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# A Lawyering Approach to Law and Development

## **Cover Page Footnote**

International Law; Commercial Law; Law

# A Lawyering Approach to Law and Development

Steven D. Jamar\*

## I. Introduction

The law and development movement has tried to articulate the role of law itself in a state's development, particularly economic development. In doing so, it has tended to focus on the substance of the law and the shape of legal institutions, including legal procedures for enforcement of laws. The law and development movement has not succeeded as early proponents had hoped it would.<sup>1</sup> While it has been demonstrated that law may be an instrumental part of a state's development process, the hard evidence demonstrates that law reform, including institutional and procedural aspects of law, is rarely, if ever, sufficient by itself.<sup>2</sup>

Although my main focus on the development side of law and development will be on economic development,<sup>3</sup> I agree with

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\* Professor and Director, Legal Reasoning, Research, and Writing Program, Howard University School of Law. I wish to thank Mohan Gopal of the World Bank Group for his inspiration and comments on a paper I submitted on a related topic for his Law and Development class at Georgetown University Law Center in Spring 1994. I also wish to thank my research assistant, Parisa Salehi, J.D. 1997, Howard University School of Law, for her detailed research and thoughtful insights on an earlier version of this article.

<sup>1</sup> Eighteen years after his first article, David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1 (1972) [hereinafter Trubek, *Toward a Social Theory*], Trubek candidly surveyed the ruin that was the field of law and development. David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 4 (1990); see also Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1, 6–8 (1998) [hereinafter *Markets, Democracy, and Ethnicity*]; cf. 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 (1975) (concluding that the law and development field could still be profitably cultivated, despite their generally negative assessment of the field).

<sup>2</sup> See Seung Wha Chang, *The Role of Law in Economic Development and Adjustment Process: The Case of Korea*, 34 INT'L LAW. 267 (2000) [hereinafter Chang, *The Role of Law*].

<sup>3</sup> In his companion article to this one on the lawyering approach to law and development, Professor Rosen illustrates how he applied essentially this approach to

those who have long argued that economic development cannot occur in isolation—a more holistic approach needs to be tried. This position is hardly novel; it has been advanced by critics of the World Bank approach for years<sup>4</sup> and is being adopted by the World Bank and other international development players.<sup>5</sup>

The traditional approach of the development community to law and development, and indeed to development itself, has been based on the Weberian<sup>6</sup> belief that normative changes in the law and institutional changes in the administration of the law will enhance development and are even necessary preconditions for development.<sup>7</sup> Weber's theory, based on his observations and

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develop “new Penal and Criminal Procedure Codes for the recently independent East African state of Eritrea.” Richard A. Rosen, *Code Drafting in Eritrea*, 27 N.C. J. INT'L L. & COM. REG. 67 (2001). Professor Rosen approached the problem as a lawyer, not as an external, omniscient expert possessed of all the answers. He facilitated the development of the codes by the Eritreans to whom he offered his expertise and made suggestions. He did not simply adapt a pre-existing set of laws from North Carolina or any other jurisdiction and hand it over to them. Although Professor Rosen's efforts were not within the economic development sphere I primarily use to illustrate the lawyering approach, they were clearly well within the broader field of law and development toward which this article is targeted.

<sup>4</sup> See, e.g., *Markets, Democracy, and Ethnicity*, *supra* note 1 (arguing that the push toward democratization and marketization has failed in part because of the failure to account for ethnic, cultural, and historical realities); Stanley Lubman, *Bird in a Cage: Chinese Law Reform after Twenty Years*, 20 N.W. J. INT'L L. & BUS. 383 (2000) (tracing some of the major reforms and identifying some obstacles to reform, including some Chinese cultural aspects affecting the efficacy of law reform).

<sup>5</sup> Richard Cameron Blake, *The World Bank's Draft Comprehensive Development Framework and the Micro-Paradigm of Law and Development*, 3 YALE HUM. RTS. & DEV. L.J. 4 (2000), available at [http://www.yale.edu/yhrdlj/index\\_enhanced.htm](http://www.yale.edu/yhrdlj/index_enhanced.htm).

<sup>6</sup> The Weberian approach is named after Max Weber who, in the late nineteenth and early twentieth centuries, sought to explain why the West came to dominate the world in the eighteenth and nineteenth centuries. Part of his explanation dealt with what he perceived to be the rational development of bureaucracies and the law. See MAX WEBER ON LAW IN ECONOMY AND SOCIETY 349–56 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1954) (translating from the second edition of Max Weber's original 1925 work *Wirtschaft und Gesellschaft*). An example of the kinds of advice given under this sort of approach is found in IMF ET AL., *A Study of the Soviet Economy* vol. 2 ch. IV.7 (1991). See *infra* Part II.A and text accompanying footnotes 17–32 for further elaboration of the Weberian model.

<sup>7</sup> Many World Bank studies that addressed systemic legal reform followed this model. Indeed, as stated by Professor Mohan Gopal in Spring 1994, admittedly with some hyperbole, some of the reports were so similar in content that one could just change the name of the country and reissue the report to fit another country. Though there is now a shift from paternalism and discrete macroeconomic projects to a self-

surmises a century ago, was accepted as the model for development for the second half of the twentieth century.<sup>8</sup> While the last decade has seen advances around the world in implementing the rule of law,<sup>9</sup> in improving economic development, and in advancing democratization,<sup>10</sup> those changes have not been the direct result of development projects based on the top-down Weberian model that has held sway for so long.

I propose an entirely different approach to law and development, a lawyering approach,<sup>11</sup> as an alternative to the traditional top-down, Weberian methodology. This alternative methodology relies not upon an arcane sociological theory, but rather upon the lawyer's consummate practical skill of problem-

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described more "holistic" approach with states being treated as partners, not just objects, the World Bank still seems to be operating from a top-down, preset agenda. See THE WORLD BANK, WORLD DEVELOPMENT REPORT 1990: POVERTY at [http://www.netlibrary.com/ebook\\_info.asp?product\\_id=33155](http://www.netlibrary.com/ebook_info.asp?product_id=33155); Discussion Draft from James D. Wolfensohn, World Bank President, to the Board, Management, and Staff of the World Bank Group, *Proposal for a Comprehensive Development Framework* 10–20 (Jan. 21, 1999), available at <http://www.worldbank.org/cdf/cdf.pdf> [hereinafter *CDF Proposal*] (memorandum from Wolfensohn, World Bank Group President, to the Board, Management, and Staff of the World Bank Group cataloging desired attributes). Wolfensohn's articulated list of goals is unobjectionable as an ultimate aim at some level, but it still reflects the Weberian, top-down approach rather than a lawyering approach and is much too complex to be implemented as a piece. See also Blake, *supra* note 5 ¶ 32.

<sup>8</sup> E.g., Trubek, *Toward a Social Theory*, *supra* note 1; *CDF Proposal*, *supra* note 7; Blake, *supra* note 5.

<sup>9</sup> Part of development is improving the rule of law; part of improving the rule of law is improving the content of the law as well as increasing the transparency and availability of the law. See Steven D. Jamar, *The Human Right of Access to Legal Information: Using Technology To Advance Transparency and the Rule of Law*, 1 GLOBAL JURIST TOPICS no. 2 art. 6 (2001), at <http://www.bepress.com/gj/topics/vol1/iss2/art6>.

<sup>10</sup> See Amy L. Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 HARV. INT'L L.J. 287 (2000) [hereinafter Chua, *The Paradox of Free Market Democracy*] for a discussion of some of the problems with Western free market democracy paradigm transplanted to the developing world.

<sup>11</sup> I happily credit Professor Mohan Gopal of the World Bank for introducing the problem-solving approach as one of the central ideas in the course on Law and Development he taught at Georgetown University Law Center in 1994. He critiqued the traditional approach and presented this idea as an alternative. Although I am indebted to him, my particular elaboration of the idea, and any resultant errors and weaknesses in it, are my responsibility, not his.

solving.<sup>12</sup> The lawyering approach involves professionalism, working for and with the client (including active client participation in decision-making),<sup>13</sup> and problem-solving.<sup>14</sup> It takes as its starting point the need to define what problems need to be addressed. Then a practical analysis of each problem is undertaken with an aim of developing and implementing practical solutions to those problems. A solution may well include modifying aspects of the country's economic structure, the substance of some of its law, and the structure of legal institutions; but neither the problems nor the solutions are presumed.

