Afghan Rival's Stronghold on Uzbek Border}, \textit{N.Y. Times}, Sept. 19, 1997, at A7 (noting that seizure of a town on the border with Uzbekistan raises the danger that Afghanistan's civil war will broaden to include Central Asia).

\textsuperscript{51} The fact that Uzbekistan is the only landlocked country in the world that is completely surrounded by landlocked countries is illustrative of Central Asia's physical isolation. See Helen Mingay, \textit{Alluring Market, If a Little Esoteric}, \textit{Fin. Times}, Oct. 11, 1995, § 3 (FT Exporter) at 9 (noting that Uzbekistan is the only doubly landlocked country in the world and also quoting a characterization of Central Asia as located "in the back of beyond").
Central Asia, then, represents a good region for testing conventional wisdom with respect to the transplant of law. The research that is discussed in this Article gathered data in one Central Asian country — Kazakhstan — with respect to one transplanted law — the Foreign Investment Code. Data was obtained by means of interviews conducted by the author. The data was not collected with the goal of parsing and analyzing it quantitatively, but instead was gathered impressionistically for the purpose of answering a single question: has this transplanted law been accepted or rejected.\(^2\)

The interviews and the information obtained thereby are discussed in more depth in a later section of this Article.\(^3\) Before discussing any findings, however, it is important to establish the cultural differentness of Kazakhstan and to discuss the Foreign Investment Code.

2. THE CULTURE AND LAWS OF KAZAKHSTAN

2.1. The Historical Context of Kazakhstan

The Republic of Kazakhstan is the second largest of the former republics of the Soviet Union.\(^4\) Kazakhstan is larger in area than Western Europe.\(^5\) The population of this vast country is a mere seventeen million, slightly under half of which are ethnic


\(^{53}\) See *infra* notes 135-145 and accompanying text.


\(^{55}\) See Mandelbaum, *supra* note 44, at 6.
Kazakhs. Ethnics Russians make up a large percentage of the population; there are also sizable numbers of ethnic Germans, Ukrainians, Tartars and Uzbeks.

The western concept of nationhood is not indigenous to Central Asia. In 1924, Moscow created the polity of Kazakhstan; the nation of the Republic of Kazakhstan has existed only since 1991. As a separate republic within the Soviet

56 See Akner, supra note 54, at 5. Akner notes that the most recent census data is from 1989, and that political changes have almost certainly increased the percentage of ethnic Kazakhs, which was then estimated at 40%. See id. In 1992 the government of Kazakhstan claimed that 43.2% of the population were ethnic Kazakh. See Kazakhstan, in ECONOMIC INTELLIGENCE UNIT, COUNTRY PROFILE: GEORGIA, ARMENIA, AZERBAIJAN, KAZAKHSTAN, CENTRAL ASIAN REPUBLICS 66, 70 (1995)[hereinafter ECONOMIC INTELLIGENCE UNIT]. Available data does show an upward trend in the percentage of ethnic Kazakhs and a downward trend in the percentage of ethnic Russians since 1959. See Robert J. Kaiser, Nations and Homelands in Soviet Central Asia, in GEOGRAPHIC PERSPECTIVES ON SOVIET CENTRAL ASIA, supra note 49, at 279, 291 (1992).

57 See Akner, supra note 54, at 5.

58 See George J. Demko, The Russian Colonization of Kazakhstan 1896-1916, at 26 (1969) ("Political organization of a nation-state type was not common to the Kazakhs. Their organizational units were loosely defined and usually lacking in authority except at the lowest level."). In particular, the concept of nationhood based on ethnicity or language is not indigenous to the region. See Graham E. Fuller, The New Geopolitical Order, in The New Geopolitics of Central Asia and Its Borderlands 19, 20 (Ali Banuazizi & Myron Weiner eds., 1994) ("For the Central Asian states the very concept of Uzbek, Turkoman, Kazakh, Kyrgyz or Tajik as the basis of statehood was entirely new under early Leninist policies . . . "). In an interesting parallel to the debate over the transplantability of law, not everyone believes that the imposition of western concepts of nationhood are feasible in the region. See, e.g., Victor Ya. Porkhomovsky, Historical Origins of Interethnic Conflicts in Central Asia and Transcaucasia, in CENTRAL ASIA AND TRANSCAUCASIA: ETHNICITY AND CONFLICT 1, 16 (Vitaly V. Naumkin ed., 1994) ("[T]he 'Eastern way' of formation of state systems differs from the European one . . . it is clear that a sharp transition from the 'Eastern' type to the 'European' cannot but cause ethnic tensions and conflict.").

59 See Mohiaddin Mesbahi, Introduction to Central Asia and the Caucasus After the Soviet Union: Domestic and International Dynamics 1 (Mohiaddin Mesbahi ed., 1994) (stating that the Central Asian republics of the Soviet Union gained independence in 1991). An expatriate advisor to the Kyrgyz Republic claimed that a facsimile from Moscow informed the Kyrgyz Republic that it was an independent country This facsimile was jokingly referred to as the "Fax of Independence." Conversation with U.S. Agency for International Development adviser to the Kyrgyz Privatization Program, Bishkek, Kyrgyz Republic (Nov. 26, 1994).
Union, Kazakhstan existed only since 1924.\(^{60}\) Even then, Kazakhstan was initially designated the "Kирг Autonomous Republic," and its borders were constantly redrawn until 1960.\(^{61}\) Indeed, the political borders that were drawn up had little to do with cultural or ethnic realities, and much to do with Stalin's efforts to maintain power within the Soviet system.\(^{62}\)

Nonetheless, although there may not be an extensive history of Kazakhstan as a western-style nation, the peoples of Kazakhstan and the Khanate of Kazakhstan have a rich and vibrant history. Central Asia, of which Kazakhstan is geographically the largest country, constitutes the "heartland of the world."\(^{63}\) Until trade by sea became predominant, Kazakhstan contained the major route for trade between East Asia and Europe, and also encompassed major routes for trade among Europe, the Middle East and South Asia.\(^{64}\) Central Asia has been the source of migrations and military invasions that affected much of the known world, and has in turn been conquered by several waves of invaders.\(^{65}\) At

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\(^{60}\) See Akiner, supra note 54, at 11 (stating that the National Delimitation of Central Asia in 1924 created the Central Asian Republics).

\(^{61}\) See Porkhomovsky, supra note 58, at 19-20; ECONOMIST INTELLIGENCE UNIT, supra note 56, at 60. The appellation reflects Russian tradition rather than a mistake. The nomenclature kyrgyz "was used in order to avoid confusion with the Cossacks since the Russian word for Cossack and Kazakh are similar." DEMKO, supra note 58, at 22.

\(^{62}\) See Stephen Blank, Soviet Reconquest of Central Asia, in CENTRAL ASIA: ITS STRATEGIC IMPORTANCE AND FUTURE PROSPECTS 39, 55 (Hafeez Malik ed., 1994) (noting that although "Stalin claimed that the delimitation made real nations and states feasible for the first time," the borders did not make cultural sense); see also Paul A. Goble, Stalin Draws the Borders, CENT. ASIA MONITOR, 1995, no. 2, at 12, 13-14 (arguing that Stalin drew the borders to maintain his power).

\(^{63}\) Hafeez Malik, Central Asia's Geopolitical Significance and Problems of Independence: An Introduction, in CENTRAL ASIA: ITS STRATEGIC IMPORTANCE AND FUTURE PROSPECTS, supra note 62, at 1, 1 (attributing the phrase to Sir Haldor Mackinder). Kazakhstan is geographically the largest country, but Uzbekistan is the most populous Central Asian country. See Mandelbaum, supra note 44, at 7.

\(^{64}\) See Beatrice F. Manz, Historical Background, in CENTRAL ASIA IN HISTORICAL PERSPECTIVE 4, 4 (Beatrice F. Manz ed., 1994) (Central Asia was "an important urban and agricultural center and a nexus for long distance trade. The main east-west route, the Silk Road, here intersected the northern and southern routes connecting the Middle East to India and to the northern Forest-steppe region.").

