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THE CHANGING INTERNATIONAL BUSINESS CONTEXT AND THE CHALLENGE IT POSES FOR THE EDUCATION OF INTERNATIONAL BUSINESS LAWYERS

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The Changing International Business Context and the Challenge It Poses for the Education of International Business Lawyers¹

BY:
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Introduction: Three Factors Affecting International Business

There are 3 factors that are changing the way international business is practiced and which therefore need to be taken into account in the education of future international business lawyers. These factors are:

Transnationalization of Economic Activity: The rapid growth in the amount of cross-border economic activity over the past twenty years is affecting the balance of power between the state and the market in the regulation of such activity. The ability of economic actors to escape national regulation by structuring their operations to take place in jurisdictions that they find congenial and to avoid those that they find unsatisfactory is undermining the regulatory role of the state. It is also creating demand for lawyers who can help their clients exploit these opportunities for private ordering of economic transactions.

Increased Concern about the Environment: The growing recognition that human activity is adversely affecting our physical environment imposes on all actors whose actions will affect this environment an obligation to account for all the costs and benefits that their activity is likely to cause. Since the impacts of these activities can extend over large areas and over long periods of time, a full accounting for their effects is also blurring the geographical and temporal boundaries that have historically circumscribed our concepts of legal responsibility and liability. This in turn is challenging us to adapt these concepts to new environmental realities and to the requirements of social and environmental sustainability and inter-generational equity.

Increased Attention to the Human Rights Obligations of Actors Other Than States: The growing scale of operations of transnational corporations is resulting in changing perceptions of the rights and obligations of all economic actors, including in regard to human rights. To date, this has initially manifested itself in two ways. First, it has stimulated the development of soft law standards of conduct for corporations—such as corporate codes of conduct, the UN Compact, IFC Performance Standards -- and an increased emphasis on corporate social responsibility. The second is the increased willingness of consumers, non-state actors, and international bodies to hold corporations accountable for the social consequences of their actions. These two developments are

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causing businesses and their lawyers to become much more sensitive to the human rights implications of their actions.

The Role of Law and Lawyers

Given the complex ways in which the above factors affect international business transactions, lawyers can most effectively serve their international business client's needs by developing an expanded vision of the value they add to their clients' business operations. This means that, in addition to offering their clients specific technical legal expertise, lawyers need to see themselves as member of the multi-disciplinary teams that help their client's negotiate and structure international business transactions. Given the economic, social and environmental impact of these transactions, the lawyers should also recognize that, *de facto*, they act as agents for social change.

In order to play this expanded legal role, international business lawyers, in addition to knowledge of their own legal systems, need:

1. A better understanding of the social, environmental and economic context in which the law operates. This knowledge will enable them to assist their clients assess and manage the legal risks associated with their proposed plans of action. It will also ensure that they function effectively as members of the cross-cultural and multi-disciplinary teams that drive most international business transactions.
2. Cross-cultural negotiating and drafting skills so that they can help their clients structure and negotiate international transactions that both meet the needs of all relevant stakeholders and that creatively exploit the opportunities that currently exist for the private ordering of cross-border business relations. This suggests that effective international business lawyers need an understanding of diverse cultures and the ability to communicate in different languages.
3. Sufficient knowledge of international and comparative law and international affairs that they are able to advise clients and other stakeholders on the municipal and international legal implications of proposed actions that have cross-border impacts.
4. Sufficient knowledge of legal ethics to understand their own responsibilities when advising their clients about their transnational activities. Lawyers need to see that their advice and actions will influence how their clients and the transactions they help structure and negotiate impact the process of social change and development in their host societies and to understand the responsibilities that this imposes on them. These responsibilities extend beyond their client's narrow transaction-specific interests to include a concern about the environmental and social impacts of these activities.

Challenges for Training Lawyers For This New Role

Legal education is not currently designed to provide lawyers with the broad perspective and planning and counseling skills described above. Instead it tends to training lawyers to be "backward looking" dispute resolvers rather than "forward looking" problem avoiders. Further, it focuses on educating lawyers to function in a single national legal system. In

many countries it also encourages lawyers to see law as a technical discipline that reacts to rather than shapes either business transactions or social and economic policy.

In order to produce this new kind of international business lawyer, legal education needs to produce lawyers who have the ability to help their clients understand and evaluate the practical effects of the legal choices they face and to minimize their negative impacts. This means law students, in addition to the standard domestic law curriculum, need to learn something about the social, environmental and economic contexts in which law operates. They also need to develop expertise in international law, including soft international law, like *de facto* global regulatory regimes, and comparative law. Legal education should also provide students with opportunities to devise legal solutions that mitigate risks and advance their clients' business interests.

Law schools can provide this training to their students in a number of different, and non-mutually exclusive, ways. They can include more non-legal subjects in the basic legal training; they can offer joint degree or post-graduate degree options; and they can introduce innovative teaching techniques – such as simulation and drafting exercises-- in business law courses.

These changes pose challenges to law schools which face personnel and financial constraints on their capacity to deliver legal education. Most law with these constraints, operate with relatively large class sizes and limited access to materials. Both of these constraints undermine the ability of professors to innovate in their teaching. While these issues are often symptoms of deeper social problems, there are some steps that can be taken to deal with them. For example, law schools can engage in revenue generating activities, like commissioned research for government and other paying entities and CLE programs, that will increase the resources available for innovations in legal education. These activities offer the added benefit of improving relations between the practicing bar and legal academics. This in turn should help promote legal education that is responsive to the demands of the practicing bar and ensures that practitioners remain aware of the latest legal scholarship. It can also stimulate legal academics to do research that is grounded in the demands of the profession and is related to the needs of society. Another way to overcome these constraints is for law schools to cooperate with each other in joint degree programs.³

Conclusion

The rapidly changing global environment in which international business takes place has created a demand for lawyers who are capable of functioning as problem avoiders rather than dispute solvers; who understand how to use their skills and knowledge in a multidisciplinary and cross-cultural team; and who have the sense of professional responsibility to make sure that their clients enter into socially and environmentally sustainable transactions. In order to meet this demand, law schools need to change the ways in which they educate lawyers and socialized them into the legal profession. The

³ One good example of this is the LLM for African Lawyers established by the Universities of Pretoria and Western Cape with the participation of American University Washington College of Law and the University of Amsterdam.

requisite change can be resource intensive and so may be beyond the capacity of most law schools in the developing world to implement. However, with creativity and the cooperation of more fortunate law schools, they can overcome these limitations.