In contrast to the Weberian approach, the lawyering approach focuses more narrowly; it assesses actual human needs based on actual conditions. The environmentalists' creed of "think globally; act locally" seems fully applicable to development. After needs are determined, a lawyering approach requires developing strategies to address needs revealed by the assessment, but without prejudging the utility of any particular structure or set of laws. It does not demand intellectual property protection, for example, as a matter of course, although such protection may be part of a solution to a particular development problem. The lawyering approach treats a list like the World Bank's as a resource,<sup>15</sup> i.e., as a list of possible things to be concerned about. Instead of being the thing itself, the list becomes part of the information to be examined to identify problems and to develop possible solutions.

Under the lawyering approach the reformer's palette is not monochromatic. Instead of simply adopting the market and legal model from whichever state the consultant hails, the reformer should, indeed must, understand the local conditions. The solutions need to be tailored to fit the local conditions so that achievement of the goals is a realistic possibility.<sup>16</sup> We are not living in a one-size-fits-all world.

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<sup>12</sup> See STEFAN H. KRIEGER, RICHARD K. NEUMANN, JR., KATHLEEN H. MCMANUS, & STEVEN D. JAMAR, *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* (1999) [hereinafter *ESSENTIAL LAWYERING SKILLS*].

<sup>13</sup> This aspect is captured to some degree by the World Bank's new holistic, partnership approach as articulated in the *CDF Proposal*, *supra* note 7, at 3, 7.

<sup>14</sup> *ESSENTIAL LAWYERING SKILLS*, *supra* note 12, at 3-44.

<sup>15</sup> See *infra* text accompanying note 25.

<sup>16</sup> See *Markets, Democracy, and Ethnicity*, *supra* note 1, at 20.

Unlike Weberian, top-down approaches to development such as the traditional “law and development” or pure “economic development” or even “human rights and development” approaches, the lawyering approach is a problem-solving, process-oriented approach. This approach to development is superior to any Weberian approach in part because the lawyering approach focuses on problems in all of their dimensions rather than on a single aspect such as the need for capital. The problem may be narrowly defined, but the approach to that problem may require a solution which involves more than throwing money at it.

The lawyering approach does not ignore the importance of attending to substantive and procedural and institutional aspects of law itself. That is, there is still a great deal of room for work on issues relating to what types of law, what types of legal institutions, and what processes are most conducive to solving particular development problems. But the approach I am proposing does not assume that any particular model is the correct solution to the development puzzle. Parts of the solutions may look the same under both approaches in some circumstances, but the presumptions and processes are radically different.

In the balance of this article I develop the idea of a lawyering approach to development more fully and then examine it within the context of the relationship between computer sector development and the protection of intellectual property.

## II. A Lawyering Approach to Law and Development

### A. *The Weberian Model*

The Weberian theory of law and development holds that a necessary precondition of development is a rationally structured set of laws and a system of justice in a bureaucratic state.<sup>17</sup> In his 1972 article, Professor Trubek adopted this approach and argued

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<sup>17</sup> See MAX WEBER ON LAW IN ECONOMY AND SOCIETY, *supra* note 6, at 349–56. For a discussion of the Weberian theory, Schumpeter’s ideas (see generally JOSEPH A. SCHUMPETER, *THE THEORY OF ECONOMIC DEVELOPMENT; AN INQUIRY INTO PROFITS, CAPITAL, CREDIT INTEREST, AND THE BUSINESS CYCLE* (Harvard University Press 1949) (1934)), and critiques of them, see David Silverstein, *Patents, Science and Innovation: Historical Linkages and Implications for Global Technological Competitiveness*, 17 RUTGERS COMPUTER & TECH. L.J. 261 (1990) (focusing on the need for the United States to continue to innovate to be globally competitive).

that the parts of law that are necessary for development could be determined by applying social science methods.<sup>18</sup> Trubek's approach epitomizes the top-down approach which not only considers law as an essential tool for development (which it probably is in an instrumental sense when used for solving problems), but which also postulates that there is some optimal model of law and institutions for the administration of justice, if we can just discover them.

In practice, the basic law and development approach has been to determine the extent of the particular state's conformance with some Western legal model and then recommend changes to the domestic law to bring it more closely in line with that idealized Western structure. The underlying, seemingly unexamined assumption was that once Western-style law and Western-style economic infrastructures were in place, development would occur.<sup>19</sup>

Since the end of the Cold War, the establishment of political and legal "infrastructures" has become the paramount focus of U.S. foreign aid and of countries and intergovernmental and non-governmental efforts worldwide.<sup>20</sup> The twin targets of this political and legal infrastructure have been (1) building democratic institutions to make the current wave of democratic reforms more permanent, and (2) economic and regulatory reform aimed at moving various economic systems toward market economies with sufficiently powerful and flexible economic tools to permit and encourage development.<sup>21</sup> Such law-focused development projects

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<sup>18</sup> Trubek, *Toward a Social Theory*, *supra* note 1.

<sup>19</sup> See Lan Coa, *Law and Economic Development: A New Beginning?*, 32 TEX. INT'L L.J. 545, 557 (1997) (reviewing LAW AND DEVELOPMENT (Anthony Carty ed., 1992)) ("The modernization model oversimplifies the process of development by viewing it as a series of progressions culminating in an essentially Western-style economy with a Western-style liberal democracy.").

<sup>20</sup> JOHN MARTINUSSEN, SOCIETY, STATE, AND MARKET: A GUIDE TO COMPETING THEORIES OF DEVELOPMENT 34-35 (1997); WORLD DEVELOPMENT REPORT 1990, *supra* note 7, at 2-3; Brian Z. Tamanaha, *The Lesson of Law and Development Studies*, 81 AM. J. INT'L L. 470, 471 (1995); See also *Human Development Report*, U.N. Development Programme at ch. 1 (1990) (entitled *Defining and Measuring Human Development*); See generally *Human Development Report*, U.N. Development Programme (annually 1990-2000).

<sup>21</sup> See Chua, *The Paradox of Free Market Democracy*, *supra* note 10, at 3-44. For a discussion of structural adjustment policies and critiques of them, see David P. Fidler,



have sometimes played a role in development, but they have not succeeded as anticipated and as the Weberian theory would predict. Indeed, in many cases the World Bank economic development approach has led to developing states suffering under a crushing load of debt.<sup>22</sup> More often the changes which have arisen have been more the result of more complex, oftentimes almost accidental (from a development perspective), shifts in the international scene such as the disintegration of the Soviet Union and the end of the Cold War.

Although in the 1990s the World Bank and the United Nations Development Programme adopted an approach which focused more on the effect of actions on actual people,<sup>23</sup> development has remained tied to a Weberian model. More recently the World Bank has articulated its intention of adopting a holistic, partnering approach to development.<sup>24</sup> Despite the shift in focus, even a cursory examination of the fourteen-point approach reveals that Weber still holds sway. The fourteen bullets are:

A. Structural

1. Good and Clean Government
2. An Effective Legal and Justice System
3. A Well-Organized and Supervised Financial System
4. A Social Safety Net and Social Programs

B. Human

5. Education and Knowledge Institutions

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*A Kinder, Gentler System of Capitulations?: International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization*, 35 TEX. INT'L L.J. 387 (2000).

<sup>22</sup> E.g., Doug Cassel, *Third World Debt: Time for a Jubilee?*, Northwestern University School of Law, Center for International Human Rights, Worldview Commentary No. 41, at <http://www.law.nwu.edu/depts/clinic/ihr/hrcomments/1999/aug25-99.html> (Aug. 25, 1999); Noam Chomsky, *The Capitalist 'Principle' and the Third World Debt*, at <http://jinx.sistm.unsw.edu.au/~greenlft/2000/406/406p17.htm> (May 24, 2000); Lewis Green, *Cancel the Crushing Debt of Third World countries*, THE SEATTLE TIMES (Apr. 10, 2000), available at [http://seattletimes.nwsource.com/news/editorial/html98/eddebt\\_20000410.html](http://seattletimes.nwsource.com/news/editorial/html98/eddebt_20000410.html); Jubilee 2000/USA, Debt Tables, at <http://www.j2000usa.org/debt/chart1.html>, <http://www.j2000usa.org/debt/chart2.html> (June 15, 1999) (figures from the 1997 and 1999 reports).