\(^{65}\) Andre Frank refers to waves of migration or invasion from 4300-4200 B.C., 3400-3200 B.C., 3000-2800 B.C., 1700-1500 B.C., 1200-900 B.C., 500 B.C., 0 A.D., 500 A.D., 1000 A.D. and 1300-1700 A.D. These waves of migration
least one scholar has argued that, in light of its history as a crossroads for vast numbers of people, Central Asia "has shown an extraordinary ability to recreate itself, to accept change and yet to maintain continuity."66

The origin of the Kazakh people is hazy.67 Nomadic peoples traditionally have populated the area. "From the earliest period of recorded history [nomadic peoples] have roamed the desert and steppe north of the ancient emirates of Khiva and Bukhara."68 The ethnic makeup and political allegiances of those peoples changed often between the Lower Paleolithic period and the fifteenth century.69 By the late 1300s, however, Turkic nomads peopled the area and lived under Mongol rule. The Mongol rule ended with the victories of Timur.70 The indigenous Turkic

or invasion involved civilizations such as the Hittite, the Hyksos, the Indo-Europeans, the Phoenicians, the Arameans, the Dorians and possibly the Huns. Military leaders included Ghengis Khan and Timur. Scholars also believe that Central Asians crossed the Bering Strait to settle the unpeopled New World. See ANDRE G. FRANK, THE CENTRALITY OF CENTRAL ASIA 9-11 (1992). Just this short list illustrates the fundamental importance of Central Asia to the development of civilization and the unfolding of the world's history. Indeed, L.S. Stavrianos has argued that "the ancient, the classical, the medieval periods of pre-1500 Eurasian history . . . were heralded by major turning points primarily attributable to these nomadic invasions." L.S. STAVRIANOS, THE WORLD TO 1500: A GLOBAL HISTORY 6 (1970).

66 Akiner, supra note 54, at 6. Sergei Panarin echoes this argument:

[Ex]istential structures permeating ethnic consciousness . . . are not just whithered remains of the past. On the contrary, being inseparable from the present way of life of the ethnic group and its current changes, they are flexible and capable of a partial and often very deep transformation. Despite any negative influence occurring during the course of history, these structures cannot be destroyed completely and replaced by entirely new ones.


67 This is due to the dearth of primary material, which is sketchy throughout the early periods. See, e.g., JOHN R. GARDINER-GARDEN, KTIESIAS ON EARLY CENTRAL ASIAN HISTORY AND ETHNOGRAPHY, Papers on Inner Asia No. 6, 1987 (debating value of the writings of a Greek physician who accompanied the Persian military invasions in Central Asia in 400 B.C.).

68 DEMKO, supra note 58, at 22.


70 See id. at 7. In many respects, Timur — often called Timur the lame or Timurlane by his Western adversaries — had more influence on Central Asia than did the more famous Ghengis Kahn. For an excellent account of Timur,
people, who were beginning to be called Uzbeks, divided into two hordes: a nomadic horde to the north and a more sedentary group in the south. The rivalry that developed between these hordes led to a bifurcation of the Uzbeks and contained the genesis of the Kazakh peoples. Indeed, the coalescence of the Kazakh nomads into one people and the formation of the Kazakh Khanate by the 1480s were directly attributable to hostilities with the Uzbek Khanate.71

The Kazakh Khanate existed as a loose "political union"72 from the fifteenth to the eighteenth centuries. By the sixteenth century, the clans and tribes that made up the political union had coalesced into three organizational units usually referred to as "Hordes."73 In the eighteenth century, the three Hordes became virtually sovereign Khanates of their own, although Kazakhs continued to think of themselves as one people.74

At the end of that same century, Russia began a series of maneuvers that would result in its acquisition of Kazakhstan. The first stage of this acquisition was absorption: Russia built lines of fortresses in southward succession that resulted in huge swaths of Kazakhstan being under Russian control.75 The second stage was a brutal military conquest of the remainder of Kazakhstan. By 1864, Kazakhstan was no longer independent.76

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71 See OLCOtt, supra note 69, at 8-9.
72 Id. at 9.
73 DEMKO, supra note 58, at 25; see also Akiner, supra note 54, at 9. For a very brief history of Kazakhstan prior to the Russian invasion, see Gali O. Tealakh, Brief History of the Central Asian Republics and Azerbaijan 41-42 (1992).
74 See OLCOtt, supra note 69, at 11. For a very interesting discussion of the period, see Alan Bodger, Change and Tradition in Eighteenth-Century Kazakhstan: The Dynastic Factor, in Cultural Change and Continuity in Central Asia 344 (Shirin Akiner ed., 1991).
76 See Ralph E. Clem, The Frontier and Colonialism in Russian and Soviet Central Asia, in Geographic Perspectives on Soviet Central Asia, supra note 49, at 19, 28-33 (describing Russian conquest of Kazakhstan); Hélène Carrère d'Encausse, Systematic Conquest, 1865 to 1884, in Central Asia: 120 Years of Russian Rule 131, 131 (Edward Allworth ed., 1989). Russia's motives included Kazakhstan's fertile agricultural land, religious colonization,
Rule by tsarist Russia did not sit well with the Kazakhs; in 1916 discontent exploded into violent rebellion. The Bolshevik revolution in Russia, therefore, was welcomed by the Kazakhs, who took the opportunity to create an autonomous government. Within two years, however, the Bolsheviks brought Kazakhstan firmly within Soviet control, where it remained until the dissolution of the Soviet Union. Over the years, Moscow ensured that the Kazakh bureaucracy became and remained one of the most conservative of the Soviet Union.

Indeed, Kazakhstan’s government, like those of other Central Asian republics, did not embrace independence with open arms. Kazakhstan was the last republic to leave the Soviet Union on December 16, 1991, following the surprise announcement on December 8th by Russia, Belarus and Ukraine that they were forming the Commonwealth of Independent States. Since its independence, Kazakhstan has joined the Commonwealth as a founding member and is considered, with Belarus and Russia, to be one of its core members.

Kazakhstan was the beneficiary of massive transplants of industries during the Second World War. As a result, Kazakhstan has a bifurcated economy, with heavy industry and collectivized agriculture in the north, and large scale agriculture — primarily cotton — in the south. Nonetheless, Soviet central planning was no kinder to Kazakhstan than it was to other control of trade, and the desire to create a buffer between Russia and British India. See Edward Allworth, Encounter, in CENTRAL ASIA: 120 YEARS OF RUSSIAN RULE, supra, at 1. Interestingly, Russia’s desire to conquer Central Asia as a whole was exacerbated by disruptions to Europe’s supply of raw cotton due to the United States’ Civil War. See d’Encausse, supra, at 131.

See OLCOTT, supra note 69, at 100-01 (describing the 1916 rebellion). The immediate cause of the 1916 rebellion was the forced conscription of Central Asian men to supplement the Russian army, which at that point was in danger of losing the First World War. See id. at 119-20.

See id. at 129.


80 See Ian Murray Matley, Industrialization, in CENTRAL ASIA: 120 YEARS OF RUSSIAN RULE, supra note 76, at 309, 340-341 (describing the transfer of industry to Kazakhstan).

81 See ECONOMIC INTELLIGENCE UNIT, supra note 56, at 72 (describing the bifurcation of Kazakhstan’s economy).
republics; its economy was severely distorted.\textsuperscript{83}

The economies of these states were made into adjuncts of the Soviet economy. Primarily producers of raw materials for the Russians, these economies were warped by Soviet domination, cut off from opportunities for independent development, and unable to engage in free trade with their immediate neighbours or others beyond the Soviet borders.\textsuperscript{84}

Kazakh culture, then, is a nomadic culture that has been forced recently and reluctantly into a sedentary life. Indeed, nomadism was one of the unifying features that led to the self-identification of the Kazakh people and their separation from the Uzbeks.\textsuperscript{85} Because family and community are the most important relationships to the Kazakhs, the Kazakhs cultivate and carefully protect them.\textsuperscript{86}

If a thousand years of Kazakh culture can be symbolized by one phenomenon, it is by the oral literature of the Kazakh people.\textsuperscript{87} In particular, the Kazakhs have developed the oral epic — tales of war and love that are fascinating but quite foreign to the Western ear.\textsuperscript{88} Temporal analysis of the poetry and epics of

\textsuperscript{83} See Mandelbaum, supra note 44, at 4-5.