<sup>23</sup> WORLD DEVELOPMENT REPORT 1990, *supra* note 7, at 56; see generally *Human Development Report* (annually 1990–2000), *supra* note 20.

<sup>24</sup> CDF Proposal, *supra* note 7, at 10–20.

## 6. Health and Population Issues

### C. Physical

#### 7. Water and Sewerage

#### 8. Energy

#### 9. Roads, Transportation and Telecommunications

#### 10. Sustainable Development, Environmental and Cultural Issues

### D. Specific Strategies – Rural, Urban, and Private Sector

#### 11. Rural Strategy

#### 12. Urban Strategy

#### 13. Private Sector Strategy

#### 14. Special National Considerations<sup>25</sup>

Partial quotes from just three of the paragraphs describing the first three of these elements illustrate the epitome of the Weberian approach:

1. **Good and Clean Government:** A country must have an educated and well-organized government. This requires capacity building, an open legislative and transparent regulatory system, properly trained and remunerated officials and an absolute commitment to clean government. . . .

2. **An Effective Legal and Justice System:** Without the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible. A government must ensure that it has an effective system of property, contract, labor, bankruptcy, commercial codes, personal rights laws and other elements of a comprehensive legal system that is effectively, impartially and cleanly administered by a well-functioning, impartial and honest judicial and legal system.

3. **A Well-Organized and Supervised Financial System:** . . . [A] government must establish an internationally accepted and effective supervisory system for banks, financial institutions and capital markets to ensure a well-functioning and stable financial system. Information and transparency, adequately trained practitioners and supervisors, and internationally acceptable accounting and auditing standards will be essential. Regulation

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<sup>25</sup> *Id.*

and supervision must include banking, savings institutions, insurance and pension plans, leasing and investment companies. Capital markets should also be developed and strengthened as resources allow.<sup>26</sup>

This is a remarkable list of things to do. While I do not doubt that implementing most of these ideas would be valuable, I am suspicious of a “great leap forward” approach to development, even one that treats cultural matters, environmental concerns, and people as if they mattered. The task confronting the developing country when development is approached this way is too vast.<sup>27</sup> Having a vision of such a Xanadu may make some sense, but when the need is for potable water for drinking and cooking, these great goals seem mockingly distant and out of place. These are not wrong goals; they are simply not necessarily the most relevant ones for solving discrete problems.

Another approach to development that has more recently gained some currency is the human rights approach. Under this approach, development is treated as a human right and a rights-based analysis is followed.<sup>28</sup> This approach, like the others, is still essentially a top-down, content-driven approach—establish the right and then enforce it. Despite its change of focus and language and underlying concept, it is, nonetheless, still a Weberian approach.

After fifty years of field tests, it would appear that the Weberian approaches do not work. William L. Andreen addresses this problem in the environmental regulation context:

Consultants retained by a donor and commissioned by a government body to review environmental and natural resource legislation with a view to participating in the drafting of some

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<sup>26</sup> *Id.*

<sup>27</sup> See Lubman, *supra* note 4 (tracing some of the major reforms and identifying some obstacles to reform, including some Chinese cultural aspects affecting the efficacy of law reform).

<sup>28</sup> See, e.g., U.N. World Conference on Human Rights: Vienna Declaration and Programme of Action, June 25, 1993, 32 I.L.M. 1661 (declaring rights to development); Isabella D. Bunn, *The Right to Development: Implications for International Economic Law*, 15 AM. U. INT'L L. REV. 1425 (2000); Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 HARV. HUM. RTS. J. 1 (2000); Hans-Otto Sano, *Development*, 22 HUM. RTS. Q. 734 (2000); N.J. Udombana, *The Third World and the Right to Development: Agenda for the Next Millenium*, 22 HUM. RTS. Q. 753 (2000).

new legislation are entering a virtual mine field. Not only is the legal and cultural terrain complex, but the institutional dynamics can be treacherous. Simply collecting the necessary information can be a tremendous challenge since legal treatises, government organization manuals, and compilations of relevant law seldom exist or if they do, their existence is either unknown to the consultant or, if known, almost impossible to find. All too often, consultants will lack the time, the ability, or perhaps even the desire to accurately assess the overlapping legal and institutional responsibilities existing within the government. Thus, either advertently or inadvertently, many proposed reforms will favor one or another institution, ministry or donor—a fact that will not only doom the entire exercise to likely failure, but will produce even more cause for institutional distrust. Donors and governments alike, moreover, may eventually grow weary of even trying to craft appropriate laws and institutional structures.

For these reasons, successful law reform projects are not terribly common. Reports and proposals are written by a seemingly endless chain of consultants who often work in isolation, producing work lacking continuity and destined to gather dust.<sup>29</sup>

Though substantive reforms may help transform a state's political and economic situation, the mere combination of changing laws and reforming bureaucracies to match some external model is not sufficient. As summarized by one scholar, despite the greater sophistication of people in the field today, "the thrust of international development policy today remains essentially what it was in the sixties and seventies: to export markets, democracy, and the rule of law to the developing world,"<sup>30</sup> and to do so virtually without regard to local conditions and needs.<sup>31</sup> Nor, I would argue, is a more holistic approach better

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<sup>29</sup> William L. Andreen, *Environmental Law and International Assistance: The Challenge of Strengthening Environmental Law in the Developing World*, 25 COLUM. J. ENVTL. L. 17, 31 (2000) (citations omitted).

<sup>30</sup> *Markets, Democracy, and Ethnicity*, *supra* note 1, at 14; *see also* Viet D. Dinh, *What is the Law in Law & Development?*, 3 THE GREEN BAG 2d 19 (1999) ("Although the theories, the players, and therefore the prescriptions have changed, it seems that one constant remains: now, as then, we lawyers have not shown that we know what we're doing."). Dinh means that the meaning of "the rule of law" in the economic development context has not been adequately developed. *Id.* at 19.

<sup>31</sup> *Cf.* Reif, *supra* note 28 (arguing that legal structures related to protecting human

if it is undertaken with the same Western, Weberian mindset. Something different is needed. That something is, instead of law and development, lawyering and development.

The problem is not one of ultimate aims, nor is it one of a lack of good ideas. The problem on the ground stems from using a Weberian mind-set instead of a lawyering one.<sup>32</sup>

### *B. The Lawyering Approach*

The core attributes of a lawyering approach are: (1) professionalism,<sup>33</sup> (2) client-centeredness,<sup>34</sup> and (3) problem-solving.<sup>35</sup>

Professionalism has many attributes, a few of which will be noted here as particularly relevant to law and development practitioners, including both institutions as well as individuals. As stated by Richard K. Neumann, “[p]rofessionalism means, among other things, finding a solution that is hidden inside all [of the typical] uncertainty and conflict.”<sup>36</sup> The ability to find that hidden solution requires openness, good judgment, creativity, curiosity, and tenacity. Openness requires, in part, an ability and willingness to listen and to set aside prejudgments. Tenacity is necessary

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rights are an important part of democratization).

<sup>32</sup> Many of the legal reforms in China in the 1980s came about more through a more targeted, problem-solving approach than through a structural, Weberian approach. See Rui Mu, *New Developments in China's Economic Legislation*, reprinted in CHINA'S LEGAL DEVELOPMENT 61-76 (John R. Oldham ed., 1986). See also Lubman, *supra* note 4 (examining Chinese legal reforms and some of the problems with fitting western legal and institutional norms to Chinese societal and cultural and legal traditions and concepts). See generally LYNN T. WHITE, III, UNSTATELY POWER, VOLUME II: LOCAL CAUSES OF CHINA'S INTELLECTUAL, LEGAL, AND GOVERNMENTAL REFORMS (1998).

<sup>33</sup> ESSENTIAL LAWYERING SKILLS, *supra* note 12, at ch. 2.

<sup>34</sup> *Id.* at ch. 3.

<sup>35</sup> *Id.* at ch. 4. An interesting counterpoint to the idea advanced under this lawyering methodology is the macro-level work done through international agreements such as GATT with its intellectual property norms and other generally ineffectual intellectual property harmonization attempts. These initiatives at the multi-state level may well bear fruit, but such endeavors are not likely to be sufficiently targeted to solve particular development issues. This is not surprising since economic development of other countries is not the goal of those controlling GATT. Such development would be incidental to the work undertaken. The point is, these ideas may be very good in themselves, but the development lawyer with a narrow task and a particular client would be well advised to take another, narrower approach.