\textsuperscript{84} Ali Banauzizi & Myron Weiner, Introduction, to THE NEW GEOPOLITICS OF CENTRAL ASIA AND ITS BORDERLANDS, supra note 58, at 1, 7. As one Kazakh politician wistfully notes: "Now we look for those huge warehouses, previously closed even to the Kazakhs themselves, and wonder what they were for." TEALAKH, supra note 73, at 59 (quoting an unnamed politician).

\textsuperscript{85} See supra text accompanying note 71. Interestingly, even in post-Soviet Kazakhstan the author has frequently heard Kazakh joke that Uzbeks are better business people because they are not nomads. The fact that Kazakhs can be self-effacing, however, should not mislead others into characterizing nomadic culture as simple. See, e.g., Oljas Souleimenov, Nomads and Culture: The Kazakhs, People of the Steppe, in CULTURAL TRENDS VII, at 126 (G.S. Métraux ed., 1978) (illustrating the complexity of nomadic culture and condemning historians for viewing nomadic culture as simple).

\textsuperscript{86} See Souleimenov, supra note 85, at 127 ("Kazakhs have a keen sense of history, and every house keeps its shezhre or genealogical tree, going back seven generations.").

\textsuperscript{87} See id. at 128 ("[Kazakhstan's] moral code is expressed in proverbs and sayings, which play a very important part in the education of the people.").

\textsuperscript{88} See THOMAS G. WINNER, THE ORAL ART AND LITERATURE OF THE KAZAKHS OF RUSSIAN CENTRAL ASIA 25 (1958) (stating that until the
Kazakhstan shows that their content correlates quite closely with contemporary events; for example, when it became clear that Kazakhstan would have to yield to Russian rule, the oral literature became resigned and bitter.\textsuperscript{89} Interestingly, however, close analysis of the literature of Kazakhstan also indicates that efforts to "Russify" Kazakhstan failed, and instead actually solidified nascent nationalistic feelings in the region.\textsuperscript{90}

2.2. Kazakhi Law

2.2.1. Indigenous Law

Although Islam was introduced into Central Asia between the ninth and eleventh centuries, it never established deep roots. This was particularly true among the nomadic Kazakhs.\textsuperscript{91} Thus, while traces of the fiqh and shari‘a of Islam\textsuperscript{92} can be found in indigenous Kazakh law, Islam did not constitute a significant part of Kazakhstan’s legal heritage. Mongol law, on the other hand, had a tremendous influence on Kazakh law. Valentin Riasanovksy, who has undertaken comparative analyses of all of the major indigenous laws of Central Asia and Siberia, has found several portions of Kazakh law that were taken directly from the Great

nineteenth century well developed oral epics were the primary form of literature in Kazakhstan). Winner notes that Kazakhstan “has presented the world with an almost inexhaustible reservoir of folklore productions representing a wide variety of genres.” \textit{Id.} at 26. An interesting treatment of a single epic can be found in H.B. Paksoy, \textit{Alpamysb: CENTRAL ASIAN IDENTITY UNDER RUSSIAN RULE} (1989), which uses a case study of \textit{Alpamysb} — a widespread Turkic historical epic, or \textit{dastan} — to show the resilience of Central Asian culture in the face of Russification. For the purposes of this article, it is worth noting Paksoy’s admonition that it is better to view a particular version of a \textit{dastan} as a ‘freeze-frame’ in an on-going, dynamic process” of cultural change rather than as ossified or ancient folklore. \textit{Id.} at 150.

\textsuperscript{89} See \textsc{Winner}, supra note 88, at 86.

\textsuperscript{90} See \textit{id.} at 24; see also Edward Allworth, \textit{Religious and National Signals in Secular Central Asian Drama, in Muslim Communities Reemerge 80, 81} (Andreas Kappeler et al. eds., 1994) (stating that live performances of Central Asian plays were the best source of information about attitudes toward the Soviet government during the Soviet period).

\textsuperscript{91} See \textsc{Olcott}, supra note 69, at 19 (“The pastoral nomads [the Kazakh masses and most of the Kazakh nobility] had only the sketchiest knowledge of Muslim tenets and practices.”).

\textsuperscript{92} Olcott argues that by the end of the seventeenth century Kazakh law evidenced some influence by the shari‘a. \textit{See id.}
Yasa (law) of the Mongols. Riasanovsky has also illuminated other portions of Kazakh law on which the Yasa had a significant effect. The other major source of law was Kazakh custom—which supports the argument that law is a product of culture.

The most complete surviving record of Kazakh law is the Jhety Jharga — a compilation of laws ordered by Khan Tauke in the 1600s. The Jhety Jharga was kept and transmitted orally until the 1820s, when Mikhail Speranskii recorded it as part of the Russian effort to promulgate laws in the conquered regions of Central Asia.

Khan Tauke’s Code is fairly short — shorter even than the Code of Hammurabi, which predates Khan Tauke’s Code by several thousand years. The bulk of rules govern behavior that could be considered criminal or immoral, such as murder, regicide, incest, suicide, theft and insulting one’s parents. The Code contains several hints that it was not intended to supplant the relationships among families or communities. For example, the Code states that, “incest is punishable by death; this is substituted by the sentence of the family, since such crimes cannot be

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94 See VALENTIN A. RIASANOvSKY, CUSTOMARY LAW OF THE NOMADIC TRIBES OF SIBERIA 24-29 (1965) (discussing Mongol influence on Kazakh law). Among other indicia are the great number of crimes punishable by death and the payment of fines in nines of cattle, horses, sheep, or camels. The penalty for adultery in Kazakh law was almost identical to that contained in the Great Yasa — a husband who caught his wife committing adultery was allowed to kill his wife on the spot — unlike the penalty contained in other Central Asian laws. See id. In fact, Riasanovsky opines that indigenous Kazakh law was more similar to Mongol law than any other law in the region. Moreover, Kazakh law retained the severe nature of the Mongol law it had experienced before its independence and “did not come under the later tendency of [Mongol] law to become milder.” Id. at 21.

95 See id. at 20-21 (describing the influence of Kazakh custom on indigenous Kazakh law). Some of the more macabre evidences of custom were the means of carrying out death penalties, which included trampling by horses and freezing to death in water. See id. at 20.

96 See OLCTT, supra note 69, at 15.

97 The Code of Hammurabi was promulgated in Babylon around 2200 B.C. See THE CODE OF HAMMURABI (Robert F. Harper trans., 1904).
submitted for the consideration of outsiders." A woman who killed her husband was to be put to death unless the relatives of her husband forgave her. A son who insulted his parents was seated on a black cow and beaten by members of the community. A daughter who insulted her parents faced a potentially more hazardous punishment: she was bound and delivered to her mother, to be punished as the mother saw fit.

Khan Tauke's Code provides insights into the nature of indigenous Kazakh law, but it does not contain any commercial provisions. The Russian scholars who followed Speranskii, however, collected and memorialized other traditional laws, which included some commercial laws. The laws of obligations are brief. They hold that a party who fails to pay a debt on the day it is due will be given an extension of time in which to pay. If he cannot pay after the extension, he must work off his debt. A guarantor is also obliged to work off an unpaid debt.

Property could be held either in pledge or in trust. A holder of a pledged property could sell that property if the underlying obligation was not satisfied at the proper time. If, however, the pledge holder damaged the pledged property while it was in his care, the pledge holder was required to pay the full value of the property to the pledge giver. Merchants who squandered merchandise placed in their trust by partner merchants were required to reimburse their partners, or be pressed into the service

98 Khan Tauke's Code art. 12.
99 See id. art. 4. In the non-community oriented laws of the West, the forgiveness of the relatives of a victim was meaningless. Interestingly, in Khan Tauke's Code a husband who killed his wife could pay a fine to avoid death—an option that was not available to wives who killed their husbands. See id. art. 4 (husband can escape death penalty by paying 100 horses, 2 servants, 2 camels and 2 suits of armor to her family).
100 See id. art 16.
101 See id.
102 See Customs of the Kirghiz, art. 175 (1824). The Russians used the term "Kirghiz" to differentiate the Kazakhs from the Cossacks.
103 See id. art. 167.
104 See id. art. 178.
105 See id. art. 165. Any excess proceeds were to be delivered to the pledge giver.
106 See id. art. 166. The pledge giver was then required to pay the underlying obligation.
of the other merchants.\textsuperscript{107}

In short, indigenous Kazakh law is primarily concerned with community and social order. The law reflects the importance of the centrality of family and community to Kazakh culture. The laws relating to commercial transactions also reflect, to some degree, a sense of responsibility and the importance of relationships.