<sup>36</sup> *Id.* at 6. Neumann was the lead author for Part I of the book. *Id.*

because few things can be accomplished easily.

Professionalism also encompasses the idea of the reflective practitioner.<sup>37</sup> A "reflective practitioner is one who can reflect while acting."<sup>38</sup> Even while in the midst of a project the reflective practitioner needs to be evaluating his or her own decisions and actions and adjusting them as appropriate. I would suggest that this attribute is particularly critical in law and development on the ground.

The second core attribute of the lawyering approach is that it is client-centered.<sup>39</sup> In a client-centered approach the practitioner focuses not only on a problem, but also on the client. It also means that the client participates at all steps along the way from defining the problem to making and implementing decisions. The law and development practitioner does not abdicate responsibility to the client; the practitioner has expertise and an important say in what is to be done. But neither does the practitioner dictate to the client nor paternalistically decide for the client what the client must do. The state and other local participants in the development project must be partners at all stages of the process.

Important as professionalism and client-centeredness are, the third attribute to effective lawyering, following an effective problem-solving approach, is key. Though the number and naming of the steps involved in problem-solving can vary, the basic structure remains the same:<sup>40</sup>

1. *Problem-identification.* The law and development consultant working with the particular client state identifies something that needs to be addressed and defines the problem and its related sub-problems as precisely as possible. This process can consume a significant amount of time.
2. *Gathering and evaluating information.* Information is obtained from the client and from other sources "in a fairly

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<sup>37</sup> See DONALD A. SCHÖN, EDUCATING THE REFLECTIVE PRACTITIONER: TOWARD A NEW DESIGN FOR TEACHING AND LEARNING IN THE PROFESSIONS (1987).

<sup>38</sup> ESSENTIAL LAWYERING SKILLS, *supra* note 12, at 6 (original emphasis removed).

<sup>39</sup> See *id.* at 21–24; see also DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (1991). A client-centered approach almost always includes a process-oriented approach of the sort described by Gita Gopal. GITA GOPAL, GENDER RELATED LEGAL REFORM AND ACCESS TO RESOURCES IN EASTERN AFRICA, WORLD BANK DISCUSSION PAPER 405 (1999).

<sup>40</sup> These are adapted from ESSENTIAL LAWYERING SKILLS, *supra* note 12, at 33–34.

open-ended manner.”<sup>41</sup> This investigatory phase must neither be allowed to drift aimlessly and indefinitely, nor be too cramped by time or scope; a middle way must be followed.

3. *Solution-generation.* The net should be cast wide in generating possible solutions. The consultant and client ought not rely upon pat answers or even “tried and true” solutions. Every situation is unique. Every solution is unique. There are always similarities, but those ought not be allowed to obscure the uniqueness.

4. *Solution-evaluation.* The possible solutions must be tested for workability and cost. Can it be done? Are the right people available? Would something else work better with the people on the ground?

5. *Decision.* The host state and the law and development practitioner must choose the solution that fits best. Selection must be done collaboratively with all partners involved reaching consensus if at all possible.

6. *Implementation.*

Although this presentation of the problem-solving method makes problem solving seem linear, in practice it is both iterative and web-like with each of the six phases affecting the others. As information is obtained, the problem is more clearly defined. As solutions are generated and evaluated, not only does the problem tend to mutate, but also there is invariably a need to gather more information. Even as late as the implementation phase, the problem, information, and solution steps are likely to be revisited. Like the world in which the problem-solving approach is applied, problem solving is dynamic and complex, not linear and simple.

When the three core elements of the lawyering approach are considered together, one is forced into a process-oriented approach rather than a Weberian approach. Client centeredness and client involvement in the problem-solving process ensure an emphasis on inclusion and process rather than exclusion and fiat.

Something very akin to what I am proposing has been used to good effect in actual development projects.<sup>42</sup> Gita Gopal labels the

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<sup>41</sup> *Id.* at 34.

<sup>42</sup> *E.g.*, Rosen, *supra* note 3; GOPAL, *supra* note 39 (development regarding women’s status in East Africa); ALEX COUNTS, GIVE US CREDIT (1996) (Grameen Bank in Bangladesh).

approach she used to address gender problems in East Africa a process approach.<sup>43</sup> Gopal's process approach focuses on how law gets changed and by whom, not just on what changes should be made. Instead of being top-down, reform is broadly from the bottom up, coming from the affected people.<sup>44</sup> In many circumstances a process-oriented approach would fit well with the lawyering approach. For example, a solution to gender inequality may include reforming law using an inclusive, process-oriented, educational approach as distinguished from simply enacting gender-neutral norms.

Another example of a non-Weberian approach is the micro-investment approach employed by the Grameen Bank in Bangladesh.<sup>45</sup> The Grameen Bank not only approached poverty holistically, but it also approached it as a problem to be solved by the people themselves with bankers providing economic and other assistance, including community-building.<sup>46</sup> The Grameen Bank requires borrowers to form community groups which will be jointly responsible for repayment of loans. It also supports the creation of these groups by guidelines and face-to-face testing of the understanding of those guidelines. It is broadly educational. It is not focused on top-down infrastructure and trickle-down economic hopes; it is a ground-level program.

Central to the Bank's success is the pledge it requires all borrowers to memorize and implement, the so-called Sixteen Decisions. This informal "social development constitution of Grameen Bank" was "formulated in a national workshop of one

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<sup>43</sup> GOPAL, *supra* note 39, at vii.

<sup>44</sup> *Id.*

<sup>45</sup> COUNTS, *supra* note 42.

<sup>46</sup> *Id.* Grameen Bank has accepted foreign aid, but has also refused some aid, including a grant of \$200 million in 1986 offered by the World Bank. *Id.* at 172-83. The aid was refused because the Grameen Bank's founder, Muhammad Yunus, "didn't need the money and wasn't eager to have arrogant World Bank consultants telling him how to do his job." *Id.* at 178. Yunus has not been shy about criticizing the bank:

The World Bank was not created to help end hunger in the world . . . . It was created to help development. To the World Bank, development means [economic] growth. Single-mindedly it pursues growth to the best of its ability until it is distracted by other issues like hunger, women, health, environment, and so on.

*Id.* at 182 (quoting from a speech by Yunus to a 1988 World Bank Conference on "Hunger, Poverty, and the World Bank").



hundred women center chiefs . . . in March 1984.”<sup>47</sup>

1. We shall follow and advance the four principles of Grameen Bank—Discipline, Unity, Courage, and Hard Work—in all walks of our lives.
2. Prosperity we shall bring to our families.
3. We shall not live in dilapidated houses. We shall repair our houses and work towards constructing new houses as soon as possible.
4. We shall grow vegetables all year round. We shall eat plenty of them and sell the surplus.
5. During the plantation season, we shall plant as many seedlings as possible.
6. We shall plan to keep our families small. We shall minimize our expenditures. We shall look after our health.
7. We shall educate our children and ensure that we can earn to pay for their education.
8. We shall always keep our children and their environment clean.
9. We shall build and use pit-latrines.
10. We shall drink water from tube wells. If it is not available, we shall boil water or use alum.
11. We shall not take dowry at our sons’ weddings, nor shall we give any dowry at our daughters’ weddings. We shall keep our centre free from the curse of dowry. We shall not practice child marriage.
12. We shall not inflict any injustice on anyone, nor shall we allow anyone else to do it.
13. We shall collectively undertake larger investments for higher incomes.
14. We shall always be ready to help each other. If anyone is in difficulty, we shall help him or her.
15. If we come to know of any breach of discipline in any centre, we shall go there and help restore discipline.
16. We shall introduce physical exercises in all of our centres. We shall take part in all social activities collectively.<sup>48</sup>

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<sup>47</sup> *Id.* at 348.

<sup>48</sup> *Id.* at 347–48.

Muhammad Yunus's approach was to see a problem and develop a creative, effective solution based on local realities. This approach has been used effectively around the world,<sup>49</sup> including in Chicago where it has helped lift inner city families out of poverty.<sup>50</sup> In adapting the approach developed in Bangladesh to addressing economic development in depressed areas of Chicago, the implementers retained some of the basic ideas such as individual and group responsibility and reform of attitudes. But the adaptation to conditions in Chicago fit the people and the needs of the people. It was not imposed, it was inculcated. Local people created it; outsiders helped.