Just as Kazakh literature evidences the survival and growth of Kazakh culture under Russian rule, there is also evidence that Kazakh law maintained its vitality. In 1928, the Supreme Soviet of the Soviet Union ratified the Decree About the Struggle Against Crimes Based on Customs.\textsuperscript{108} The Decree prohibited many of the practices that were required or provided for in Kazakh law. In Kazakhstan, there were so many violations of the Decree that the Soviets had to set up special courts that dealt only with violations of the Decree.\textsuperscript{109} These special courts continued to be active well into the 1960s.

\subsection{2.2.2. Soviet Law}

Imperial Russia was not aggressive about imposing its laws on Central Asia. The Soviets, on the other hand, had no compunctions. As already discussed in this Article, Russian culture and Soviet laws did not make significant inroads in Central Asia. Nonetheless, Soviet law does form part of the background into which laws transplanted into Central Asia must fit, and therefore must be noted by this Article. The subject of Soviet law, however, is so vast that this Article will discuss only the underlying philosophy of Soviet law.

Lenin’s argument that a powerful proletarian state would “crush” the bourgeoisie and then also begin withering away at once is the starting point for socialist theories of jurisprudence.\textsuperscript{110} The first Soviet Commissar of Justice defined law as “a system of, or order of, social relations which corresponds to

\begin{footnotesize}
\begin{enumerate}
  \item See \textit{id.}, art. 184.
  \item The Decree was submitted in 1924 but was not ratified for four years. See \textit{WINNER, supra} note 88, at 137-38.
  \item See \textit{id.}.
  \item Marx and Engels paid little attention to the law; their comments regarding the law are generally found in their criticisms of society in general. See \textit{WILLIAM E. BUTLER, SOVIET LAW} 30-31 (2d ed. 1988) (discussing Marx and Engels).
\end{enumerate}
\end{footnotesize}
the interests of the dominant class and which is safeguarded by the organized force of that class." The most prominent Soviet legal theorist of the time, E.B. Pashukanis, however, followed Lenin's lead. He believed that law originated in the marketplace and thus was irreparably bourgeois. Therefore, he argued that law had no place in the fulfilled socialist society; as the state withers away law would also vanish and would not be replaced. Soviet legal scholarship thereafter oscillated between those two schools of thought: law as a reflection of the will of the proletarian class and law as an eventually-to-be-discarded remnant of the bourgeois state. In actual practice, however, the Soviet Union was not able to discard law, and an identifiable body of Soviet law emerged.

Soviet law reflected its position within the context of a collectivist society. Cooperation was overtly emphasized. Justice on a case-by-case basis was subsumed by the goal of promoting the collective good. Moreover, the law as implemented was far more fluid than the law as written: "[F]rom Lenin onward the published law has not been a definite indication of what is permitted and what is prohibited." In theory, the source of law was the "class struggle;" in real terms, however, the will of the communist party was the source of law, and the will of the party did not always correspond to the written law.

In general, the same social orientation that permeated Soviet law as a whole infused Soviet commercial law. Lisa Granik notes

112 See BUTLER, supra note 110, at 32-33 (discussing the work of E.B. Pashukanis); OPOLOT, supra note 111, at 108-09 (same).
113 See BUTLER, supra note 110, at 33-40 (describing the debate).
114 See GYULA ÉÖRSI, FUNDAMENTAL PROBLEMS OF SOCIALIST CIVIL LAW 9-12 (József Decsényi & Jenö Rácz trans., 1970) (stating that socialist society is organized around collectives and that this is reflected in the law).
115 See id. at 18.
117 See Peter Costea, The Legal System and the Judiciary in the Marxist-Leninist Regimes of the Third World, 16 REV. SOCIALIST L. 225, 229 (1990) (stating that the doctrinal source of law was the class struggle, but that the real source of law was the will of the communist party); Dobek & Laird, supra note 116, at 136 (noting that the Communist party has acted lawlessly).
that Soviet law proffered a social concept of contract. Of particular interest is her observation that already existing relationships, either between individuals or between an individual and society, affected the legal interpretation or enforcement of a given contract. In reality, however, most persons living in the Soviet Union did not have access to laws for purposes of enforcing a commercial agreement. Nor were alternative, non-state institutions available to enforce commercial contracts. Instead, people relied on dense networks of familial and close-acquaintance relationships. These relationships constituted the single most important vehicle for commercial interaction for most Soviet citizens.

In one respect, the Soviet system comported with Kazakh laws and culture. Kazakh laws and culture emphasize community and pre-existing relationships. So too did Soviet law. Western systems, however, do not emphasize community, status or pre-existing relationships, which makes commercial transactions between the two systems difficult. Thus, Western entities often press for the enactment of special codes when confronted with legal systems of the type found in Kazakhstan.

2.3. The Kazakhstani Foreign Investment Code

The Kazakhstani Foreign Investment Code is the most recent in a series of Laws on Foreign Investment promulgated by a number of entities over the past decade. Shortly before the dissolution of the Soviet Union, Moscow drafted and transmitted


119 See id.

120 See VLADIMIR SHLAPENTOKH, PUBLIC AND PRIVATE LIFE OF THE SOVIET PEOPLE 9-11 (1989) (discussing state control and noting that non-state institutions were illegal in the Soviet Union).


122 See id.

123 See JANET TAI LANDA, TRUST, ETHNICITY, AND IDENTITY: BEYOND THE NEW INSTITUTIONAL ECONOMICS OF ETHNIC TRADING NETWORKS, CONTRACT LAW, AND GIFT-EXCHANGE 107 (1994) (noting that Western business people do not possess the status or pre-existing relationships necessary to operate in legal systems based on personal relationships).
to Kazakhstan a draft code to regulate foreign investment. Upon independence, the Law on Foreign Investments in the Kazakh Soviet Socialist Republic became the law of Kazakhstan. In December of 1994, Kazakhstan’s Parliament replaced this remnant of Moscow’s control over Kazakhstan with the Law of Foreign Investment of the Republic of Kazakhstan. Kazakhstan’s Supreme Court, however, ruled that the parliament that had promulgated the law had no power to do so. Therefore, in March of 1995, President Nazerbaev promulgated the law once again in the form of a presidential edict. In 1996, a legally constituted Parliament approved the 1995 presidential edict. The law was explicitly designed to encourage foreign investment in Kazakhstan. Among other things, it offered tax holidays and guaranteed that no changes detrimental to foreign investors would be made in the law for ten years.

In March of 1997, shortly before the interviews described in the next section were conducted, the law was changed once again. The new law made sweeping changes to the bureaucracy: one third of the federal ministries and government agencies were eliminated; a new State Committee on Investments was formed.

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125 See Britt A. Shaw & Harold T. Kelly, Current Legal Framework for Direct Foreign Investment, E/W EXEC. GUIDE, Oct. 1, 1995. The Parliament was ruled to be illegally constituted due to the incorrect drawing of precinct boundaries and voting misproprieties. See id. President Nazerbaev did not wish the dissolution of Parliament, and the Court’s ruling evidences a degree of judicial independence.


127 See Kazakhstan Investors Protected, MOSCOW TIMES, Jan. 25, 1995 (noting that the law protects foreign investors from detrimental changes in the law for a period of ten years); What Innovations Await Investors in Kazakhstan’s Draft Legislation, E/W EXEC. GUIDE, Jan. 1, 1997 [hereinafter Innovations] (noting that the law for foreign investors was designed to attract foreign investment).

128 The law was signed by President Nazerbaev on March 5, 1997. The first interview discussed in this article was conducted on March 8, 1997. This may have colored somewhat the respondents’ impression of the stability of the law in question. It should not, however, have affected the underlying acceptance or rejection of the law.
and given sole responsibility for carrying out government policies with respect to direct foreign investment; and shares of state owned companies were transferred from the State Property Committee to the new State Committee on Investments.\(^{129}\) The new law, however, continues to encourage foreign investment and offer tax holidays. It also attempts to facilitate foreign investment by placing all decision-making capacity for foreign investment in one agency.\(^ {130}\)

The various iterations of the Foreign Investment Code are largely a result of external pressure and are almost entirely the product of other legal systems. International financial organizations demanded that Kazakhstan modify the Soviet promulgated code, and held out large loans as an incentive for doing so.\(^ {131}\) The laws themselves were drafted by a small group of foreign advisors, and were modeled on laws that had been transplanted into Southeast Asia.\(^ {132}\) Those laws, in turn, had been modeled on Western laws.\(^ {133}\)

The Foreign Investment Code is a foreign transplant that does not comport with the indigenous laws or culture of Kazakhstan. At the most minimal level, the Code clearly does not share any historical ties with Kazakhstani culture, nor is it a product of the culture. Moreover, while it is dangerous to make gross generalizations about a culture, it is fair to say that Kazakh culture

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129 See Charles Clover, Kazakhstan Sets Up 'One-Stop Shop' for Foreign Investors, FIN. TIMES, Mar. 6, 1997, at 4 (describing the new foreign investment law).

130 A copy of the law in Kazakh and a rough English translation are on file with the author. Only those foreign investors who seek tax holidays or other preferential treatment are required to obtain the approval of the State Committee on Investments. Other investors, except those interested in a handful of sensitive industries, may form their business relationships under general commercial laws of Kazakhstan.

131 See Innovations, supra note 127.

132 See generally id. (discussing the group of seven to ten advisors).

133 It is not entirely clear whether the laws transplanted into Central Asia were actually modeled on the laws of Southeast Asia or were instead modeled on the original Western laws. In conversations with Western advisors to the Kazakhstani government, the advisors gave both explanations. The advisors also frequently commented about the need to enhance the political acceptability of Western transplants by emphasizing that the same laws had worked in Southeast Asia.
emphasizes community and historical relationships.\textsuperscript{134} The Foreign Investment Code does not, and treats every transaction as a discrete event, enforceable on its own face and in its own right.

Conventional theory, then, would predict that the Foreign Investment Code will not be accepted in Kazakhstan and instead will be either ignored or rejected. Interviews conducted with Kazakhstani businesspersons, however, indicated that such was not the case.

3. **Kazakhstani Perceptions of the Foreign Investment Code**

3.1. *Kazakhstani Perceptions of the Foreign Investment Code*

In order to gauge Kazakhstani perception of the Foreign Investment Code, the author conducted interviews with officers of twenty Kazakhstani companies.\textsuperscript{135} The sizes of the companies ranged from medium to large, most of which were medium.\textsuperscript{136} Although it was not a criteria in selecting the companies to be interviewed, all the companies that were interviewed indicated either that they worked with foreign investors or that they would like to work with foreign investors.\textsuperscript{137} All the companies were either privately owned or in the final stages of privatization.\textsuperscript{138} The interests of the companies ranged from consumer goods to natural resource extraction. Fifty-seven people were interviewed;

\textsuperscript{134} Cf. Souleïmenov, *supra* note 85, at 127 (discussing the feats of the ancestors and how the past influences the present lives of Kazakhs).

\textsuperscript{135} The author provided firm assurances to each of the persons interviewed as well as to their companies that their names and identities would not be recorded or revealed. The information in this section will not be attributed to any specific company.


\textsuperscript{137} This is not a statistical aberration, nor does it indicate a bias in the data. Most Kazakhstani companies have severe capital shortages and consider foreign investors a desirable — and perhaps even the only — source of capital. See Charles Clover, *Kazakh Pension Reform to Aid Capital Markets*, FIn. TIMES, June 24, 1997, at 4 (noting that “Kazakhstan’s ratio of bank deposits to gross domestic product is among the lowest in the world”).

in all but two cases the most senior official of the company was among the persons interviewed.\textsuperscript{139}

The questions asked of the interviewees were based on a prepared questionnaire that was given, in Russian, to each interviewee at the beginning of the interview. The interviewer, however, asked follow-up questions based on individual responses, and encouraged interviewees to elaborate as they wished.\textsuperscript{140} Thus, although the data collected from each interview is idiosyncratic, it allows for comparison of answers to core questions. These questions focused on the perception and use of the Foreign Investment Code by Kazakhstani businesspersons.\textsuperscript{141} The flow of the questions was designed to progress from ascertaining simple awareness of the existence of the Code through familiarity with the Code to actual use and deeper knowledge of the Code. The same pattern will be followed in relating responses to the questions.

3.1.1. Awareness of the Existence of a Foreign Investment Code

A number of foreign advisors to Kazakhstani companies as well as expatriate workers in Kazakhstan predicted to the author that most Kazakhstani businesspersons would not even be aware of the Foreign Investment Code. The bases for these predictions were twofold: first, that the law changes so frequently that it is ignored; and second, that the Kazakhstani are still in the process of accepting a law-based or rule-based market, and thus tend to view the Foreign Investment Code as irrelevant. Both of these bases fit into the common understanding of emerging economies as places of tremendous change — particularly with respect to law. The latter reason also reflects the theory that law that does not

\textsuperscript{139} In all but three cases, all of the officials of a given company were interviewed at the same time. Interestingly, this was by the choice of the officials and not of the author.

\textsuperscript{140} See SAHR JOHN KUNDHE, POLITICS AND CORRUPTION IN AFRICA: A CASE STUDY OF SIERRA LEONE 13 (1995) (discussing the necessity of face-to-face interviews and looser formats when obtaining data in developing countries).

\textsuperscript{141} The questions discussed in this article are only a part of the questions asked in the interviews. The questions relating to the perception of the Kazakhstani foreign investment code were a part of a larger effort to gather data throughout the Central Asia region.
comport with culture will be ignored or rejected. These predictions, however, were wrong. Every person interviewed knew of the Foreign Investment Code. In fact, at least one person in each group of interviewees could identify the most recent iteration of the Code, and could state with reasonable accuracy when that iteration was proclaimed.\textsuperscript{142} Clearly, as a threshold matter, Kazakhstani businesspersons are aware of the existence of the Foreign Investment Code.

3.1.2. \textit{Familiarity with the Foreign Investment Code}

Awareness of the existence of the Foreign Investment Code does not imply awareness of its contents. To assess the interviewees' familiarity with the Code, interviewees were asked questions that required knowledge of specific sections of the Code. The ability to discuss at least one section in depth was counted as familiarity with the Code. Using this criterion, forty-nine interviewees indicated familiarity with the Code. This number may underrepresent actual familiarity. Four high-ranking officers referred questions concerning the Code to other officers whose competency included legal matters. Several other officers appeared somewhat hesitant to discuss details of the Code in front of those officers whose competency included legal matters. Nonetheless, even using the conservative number of forty-nine, a fairly high percentage of respondents evidenced familiarity with the Code.

The first two groups of questions — awareness and specific knowledge of the Code — address only the prediction that alien transplanted law will be ignored. Clearly, in the case of the Foreign Investment Code, that prediction is not borne out. The remaining two groups of questions address the other part of the prediction — that alien transplanted law will be rejected. The most obvious test of rejection is to ask if the law is used.

3.1.3. \textit{Use of the Foreign Investment Code}

Interviewees were asked if they utilized the Foreign Invest-

\textsuperscript{142} In order to avoid a test-taking-like atmosphere (which almost certainly would have resulted in the termination of interviews) the author did not confront every person in a group with inquiries regarding the most recent iteration and the proclamation date of that iteration. Thus, it is impossible to know if every interviewee could have identified the most recent iteration.
ment Code either in negotiating or in structuring transactions. The answers given by interviewees can be divided into two sets. The first set can be characterized as answers given for government consumption. Although all interviews were conducted with assurances of strict confidentiality, this particular question seemed to make many interviewees apprehensive. Every person who was interviewed immediately responded that they and their company used the Foreign Investment Code. This response set, however, is inherently suspect, particularly given the fact that not all companies that were interviewed had negotiated with actual or potential foreign investors. Similarly, not all persons interviewed were in a position to have participated in any negotiations between their companies and potential foreign investors.