Yunus's approach, in fact, has little to do with law, macroeconomics, infrastructure, or structural improvements. And yet the Grameen Bank illustrates the lawyering approach excellently. The approach of legally trained development professionals should be less theorizing about law and development, and more lawyering for development.

The lawyering approach is not limited to micro-investment projects or to any particular setting. It is an approach that can be employed at any scale for any development problem. It is a method of approaching problems, not a particular solution. The Grameen Bank is a solution to poverty, a solution that can be adapted to other places. The lawyering approach does not say, "end poverty" or "create Grameen Bank-style institutions." It asks instead, what is the problem and what solutions can be brought to bear on it.

Among the potential advantages of the problem-solving, lawyering approach is that inhibiting factors other than those in the narrow fields of the law and economic institutions may be spotted more readily. In the information-gathering phase of the problem-solving process, one could well find other needs to be addressed such as corruption, distribution, raw materials availability, and quality of the workforce. One is also more likely to see positive features to build upon, e.g., educated workers, access to cheap energy. In short, a lawyering approach focused on a client's needs is inherently more likely to lead to the very sort of holistic approach advocated by World Bank President Wolfensohn, though

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<sup>49</sup> *Id.* at xv.

<sup>50</sup> *Id.* at xvi-xix.

on a smaller scale, built around discrete, manageable problems rather than on initiatives aimed at grandly transforming societies in giant steps.

### **III. Application of the Lawyering Approach to Intellectual Property Protection and Computer Sector Development**

The lawyering approach is a generally applicable approach. It is almost agnostic on particular economic theories, development strategies, or the content of what is to be done. I say “almost agnostic” because to be truly agnostic, the approach would be fully neutral; it is not. While it is neutral as to precisely which tactics and strategies should be brought to bear on a particular problem, it rejects the model that requires *a priori* conformance to western standards and models. Such conforming may be a good solution in a particular case, but it is not always the solution and is not the only solution.<sup>51</sup> The lawyering approach also favors broadly inclusive or even democratic processes and multi-factored analysis, so it is not completely agnostic.

Because a core attribute of the lawyering approach requires paying close attention to the actual circumstances on the ground, it may seem somewhat odd to illustrate this approach on something as broad as computer sector development and the relationship of protecting intellectual property to developing that sector. As will be seen, that is partially the point—the lawyering approach can be applied at various levels of generality or specificity and can be applied to a wide variety of law and development problems. It is not limited to situations like poverty being addressed by the Grameen Bank or Gita Gopal’s approach to gender problems in East Africa. The problem can be narrow and specific, e.g., what can be done to address the problem of a lack of conveniently accessible potable water in a particular community, or it can be much broader, e.g., what can be done to encourage development of the computer sector of the state’s economy.

Furthermore, by examining from a distance computer sector development and the relationship of protecting intellectual property to developing that sector, certain ideas may be developed that can be adapted to specific circumstances within discrete states. That is, although using the lawyering approach in an

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<sup>51</sup> See GOPAL, *supra* note 39; Lubman, *supra* note 4.

academic exercise such as this does not solve any particular problems, it may open the door, howsoever slightly, to seeing now-familiar problems anew. The following examination thus seeks to craft an arrow or two with which to stock the development quiver.

At the same time this examination illustrates the limits of remote scholarship in advancing law and development. Theorizing, even under a lawyering approach, can take one just so far. Development happens on the ground, not on this page. Even though I may believe that a particular approach to protecting intellectual property is what is called for across the world in every country and that great benefits would result from such harmonization, such a top-down approach to implementation will not work if for no other reason than countries will not follow laws imposed upon them externally which they do not value internally.<sup>52</sup>

In defining the problem one is immediately confronted by the problem of sector specificity and spillover. For example, a state may want to develop the computer sector. Legislation intended to address the problem of only one sector may well unavoidably impact other sectors. In another example, legislation aimed at protecting rights in software almost inevitably will also impact other aspects of intellectual property. That is, even though software often warrants special attention within an intellectual property regime, any intellectual property regime ought to cover more than computers, and one should be cautious about drafting legislation solely targeted at the computer sector. If one creates laws that are too specific, then over time a crazy quilt of conflicting laws can result. This reality explains in part the powerful attraction of and tendency to use a top-down, Weberian approach. If one is going to create an intellectual property regime for one sector, why not for all?

Why not indeed. The problem that is presented may be a narrowly focused one (developing the computer sector), but parts of the solution may have more general application (a more general scheme for protecting intellectual property). Another example

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<sup>52</sup> See M. McCary, *Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective*, 35 TEX. INT'L L.J. 289 (2000); Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443 (1989).

could be that a state may want to encourage foreign investment in communications infrastructure but has weaknesses in its legal regime and economic institutions such that foreign investment of any sort is discouraged. Among the possible solutions would be a set of rules and institutions targeted at the communications sector alone. Another possible solution would be to create broader institutional structures and laws relating to foreign investment that apply to sectors in addition to the communications infrastructure.

Although the scope of the problem and the solution may be asymmetric, the problem-solving, lawyering methodology still applies. Intellectual property laws would not be adopted simply for the sake of adoption or merely because a consultant or foreign trade representative thinks they would be helpful; they would be adopted because they address an identified problem. The impetus for the reforms ought to be local needs and, to the extent practicable, the protection regime adopted ought to be based upon and tailored to local traditions.<sup>53</sup>

#### A. *The Innovation, Intellectual Property, and Development Syllogism*

For many years, building the necessary infrastructure for modernization and development has been the object of attention and capital from governments, from the World Bank, and from other international organizations. Traditional elements of infrastructure, including roads, energy, sewers, water supply, communications, education, and health care, have historically and properly received high priority in competition for international loans and grants and for domestic development.

In classical economic analysis the three pillars of an economy were resources, labor, and capital.<sup>54</sup> However, studies revealed that

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<sup>53</sup> For two articles that provide background information concerning intellectual property protection under different legal traditions, see William P. Alford, *Don't Stop Thinking about . . . Yesterday: Why There Was No Indigenous Counterpart to Intellectual Property in Imperial China*, 7 J. CHINESE L. 3 (1993) and Steven D. Jamar, *The Protection of Intellectual Property under Islamic Law*, 21 CAP. U. L. REV. 1079 (1992).

<sup>54</sup> Robert M. Sherwood, *Why a Uniform Intellectual Property System Makes Sense for the World*, in GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY 68, 71 (Mitchel B. Wallerstein et al. eds., 1993) [hereinafter GLOBAL DIMENSIONS].

those three elements account for only roughly half of the economic growth.<sup>55</sup> Most of the rest of the growth was attributed to innovation and knowledge.<sup>56</sup> The basic case for the relationship between innovation<sup>57</sup> and development is easy to make—compare the West of 1790 with 1890 and both 1790 and 1890 with 1990.<sup>58</sup> One conclusion is now universally agreed upon: “With the growth of the international economy in the second hundred years, the ability of a nation’s individuals, firms and government to discovery [sic], invent and innovate has become . . . one of the most important aspects of international competition.”<sup>59</sup> Innovation has been both a contributor to and beneficiary of development in the West.

The necessity of innovation for economic development is now part of the generally accepted doctrine.<sup>60</sup> The innovation may be

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> As used in this paper the term “innovation” refers broadly to the three categories separately defined by Alfred Lorn Norman: invention, discovery, and innovation. ALFRED LORN NORMAN, *INFORMATIONAL SOCIETY: AN ECONOMIC THEORY OF DISCOVERY, INVENTION AND INNOVATION* 3–6 (1993). Norman defines discovery as an addition to the store of knowledge of natural phenomena and logical relationships, invention as “a new manmade device or process,” and innovation as a better way of doing things or “the creation or implementation of a new alternative which achieves a higher performance as measured by the respective criterion.” *Id.* at 5. As Norman makes clear later in the book his main thesis is that innovation, as he defines it, depends to a large degree on political and social structures. Indeed, his essential argument is that the ordering of society is innovation and that the basic concern he has is that innovation in this realm has slowed significantly relative to the rates of discovery and invention. *Id.* at 59. Thus his book takes a macroeconomic-social-political approach to the problem of innovation and development.