The second set of answers, obtained through follow up questioning, provides what may be more meaningful responses. Of the twenty firms represented in the interviews, fourteen had actually negotiated with potential foreign investors. Of those fourteen companies, two had only made preliminary inquiries regarding the possibility of investment, leaving twelve that had been involved in substantial negotiations. Of these twelve, eleven had made some use of the Foreign Investment Code. The remaining company, it should be noted, advised the foreign party with which they were negotiating of the existence of the Code, but was told by the foreign party that legal matters would be dealt with at a later time.

The most common manner in which the companies utilized the Foreign Investment Code was to promote the incentives — usually in the form of tax holidays — built into the Code.\textsuperscript{143} All eleven companies that used the Code mentioned use of the Code in this manner. The second most common use represented an interesting strategy on the part of the Kazakhstani companies: the Foreign Investment Code was proffered as proof that Kazakhstan offered a stable and friendly environment for foreign investment. A surprising ten of the twelve companies mentioned this use of the Code. Other uses included guidance on necessary government approvals for foreign investment and the structuring

\textsuperscript{143} Interestingly, the most common reason among all twenty companies for seeking foreign investment was enjoying the tax holidays built into various iterations of the Foreign Investment Code. This reason surpassed other reasons such as access to capital, access to foreign markets and the acquisition of foreign knowledge, skills, or equipment.
of specific transactions.

Clearly, the prediction that alien foreign law will be rejected is not borne out. The Foreign Investment Code is utilized by Kazakhstani businesspersons. Moreover, the Code is utilized in ways that probably go beyond what the drafters of the Code envisioned, indicating that the Code is accepted on more than a simplistic level.

3.1.4. Suggestions for Improving the Foreign Investment Code

In an effort to further ascertain acceptance of the Foreign Investment Code, interviewees were asked what improvements could be made to the Code. Of the fifty-seven interviewees, five responded that they would make no changes. Forty-six suggested that a significant problem with the Foreign Investment Code was that it changed too frequently, which created uncertainty for businesspeople and also conveyed the impression that Kazakhstan is not a stable investment destination. Thirty-nine suggested that the incentives for foreign investors should be increased. Seven suggested that the Code could be made clearer, four suggested that foreign investment should be treated no differently than domestic investment, and three suggested that the Code could contain specific anti-bribery provisions.

What is interesting about these answers is that they imply little dissatisfaction with the content of the Code. Indeed, the most common answer has nothing to do with content, but instead deals with extraneous matters. The second most common answer actually suggests that the content be amplified. Only two answers, given by four and three persons, suggest some unhappiness with the content of the Code. The first is that foreign and domestic investment should be treated identically, which could be interpreted as a condemnation of departure from Kazakhstani norms of fairness. However, each of the four persons who made this suggestion explained it in (rudimentary) market-oriented economic terms: they argued that it makes no sense from a

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144 As a part of the broader survey, interviewees were asked if they generally approved of the Code. Each of the fifty-seven interviewees responded that they did in fact approve of the Code. The author’s impression, however, is that this question was too blunt, and that the nature of the question shaped the interviewees’ answers.
market perspective to differentiate between foreign and local investment. The second is that the Code should contain anti-bribery provisions. This could be interpreted as a condemnation of a departure from Islamic proscriptions against bribery.145

3.2. The Foreign Investment Code Is Accepted

As mentioned, these findings are deliberately presented in a qualitative rather than a quantitative form. This Article is not concerned with a fine statistical treatment of Kazakhstani business managers. Instead it sets out to answer a single but theoretically vital question: whether Kazakhstani businesspersons accept the transplanted Foreign Investment Code, or whether — as prevailing theory would suggest — it has been rejected or ignored.

The interviews conducted in Kazakhstan strongly indicate that the transplanted law has not been rejected and is not ignored. Indeed, the quality of the discussions by Kazakhstani businesspersons regarding the Code indicates the opposite: interviewees had sophisticated levels of knowledge with respect to the Code, and used or were willing to use the Code in the appropriate circumstances.

Although this Article eschews statistical treatment in favor of impressionistic treatment, a brief tabulation of the interviewees' answers may help to substantiate the conclusion that the Foreign Investment Code is accepted.

145 See QUR’ AN, sura 2:184 ("Not to consume each other’s wealth unjustly, nor offer it to judges as bribes, so that, with their aid, you might seize other men’s property unjustly"); QUR’ AN, sura 28:77 ("Allah loveth not corrupters.").
<table>
<thead>
<tr>
<th>Question Category</th>
<th>Positive Responses</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Awareness of existence of the Foreign Investment Code</td>
<td>57/57 persons</td>
<td></td>
</tr>
<tr>
<td>Familiarity with the Foreign Investment Code</td>
<td>49/57 persons</td>
<td>Underreporting</td>
</tr>
<tr>
<td>Use of the Foreign Investment Code</td>
<td>57/57 persons</td>
<td>Overreporting</td>
</tr>
<tr>
<td></td>
<td>11/12 companies</td>
<td>11/20 Companies were in situations that might require use of the Code.</td>
</tr>
</tbody>
</table>
### Table 2

<table>
<thead>
<tr>
<th>Suggestions for Improving the Foreign Investment Code</th>
<th>Positive Responses</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>No change</td>
<td>5/57 persons</td>
<td></td>
</tr>
<tr>
<td>Stop changing so often</td>
<td>49/57 persons</td>
<td>Does not imply cultural rejection</td>
</tr>
<tr>
<td>Increase incentives</td>
<td>39/57 persons</td>
<td>Does not imply cultural rejection</td>
</tr>
<tr>
<td>Make Clearer</td>
<td>7/57 persons</td>
<td>Might not imply cultural rejection</td>
</tr>
<tr>
<td>End differentiation of foreign and domestic parties</td>
<td>4/57 persons</td>
<td>Might imply cultural rejection</td>
</tr>
<tr>
<td>Include anti-bribery provisions</td>
<td>3/57 persons</td>
<td>Might imply cultural rejection</td>
</tr>
</tbody>
</table>

This conclusion can be drawn only for one law that has been transplanted to one culture; it should be noted, however, that this culture was selected because it is very different from Western cultures, and is more likely under prevailing theory to reject transplanted law. While it would be rash to draw grand conclusions from these findings, they do raise questions. Among those questions are why this transplanted law was accepted, and what implications a finding of acceptance has for the theory of legal transplants.
4. Implications of These Findings

These findings cut against the prevailing wisdom and support a theory that transplanted law can survive even when it has little relationship to the host culture. At a minimum, the findings raise a question as to why a transplanted law was not rejected. This question can be examined both in light of Alan Watson's observations on borrowed law, and from a perspective that values a connection between law and culture. In addition to raising questions, these findings support an argument that law is not simply a product of culture, but can also play a constitutive role in forming culture. The possibility of a constitutive role for law should serve as a caution to those advising emerging economies. The laws that they transplant can take root and may have a significant effect on the host culture.

4.1. Why the Foreign Investment Code Was Not Rejected

4.1.1. Watson's Arguments

Alan Watson argues that there are four critical elements to the borrowing of law. While Watson's analysis leans more toward law that is selectively sought by an existing legal system than toward the wholesale transplant of laws into a foreign culture, and while Watson is somewhat extreme in arguing that law is completely autonomous from culture, it is nonetheless worthwhile to examine the factors that Watson proffers. Those factors are the utility of the transplanted law, accident and chance, difficulty of clear sight, and the authority enhancing effect of the transplanted law. Accident, chance, and difficulty of clear sight are beyond the scope of this Article, but the Kazakhstani

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146 Much of Watson's other writings, of course, do discuss the wholesale imposition of Roman law on Western Europe. See, e.g., ALAN WATSON, THE EVOLUTION OF LAW 66-97 (1985).

147 Watson acknowledges that "[t]o build up a theory of borrowing . . . seems to be an extremely complex matter." Watson, supra note 1, at 335.

148 Difficulty of clear sight refers to the inability of jurists to see the full effects of any change they have already made to a legal system. See id. at 342.