<sup>58</sup> For an easily accessible, general overview of these two centuries see chapters two and three of Norman, *id.* See also PURUSHOTTAM NARAYAN MATHUR, *WHY DEVELOPING COUNTRIES FAIL TO DEVELOP* chs. 3 & 4 (1991).

<sup>59</sup> NORMAN, *supra* note 57, at 59. Norman ultimately proposes nothing less than a new design of government that he contends will be driven by the computer and information revolutions. For a summary of the more conventional view and approach see Edwin Mansfield, *Intellectual Property Rights, Technological Change, and Economic Growth* (and the responding papers of the panel discussants), in *INTELLECTUAL PROPERTY RIGHTS AND CAPITAL FORMATION IN THE NEXT DECADE* ch. 1, especially pp. 23–26 (Charles E. Walker & Mark A. Bloomfield eds., 1988).

<sup>60</sup> For an interesting discussion of patents and incentives for the commercialization of them see F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, 85 *MINN. L. REV.* 697 (2001).

an appropriate technology for small scale development as in parts of rural India;<sup>61</sup> it may be development of indigenous basic production of basic needs as in China; it may relate to improvement of technologies developed first elsewhere as in Japan; it may relate to developing new industrial sectors through adapting foreign technology as with computers in Brazil. But in all cases, innovation, the creation of new information (or information that is new at least locally), is a fundamental part of the economic development puzzle.<sup>62</sup>

Until the 1990s, the field of innovation and development had been studied mostly by economists, sociologists, and political scientists who showed little awareness of or appreciation for intellectual property law per se. Given sufficient desire and endless patience, one can wade through seemingly endless economic analyses purporting to prove the obvious, i.e., innovation spurs development.<sup>63</sup> Some of the authors in this field may be characterized as performing ideologically-influenced economic analysis,<sup>64</sup> while others concoct macroeconomic theories almost inaccessible to all but the most determined scholar.<sup>65</sup>

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<sup>61</sup> See E.F. SCHUMACHER, *SMALL IS BEAUTIFUL: ECONOMICS AS IF PEOPLE MATTERED* (1973); COUNTS, *supra* note 42 (showing that Grameen Bank's program focuses heavily on helping people develop knowledge of how to improve their lives).

<sup>62</sup> See, e.g., Robert M. Solow, *Technical Change and the Aggregate Production Function*, 39 REV. ECON. & STAT. 312 (1957); F.M. Scherer, *Inter-Industry Technology Flows and Productivity Growth*, 64 REV. ECON. & STAT. 627 (1982); John R. Allison & Lianlian Lin, *The Evolution of Chinese Attitudes toward Property Rights and Invention and Discovery*, 20 U. PA. J. INT'L ECON. L. 735 (1999).

<sup>63</sup> E.g., PAUL STONEMAN, *THE ECONOMIC ANALYSIS OF TECHNOLOGICAL CHANGE* (1983); Kedar N. Kohli, *Economic Trends in Asia*, in *LESSONS IN DEVELOPMENT: A COMPARATIVE STUDY OF ASIA AND LATIN AMERICA* 24 (Seiji Naya et al. eds., 1989); AMIYA KUMAR BAGCHI, *THE POLITICAL ECONOMY OF UNDERDEVELOPMENT* (1983); WILLIAM E. JAMES ET AL., *ASIAN DEVELOPMENT: ECONOMIC SUCCESS AND POLICY LESSONS* (1989); JOHN SHEAHAN, *PATTERNS OF DEVELOPMENT IN LATIN AMERICA: POVERTY, REPRESSION, AND ECONOMIC STRATEGY* (1987).

<sup>64</sup> E.g., BAGCHI, *supra* note 63 (Marxist); ANDRÉ GUNDER FRANK, *CAPITALISM AND UNDERDEVELOPMENT IN LATIN AMERICA* (1967); W. W. ROSTOW, *THE STAGES OF ECONOMIC GROWTH* (1962). For a review of the ideological coloring of the analyses, see Maurico Rojas, *Review of the Debate over the Origins of Latin American Industrialization and its Ideological Context*, in *THE LATIN AMERICAN DEVELOPMENT DEBATE* (Patricio Meller ed., 1991).

<sup>65</sup> E.g., GENE M. GROSSMAN & ELHANAN HELPMAN, *INNOVATION AND GROWTH IN THE GLOBAL ECONOMY* (1991); STONEMAN, *supra* note 63.

Although there is a great vitality in the literature and a great deal of effort and money and attention being focused on development issues and the role of innovation in development, ultimately the theorists and scholars leave one wanting. The micro-economic level and the actual legal structures and policies followed are simply not treated. Instead, the picture is painted with broad-brush strokes in dim colors.<sup>66</sup>

Despite the opacity of much of this sort of work, it has highlighted several features common to states seeking to develop through innovation and technology transfer. These include: (1) problems of communication of information;<sup>67</sup> (2) the aim of domestic industrial development, especially through import substitution;<sup>68</sup> (3) the tension between endogenous innovation and foreign technology transfer; (4) trade policy;<sup>69</sup> and (5) the social, cultural, and political forces that affect innovation and growth.<sup>70</sup> In only extremely rare instances was the role of protection of intellectual property even tangentially addressed.

To this mix Robert M. Sherwood added that legal protection of intellectual property is part of the infrastructure needed for innovation and technology transfer, and hence development.<sup>71</sup> Sherwood demonstrated that in some circumstances effective legal protection for intellectual property in high-technology fields can potentially play a positive role in economic development by attracting foreign investment and by encouraging the creation of indigenous businesses based on economic exploitation of the

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<sup>66</sup> Robert M. Sherwood's work is something of an exception to this problem. *E.g.*, ROBERT M. SHERWOOD, INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT 191 (1990) [hereinafter SHERWOOD]; Robert M. Sherwood, *Intellectual Property Systems and Investment Stimulation: The Rating of Systems in Eighteen Developing Countries*, 37 IDEA 261 (1997) [hereinafter Sherwood, *Rating*].

<sup>67</sup> Gene M. Grossman & Elhanan Helpman, *Trade Knowledge Spillovers and Growth*, 35 EUR. ECON. REV. 517 (1991) (National Bureau of Economic Research reprint); GROSSMAN & HELPMAN, *supra* note 65.

<sup>68</sup> *E.g.*, BAGCHI, *supra* note 63, at 120-43 (taking a decidedly Marxist approach to the issue.).

<sup>69</sup> *E.g.*, Part Two: *External Economic Policies*, in LESSONS IN DEVELOPMENT: A COMPARATIVE STUDY OF ASIA AND LATIN AMERICA 55 (Seifi Naya et al. eds., 1989).

<sup>70</sup> See, *e.g.*, Allison & Lin, *supra* note 62, at 742-45; *Markets, Democracy, and Ethnicity*, *supra* note 1, at 14.

<sup>71</sup> SHERWOOD, *supra* note 66.



protected information.<sup>72</sup> Part of the persuasiveness of Sherwood's monograph<sup>73</sup> and later work<sup>74</sup> comes from the detail of the studies and from his attempt to develop a larger theory from the smaller scale study of specific structural facts, rather than from the perspective of grand, abstract economic theory or trade theory. Both theory and grounded research are useful, but until recently the attention paid to actual results of the grand development theories has been insufficient.

Sherwood's thesis that protecting intellectual property is part of the necessary infrastructure for innovation and thus development places him conceptually in the Weberian camp.<sup>75</sup> Despite Sherwood's ideas having been developed under a traditional Weberian mindset, the ideas themselves can be used in the lawyering approach. The lawyering approach does not reject useful information, useful ideas, or useful approaches based on their theoretical underpinnings. The lawyering approach uses whatever is available and appropriate to address identified problems. Even though the general applicability of his assertion may be questioned, Sherwood has demonstrated at least that protection of intellectual property can be part of a solution to an identified problem.

The underlying logic of decontextualized intellectual property protection may be stated as an informal syllogism or enthymeme: (1) Because innovation and technology transfer enhance development, then policies which encourage innovation and technology transfer will lead to economic development; (2) technology transfer and innovation are enhanced by intellectual property protection; consequently (3) such protection should be provided in order to encourage development, at least in technology-dependent industries.<sup>76</sup>

Contrary to the premise in step two of the syllogism, there are

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<sup>72</sup> *Id.* at 5-7.