149 See id.

150 Watson's discussion presupposes the transplantability of law and focuses more on explaining why certain laws were transplanted. Accident, chance, and difficulty of clear sight, in particular, deal with the happenstance of migration of law. This Article, on the other hand, has not presupposed that law is
interviews do shed light on the two other factors suggested by Watson.

With respect to utility, Watson actually prefers a definition of utility that emphasizes the utility to the lawmaker: it is easier for the lawmaker to borrow a law than to create a law.\textsuperscript{151} Watson acknowledges, however, that "practical utility is the basis for much of a reception of law."\textsuperscript{152} The practical utility of the Foreign Investment Code is obvious, and the relationship between that utility and the acceptance of the Code by Kazakhstani businesspersons is highlighted in their discussions. The Foreign Investment Code is designed for the most part to encourage foreign investment into Kazakhstan.\textsuperscript{153} Several of the interviewees suggested that they were in need of investment capital and that they recognized foreign investment as the most likely source of such capital. The number of interviewees who indicated that capital was of interest, however, was smaller than the number of respondents who perceived an even more immediate benefit in the form of tax holidays for businesses with foreign participation. This utility, which was intended to attract foreign investors, seems to have had the unintended benefit of rendering the law acceptable to many Kazakhstani businesspersons.

The other factor that Watson proffers — the authority enhancing capacity of the transplanted law — is less obvious, and may in fact not be supported by the results. By enhancement of authority, Watson means the authority of those who administer the law. Watson’s hypothesis is that “all law making . . . desperately needs authority,” and the fact that the newly made law is based on an already existing law confers that authority.\textsuperscript{154} Watson’s claim would be supported if the interviewees attributed a portion of their acceptance of the Code to the fact that it was transplanted transplantable, and is more concerned with ascertaining why a particular law was not rejected than in explaining why that law and not another was transplanted.

\textsuperscript{151} See WATSON, supra note 1, at 335.

\textsuperscript{152} Id.

\textsuperscript{153} Jeswald Salacuse differentiates foreign investment codes along several characteristics, including whether a code encourages or discourages foreign investment. That the Kazakhstani code encourages investment is evidenced by, among other things, tax holidays given to business ventures that have foreign participation. See JESWALD SALACUSE, MAKING GLOBAL DEALS: NEGOTIATION IN THE INTERNATIONAL MARKETPLACE (1991).

\textsuperscript{154} Watson, supra note 1, at 346.
law. In fact, none did so. Instead, the interviewees were more concerned with the intrinsic nature of the law and whether the law was of any use to them. What makes this observation particularly interesting is the fact that many of the government officials who responded emphasized the fact that similar laws had been successful in Southeast Asia, whereas not a single businessperson made reference to that fact.\footnote{In fact, a concern expressed by several interviewees was that Kazakhstan could develop a system that would repress personal liberties, which most interviewees felt would have negative consequences for the nascent market system. Ironically, it was in this context that Southeast Asia was occasionally mentioned.}

4.1.2. Cultural Noninvasiveness

The acceptance of a law that is not of a culture does not necessarily invalidate the hypothesis that law is connected to culture. Nor does it force acceptance of Watson’s presupposition that all law is transplantable. A more subtle analysis must take into consideration whether the law clashes with any deeply held values of a culture, or simply fails to resonate with that culture. Under this analysis, two factors mitigate in favor of Kazakhstani acceptance of the Foreign Investment Code.

The first is that the Foreign Investment Code does not appear to clash violently with deeply held Kazakhstani values. This is best illustrated through the use of a counter-example. In the 1950s and 1960s, ethnic Russian teachers were frequently sent into the very conservative highlands of Tajikistan for the purpose of teaching ethnic Tajiks that — among other things — Islam was a superstition and men and women occupied equal positions in the Soviet state. These teachers were regularly killed by the offended Tajiks.\footnote{This story, which has not been covered by the Western press, was related at the Conference on the Struggle for Democratization and Modernization: The Case of the Former Soviet Central Asian Republics, Minneapolis, Minn. (May, 1995).} Indeed, religious missionaries to foreign cultures have often been executed for attempting to transplant institutions that competed with existing deeply-rooted institutions.\footnote{See, e.g., Jay Miller, The 1806 Purge Among the Indiana Delaware: Sorcery, Gender, Boundaries, and Legitimacy, 41 ETHNOHISTORY 245 (1994) (discussing how native Americans were executed by the Delawares for collusion with missionaries). Less violent examples abound. See, e.g., Walter D. Mignolo, On the Colonization of Amerindian Languages and Memories: Renaissance Theories of Writing and the Discontinuity of the Classical Tradition, 34 COMP. STUD. SOC’Y}
These are extreme examples of rejection of a transplanted institution due to conflicts with deeply held beliefs. The Foreign Investment Code, on the other hand, certainly does not comport with Kazakh culture, but also does not transgress deeply held convictions. It is highly unlikely that any businessperson who adheres to the Code will evoke such visceral reaction that he or she will be shot. The Code simply is not culturally invasive, which may facilitate its acceptance in Kazakhstan. Brian Tamanaha makes a similar point with respect to Micronesia, where, he argues, transplanted U.S. law is accepted because it is limited to serious crimes and large commercial transactions and does not interfere with traditional systems.\(^\text{158}\)

The second mitigating factor is that Central Asia, including Kazakhstan, is not hostile to the West or to Western concepts.\(^\text{159}\) Central Asia has a unique and ancient culture, but an important part of that culture is the gathering and adaptation of ideas from other cultures.\(^\text{160}\) Although it is unlikely that Kazakhstan would incorporate a law that violently clashed with its values, Central Asia’s history predisposes the country to not reject out of hand laws that do not spring from its own culture.

Unfortunately, this observation can do little to inform a general model for successfully transplanting law. The level of a polity’s receptivity to foreign ideas is not something that can be easily or quickly manipulated. It does, however, suggest that those who seek to transplant laws should seek to introduce those laws through mediums that predispose a population to acceptance. Examples of such efforts that have already occurred include a Kazakhstani television soap opera that was used to condition the population to notions of private property,\(^\text{161}\) and a Kyrgyz

\& HIST. 301, 323-29 (1992) (discussing the rejection of the European writing system by native Americans because it was a foreign institution). Unlike several of its neighbors, Kazakhstan has not converted to the romanic alphabet.

\(^{158}\) *See Brian Z. Tamanaha, Understanding Law in Micronesia: An Interpretive Approach to Transplanted Law* 161-75 (1993).

\(^{159}\) *See* Ajani, *supra* note 1, at 97 n.14 (noting that Central Asia does not distrust Western ideas as do Central Europe and Eastern Europe). The author’s own experiences in Central Asia and Central and Eastern Europe corroborate Ajani.

\(^{160}\) *See* Akiner, *supra* note 54, at 6 (discussing ability of Central Asia to incorporate foreign ideas and yet retain its distinctive culture).

\(^{161}\) *See* Carol Midgley, *Kazakhstan at a Crossroads over Invasion of TV Soap*, TIMES (London), July 18, 1997, (Home News), at 5 (noting that over one third of the population watches a soap opera initially introduced by the British

https://scholarship.law.upenn.edu/jil/vol18/iss4/6
advertising campaign that proclaimed that parents suffered the pains of reform for the benefit of their children.\textsuperscript{162}

4.2. \textit{Law as Constitutive of Culture}

Montesquieu described law as a product of culture.\textsuperscript{163} This implies both a static culture and a unidirectional relationship between culture and law: first culture exists, then it births law. Culture is not, however, static. Rather, it is in a constant state of change, whether that change is called growth, evolution, progress, or regression.\textsuperscript{164} The exact causes of cultural change are a matter of some debate.\textsuperscript{165} Whatever the process, several factors have been shown to have caused cultural change, ranging from factors as dramatic as plagues and environmental changes to those as mundane as technological advances and increased tourism.\textsuperscript{166} To

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\textsuperscript{162} Copies are on file with the author.