<sup>73</sup> *Id.*

<sup>74</sup> Sherwood, *Rating*, *supra* note 66.

<sup>75</sup> *Id.*

<sup>76</sup> See SHERWOOD, *supra* note 66. A corollary is that protecting intellectual property may lead to an enhanced business environment in which the focus on even non-protectible know-how will enrich the creativity and development of the economy. *Id.* at 262.

no necessary relationships (a) between intellectual property protection and innovation and (b) between such protection and the exploitation of innovation, at least for certain levels of insular development and certain levels of export-driven development.<sup>77</sup> That some relationships may exist in some settings does not mean that the premise is generally true. Counter-examples exist.<sup>78</sup> As a consequence of the lack of a necessary relationship, a Western-style regime of intellectual property protection ought to be implemented only after the identification of a particular problem that it would address. Even in that situation, the regime should be carefully tailored to local needs and traditions. Egypt's copyright law fits Egypt better than would a direct transplant of the copyright law of the United States or even of the European-based roots of it.<sup>79</sup>

The protection of relevant intellectual property ought to be considered among the possible solutions for computer-sector problems for several reasons. First, as long as the willingness of businesses that possess the technology to license or otherwise transfer it depends upon some assurance of protection of that technology,<sup>80</sup> protecting it is important, even if the protection is not intrinsically necessary.<sup>81</sup> One can choose to forego the benefits of technology from such possessors of it or attempt to get it and use it through other means of transfer, but such actions have their own consequences.

A second reason to consider protecting intellectual property is that it may in fact be important and one ought not reject a useful

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<sup>77</sup> Ruth Gana Okediji, *Copyright and Public Welfare in Global Perspective*, 7 IND. J. GLOBAL LEGAL STUD. 117, 121-25 (1999) (part of the *Symposium on Globalization at the Margins: Perspectives on Globalization from Developing States*).

<sup>78</sup> See *infra* text accompanying notes 94-127.

<sup>79</sup> Jamar, *supra* note 53 (Egypt). See also Daniel Behrendt, *Computer Software Copyright Law in the People's Republic of China*, 2 U.C. DAVIS J. INT'L L. & POL'Y 1, 7 (1996) (China) ("One reason the PRC's fair use provisions differ from those of the United States is that the PRC has a different historical perspective on copyright protection and individual ownership of intellectual property.").

<sup>80</sup> *Intellectual Property: U.S. Companies Reluctant to Sign Technology Contracts Without Stronger Protection Law*, 4 Int'l Trade Rep. 276 (BNA) (Feb. 25, 1987).

<sup>81</sup> See Alan S. Gutterman, *The North-South Debate Regarding the Protection of Intellectual Property Rights*, 28 WAKE FOREST L. REV. 89 (1993); Richard T. Rapp & Richard P. Rozek, *Benefits and Costs of Intellectual Property Protection in Developing Countries*, 24 J. WORLD TRADE, Oct. 1990, at 75.

idea merely because of the source of the idea or because it has some Weberian attributes such as top-downedness. The third reason to at least consider such protection is that international norms include it through the Paris Convention, the Berne Convention, and now through the WTO. Conformity to international standards has value separate from instrumental domestic affects. Nonetheless, as will be seen in the states analyzed in this article, one must be cautious in drawing conclusions too broadly because counter-examples always can be found and specific differences in circumstances can lead to very different results.

Despite the similarity in the legal norms, which are likely to result from both the traditional law and development approach and the lawyering approach, the effectiveness of the solution is likely to be different because an essential element of the lawyering approach is the detailed involvement of the client. If the client buys into the solution in a deeper way, then the solution is likely to be effective. The difference in process is thus an important one; mere normative change in the laws is not sufficient.<sup>82</sup>

### *B. The Role of Law in Development of the Computer Sector*

In this section I examine the role of adequate legal protection of computer-related technology in enhancing economic development in the computer sector. A significant amount of development can and does occur without such protection, and significant strides can be made without it. Through implementation of a rigorous import substitution program,<sup>83</sup> e.g., Brazil, or an export development program,<sup>84</sup> e.g., Taiwan, a country can develop an indigenous computer industry without

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<sup>82</sup> Many countries have adopted normatively adequate laws only to continue the activities the United States finds offensive. See, e.g., Y. Kurt Chang, *Special 301 and Taiwan: A Case Study of Protecting United States Intellectual Property in Foreign Countries*, 15 NW. J. INT'L L. & BUS. 206, 214-15 (1994); Steven D. Jamar, *Section 301 and Informatics Market Access: The Case of Brazil (1993)* (unpublished LL. M. thesis, Georgetown University School of Law), at <http://www.law.howard.edu/faculty/pages/jamar> (last updated Aug. 30, 2001).

<sup>83</sup> BAGCHI, *supra* note 63, at 120-36; Youngil Lim, *Comparing Brazil and Korea*, in *LESSONS IN DEVELOPMENT*, *supra* note 63, at 98-102; JAMES ET AL., *supra* note 63, at 24-26.

<sup>84</sup> BAGCHI, *supra* note 63, at 143-46; Lim, *supra* note 83, at 94-98; JAMES ET AL., *supra* note 63, at 27-28.

adequate legal intellectual property protection for either foreign or domestic intellectual property. Nonetheless, the long-term health of the fledgling industry may well be threatened unless that country is able to gain access to foreign technology in order to ensure that its products are internationally competitive. In the fast-moving, internationalized, highly technical computer sector, technology importation is necessary for every country, including leaders like the United States and Japan.<sup>85</sup>

Identification of protection of intellectual property as relevant to the development of the computer industry should not be understood as a prescription of a particular regime. Instead the question should be: Assuming that intellectual property should be protected, then what should the regime of protection be? A country ought not adopt any particular structure of intellectual property protection simply because a successful country uses that structure. One example of a major variance in intellectual property protection is the United States clinging to a first-to-invent standard for primacy in patent claims while the European Community uses a first-to-file approach. The United States also maintains a post-application, pre-issuance eighteen-month period of confidentiality of the patent application<sup>86</sup> while the EC does not. Despite this type of variability in the details of implementation, there are basic, well-defined types of protection, which are generally recognized in international conventions and in many states' normative laws and practices.<sup>87</sup>

Variability extends beyond the procedural aspects to substantive concerns of what is patentable subject matter. One example of a substantive variation arises in pharmaceuticals. For public interest reasons of desiring maximum availability and lowest price, for moral reasons based on a sense of it being wrong

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<sup>85</sup> For a provocative look at technology transfer and the flow of information across borders down the ages, and the importance of it in stimulating progress, see the book and PBS television series: JAMES BURKE, *CONNECTIONS* (Little, Brown and Co. 1995).

<sup>86</sup> 35 U.S.C. § 122 (2001).

<sup>87</sup> In this respect the concept of patent protection is well-understood and "universally" accepted as being what patents are about in much the same way that many human rights are universal, but tolerate substantial variability in the details of the protection. In both cases there comes a point where one says that the protection is no longer a patent or the limitations so eviscerate the concept that there is no real patent protection.

to deny access to efficacious drugs, and for economic reasons that many drugs are developed through basic research funded by the government, many states do not protect pharmaceuticals at all or at least not to the same extent the United States does.<sup>88</sup> However, if a country were to determine that access to newly developed drugs is restricted by the lack of willingness of transnational pharmaceutical companies to manufacture or market in that country, then the country may choose to change its intellectual property protection regime. The non-protection may well be proper and may well be more moral than the approach taken in the United States, and it is not *a priori* right or wrong as a matter of economic development or development of health and social well-being.<sup>89</sup>

### C. Case Studies

Despite the seeming attractiveness and persuasiveness of Sherwood's thesis and supporting data, the role of protection in innovation and development is not free from doubt.<sup>90</sup> Examples of innovation and development in the absence of protection of intellectual property are easy to find. Indeed, countries of the Pacific Rim, including even Japan, experienced strong growth and development in the computer sector without strong intellectual property laws and without adequate remedies and enforcement of the laws they had. One need not look so far afield for another example—the U.S. computer industry was started and grew up in an environment of virtually no protection other than trade secret.<sup>91</sup>

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<sup>88</sup> E.g., Deepak Nayyar, *India*, in GLOBAL DIMENSIONS, *supra* note 54, at 162–68.