\textsuperscript{166} See Joseph M. Bryant, \textit{Military Technology and Socio-Cultural Change in the Ancient Greek City}, 38 \textit{Soc. Rev.} 484 (1990) (demonstrating the causal effect
this list can be added changes to the law.\textsuperscript{167}

Law informs culture in at least two ways.\textsuperscript{168} First, law provides an institutional structure that allows and facilitates cultural interaction. Second, law gives expression to culture; it provides symbols whereby cultural values and goals may be expressed. Both roles are reinforcing: they are shaped by but in turn shape culture.\textsuperscript{169}

It is tempting to focus on the structural role of law when contemplating transplanted law in Central Asia or in other transition economies, because these laws are being transplanted for the purpose of facilitating certain types of transactions or relationships.\textsuperscript{170} Law provides a structure for effecting societal and individual goals.\textsuperscript{171} In the process of providing a structure,

\begin{itemize}
\item of changes to military technology on cultural change in Greece); Mark C. Mansperger, \textit{Tourism and Cultural Change in Small-Scale Societies}, 54 HUMAN ORG. 87, 87-95 (1995) (discussing the process by which tourism produces cultural change in small, unindustrialized societies); M.K. Thornton \& R.L. Thornton, \textit{AIDS and Cultural Change: Lessons from Plagues of the Past}, J. AM. CULTURE, Fall, 1996, at 55 (discussing the relationship between epidemics and cultural change); H.E. Wright, Jr., \textit{Environmental Determinism in Near Eastern Prehistory}, 34 CURRENT ANTHROPOLOGY 458, 458-66 (1993) (discussing the effect of environmental changes on cultural change). The interaction of cultures seems to be a powerful cause of cultural change. Greg Wolf, for example, argues that Roman colonization of the Gauls transformed not only the Gauls but also the Roman culture. \textit{See} Greg Woolf, \textit{Beyond Romans and Natives}, 28 WORLD ARCHAEOLOGY 339, 339-51 (1997).
\item Paul Reingold describes the dual role of law: "The law lives a double life. On the one hand it refers to complex norms that define and describe our history and culture. . . . On the other hand the law is also something that gets practiced." Paul D. Reingold, \textit{Harry Edwards' Nostalgia}, 91 MICH. L. REV. 1998, 1998 (1993).
\item Mary Ann Glendon has long argued that law shapes culture. \textit{See}, e.g., Mary Ann Glendon, \textit{The Transformation of Family Law} 311 (1989) ("A country's law . . . both affects and is affected by the culture in which it arises . . . ").
\item \textit{See supra} note 130 and accompanying text.
\item \textit{See} Morton J. Horwitz, \textit{History and Theory}, 96 YALE L.J. 1825, 1834 (1987) ("Law could create structures that enabled individuals and communities to fulfill their deepest aspirations."). The voluminous literature on institutional economics cannot be reproduced in this article, but it too recognizes law as a structure for effectuating goals. \textit{See} Joel P. Trachtman, \textit{The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis}, 17 NW. J. INT'L L. \& BUS. 470 (1996-97) (discussing the
\end{itemize}
however, law also limits societal expectations to those goals that it is capable of effectuating.\textsuperscript{172} Thus, the law as a structure is both shaped by culture and shapes culture.\textsuperscript{173} Changes to the law, therefore, rather than simply being rejected as incompatible with a culture, may instead transform that culture.

While it is natural to focus on the structural role of law, it is also interesting to contemplate the expressive role of law. Law is clearly a form of rhetoric "by which community and culture are established, maintained, and transformed."\textsuperscript{174} This rhetorical role, however, also has a constitutive element: "The law is a powerful conceptual — rhetorical, discursive — force. It expresses conventional understandings of value, and at the same time influences conventional understandings of value."\textsuperscript{175} Thus, just as changes to the law in its structural role can bring about cultural changes, so too can changes to law in its symbolic role.\textsuperscript{176}

The possibility of a constitutive role for law does not mean that a transplanted law that violates cultural norms will transform relationship between institutional economics and legal scholarship).

\textsuperscript{172} See Milton C. Regan, Jr., \textit{Market Discourse and Moral Neutrality in Divorce Law}, 1994 UTAH L. REV. 605, 679 ("[T]he law inevitably affects preferences, because it contributes to a culture within which individuals orient themselves.").

\textsuperscript{173} See Thomas D. Barton, \textit{Reclaiming Law Talk}, 81 CAL. L. REV. 803, 803 (1993) (book review) ("We shape our institutions, and they then shape us.").


\textsuperscript{175} Margaret Jane Radin, \textit{Compensation and Commensurability}, 43 DUKE L.J. 56, 83 (1993); see also Kristian Miccio, \textit{In the Name of Mothers and Children: Deconstructing the Myth of the Passive Battered Mother and the "Protected Child" in Child Neglect Proceedings}, 58 ALB. L. REV. 1087, 1087 (1995) ("Law shapes and defines who we are as a culture while reinforcing the belief system that undergirds it.").

\textsuperscript{176} See MARY ANN GLENDON, \textit{ABORTION AND DIVORCE IN WESTERN LAW} 8 (1987) (characterizing law as stories that help to shape culture while themselves being shaped by culture); Lawrence Rosen, \textit{A Consumer's Guide to Law and the Social Sciences}, 100 YALE L.J. 531, 542 (1990) (book review) ("[L]aw is preeminent an artifact of culture: it is influenced by and constitutive of the way in which the members of a society comprehend their actions towards one another and infuse those actions with an air of immanent and superordinate worth.").
those norms and thereby be accepted.\textsuperscript{177} It does, however, suggest that noninvasive transplants, such as the Foreign Investment Code that is the subject of this Article, can assist in their own acceptance by changing the host culture.\textsuperscript{178} The possibility of a constitutive role for law also raises a fascinating question: will the introduction of a new vocabulary into transition economies cause members of those societies to think differently about their cultures?\textsuperscript{179} That question is beyond the scope of this Article.\textsuperscript{180} The findings of this Article, however, hint that law does play a constitutive role in culture, and that changes to law can lead to cultural change. While future research is required, at a minimum this possibility suggests that those in a position to advise transition governments on legal change must approach the task with the utmost respect. The laws that they transplant may do more than simply facilitate transactions and business deals; the laws that they transplant may also transform a culture.

5. CONCLUSION

Conventional wisdom predicts that a transplanted law that does not comport with the host culture will be ignored or rejected. The interviews discussed in this Article do not support that theory. Indeed, they demonstrate that at least one transplanted law that is not rooted in the host culture has in fact been accepted by members of that culture. The acceptance of this law raises questions about the transplant of law, and suggests that further research is necessary. Moreover, the findings in this Article suggest that law has a constitutive relationship with culture, that each shapes the other. If that is the case, then transplanted law may do more than simply allow businesses to

\textsuperscript{177} See Robert F. Nagel, The Formulaic Constitution, 84 MICH. L. REV. 165, 212 (1985) ("Constitutional law, certainly, helps to shape the culture, but it cannot routinely assault that culture.").

\textsuperscript{178} See id. ("Law must begin [the process of change] somewhere, and it must shape by participating.").

\textsuperscript{179} Cf. James, supra note 164, passim (demonstrating that the introduction of commercial advertising into Hungary has caused Hungarians to express their cultural identity differently).

\textsuperscript{180} The possibility of a constitutive role for law suggests research not just on the acceptance of law, but also into the causal relationship between a transplanted law and a change in the attitude that otherwise might have precluded acceptance of that law.
transact with one another; it could also change the culture into which it is transplanted. This possibility makes an understanding of transplantation all the more urgent.

The culture of Central Asia is beautiful beyond description. For those who have experienced its generosity, its mystery, and its dangers, there will be a natural tendency to lament and even resist its transformation. 181 Attempts by outsiders, however, to stop cultural change in Central Asia or in any transition economy — even when based on an argument of cultural sensitivity — themselves might be a form of cultural arrogance and condescension. 182 Change is inevitable in emerging economies, and the findings in this Article suggest that conventional theories regarding the role of transplanted law in emerging economies do not fully explain the role that outsiders will play.

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182 See Joseph H. Carens, *Democracy and Respect for Difference: The Case of Fiji*, 25 U. Mich. J.L. REFORM 547, 598 (1992) (“Doesn’t the attempt to preserve a collective cultural identity inevitably falsify that identity by freezing it in some respects and transforming it in others, and in neither case responding to the internal imperatives of the culture itself?”).