<sup>89</sup> After agreeing to the Uruguay Round GATT agreement, India changed its pharmaceuticals laws to protect foreign patents of medicines. *GATT: India Indicates It Will Sign Final GATT Pact, Despite Opposition*, 11 Int'l Trade Rep. (BNA) 545 (Apr. 6, 1994).

<sup>90</sup> See generally Part IV: *Scientific and Technological Advance and Its Impact on the Role of Intellectual Property Rights*, in GLOBAL DIMENSIONS, *supra* note 54, at 189; *Global Intellectual Property Rights Issues in Perspective: A Concluding Panel Discussion*, in GLOBAL DIMENSIONS, *supra* note 54, at 360; Edwin Mansfield, *Unauthorized Use of Intellectual Property: Effects on Investment, Technology Transfer, and Innovation*, in GLOBAL DIMENSIONS, *supra* note 54, at 107.

<sup>91</sup> KENNETH FLAMM, *CREATING THE COMPUTER: GOVERNMENT, INDUSTRY AND HIGH TECHNOLOGY* (1988). The existence of strong trade secret protection was important, but the industry developed largely from competition and outside companies developing products more often than not based on work of others, not of International

Software was not protected by copyright (and certainly not patent); computer chips were not patentable, copyrightable or otherwise protectible, and some of the basic hardware was patentable (and patented). But more often, trade secret protection was relied upon—especially for software.<sup>92</sup>

Although in the last twenty years the computer industry in the United States has increasingly sought to protect property through the shields provided by U.S. copyright and patent laws, the effect of that protection for economic development is not uniformly in one direction. It is not clear that the Napster litigation will be good for innovation. Nor is it clear that the ongoing rush to patent software will be beneficial. It could well be a major drag on the industry, especially in discouraging new entrants, in the coming years. The extension of patent protection to business practices and the patent office's tendency to miss prior art in software are already causing problems. Copyright-like protection of online databases also poses risks for innovation and advancement.<sup>93</sup> Strong protection may not always be a good thing.

The following four countries illustrate that the claim that the protection of intellectual property is required for development is limited, at least for development to a certain stage, and that normative and economic institutional changes may not be sufficient. Other changes need to be brought about. These brief summaries are not intended to be rounded, complete examinations of all of the relevant policies of each country. The aim is much more modest, i.e., simply to illustrate that innovation and protection of intellectual property are neither panaceas for economic development, nor is the one dependent upon the other, nor is there a necessary relationship between such protection and economic development, at least not in early stages of marketization and economic growth.

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Business Machines (IBM). *See id.* Digital Equipment Corporation (DEC) and Control Data Corporation (CDC) both succeeded without misappropriation of IBM trade secrets. *See id.*

<sup>92</sup> The place where trade secret protection was used most frequently was in the IBM-compatible peripherals industry. There were many lawsuits, but many of the peripherals companies succeeded without taking trade secrets. *See id.*

<sup>93</sup> J. H. Reichman & Paul F. Uhlir, *Database Protection at the Crossroads: Recent Developments and Their Impact on Science and Technology*, 14 BERKELEY TECH. L. J. 793 (1999).

### 1. *Brazil*

Brazil shows that protection of intellectual property is not necessary in at least some fields for some development. For example, until the mid-1970s, Brazil had no domestic computer industry. Then, despite ineffective patent protection, without effective trade secret protection, and without effective software protection,<sup>94</sup> Brazil moved from nowhere to being sixth in “informatics”-related production in the world.<sup>95</sup> Brazil developed a huge domestic computer market by implementing a variety of policies designed to keep foreign products out, to allow appropriation of the technologies by Brazilian companies, and to encourage in manifold ways the development of that sector.<sup>96</sup>

Some development occurred without protection of intellectual property. However, the period of development through isolation and appropriation of foreign technology eventually resulted in Brazil’s stagnation in the computer sector as well as in other sectors.<sup>97</sup> Plus, external pressures led to changes in the law. But the normative changes made in the 1980s were not enough to get out of stagnation. Normative law is not enough either to open markets or to effect change through law. Actual enforcement is needed, along with other related institutional changes, and even societal changes.

The lessons from Brazil are unclear and contradictory. First, computer-sector development occurred without intellectual property protection, but then it plateaued or stagnated. Second, the normative changes made in law did not lead to expected and hoped-for results. Third, changes have not been made sufficiently complete in terms of enforcement and actual, effective protection

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<sup>94</sup> The appropriation of computer technology led to several section 301 actions against Brazil. E.g., *Kantor Singles Out Brazil, India, Thailand for Special 301 Designation*, 10 Int’l Trade Rep. 726 (BNA) (May 5, 1993). See also Mary S. White, Note, *Navigating Uncharted Waters: The Opening of Brazil’s Software Market to Foreign Enterprise*, 25 STAN. J. INT’L L. 575 (1989).

<sup>95</sup> RONALD M. SCHNEIDER, “ORDER AND PROGRESS”: A POLITICAL HISTORY OF BRAZIL 3 (1991).

<sup>96</sup> See PAULO BASTOS TIGRE, TECHNOLOGY AND COMPETITION IN THE BRAZILIAN COMPUTER INDUSTRY 67–68 (1983).

<sup>97</sup> Cf. Theresa Beeby Lewis, Comment, *Patent Protection for the Pharmaceutical Industry: A Survey of the Patent Laws of Various Countries*, 30 INT’L LAW. 835, 860–61 (1996) (dealing with another high-technology area, pharmaceuticals).

to truly determine whether they would have been effective.<sup>98</sup> Sherwood assigns Brazil an IP protection rating of forty-nine, a low number indicating inadequate support.<sup>99</sup>

If the main drag on innovation in Brazil comes from entrenched forces and patterns of business through patronage, then change is hard to bring about; these are hard social customs to change. They do not get changed through merely changing normative law and legal institutions. That is, the law side of law and development is far from sufficient to work the changes needed. Such changes may be a piece of the puzzle, but will not be sufficient. The Weberian model will not work. It is not at all clear that the problem-solving, lawyering approach to development of a computer industry would lead to different results in the near term. But, if the analysis of the problem includes the extra-legal aspects and the solution includes those aspects, then using a lawyering approach and a holistic approach may well result in the hoped-for growth in the computer sector. The lawyering approach goes beyond reforming law.

## 2. *India*

Since even before independence, India has pursued a policy of self-reliance. Although it is the world's largest democracy, it has followed a generally statist approach to the economy with an emphasis on development of infrastructure and on targeted sectors of the economy. Hand-in-hand with the general approach to the economy, importation of many goods and foreign investment were difficult and discouraged.

India has generally provided weak normative protection for all types of intellectual property<sup>100</sup> and has been even more ineffective in protecting those rights because of an extremely inefficient and ineffective court system. India, recognizing those flaws in itself, sent the *Bhopal* case to the United States so that Indians injured by the tragedy could recover more and do so in a more timely

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<sup>98</sup> Cf. Christopher S. Mayer, Note, *The Brazilian Pharmaceutical Industry Goes Walking from Ipanema to Prosperity: Will the new Intellectual Property Law Spur Domestic Investment?*, 12 TEMP. INT'L & COMP. L.J. 377 (1998) (pharmaceuticals).

<sup>99</sup> Sherwood, *Rating*, *supra* note 66, at 295.

<sup>100</sup> Cf. Lewis, *supra* note 97, at 858-59.



fashion.<sup>101</sup>

Nonetheless, India has had some successes: It has its own communications satellites and space program; it has huge radio and television and telecommunications industries; it has the world's largest movie industry; it has a free and powerful press, it has some of the best software engineers in the world<sup>102</sup>—engineers who are regularly hired by American companies including Microsoft, Hewlett-Packard,<sup>103</sup> and others;<sup>104</sup> and Sun Microsystems was founded by an Indian;<sup>105</sup> and it has remained a free democracy.

Among the problems is the adequacy of protection for intellectual property including patents, trademarks, copyrights, and trade secrets. India has an extremely broad compulsory licensing, or "licensing as of right" provision in its patent law under which virtually anyone can compel a patent holder to license the technology to him or her.<sup>106</sup>

The current trend in India, as in much of the developing world, is toward a more open, market-driven economy with freer trade.<sup>107</sup> Reforms have been initiated and various avoidance schemes have

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<sup>101</sup> See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec., 1984 ("Bhopal I") 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd as modified*, 809 F.2d 195 (2d Cir. 1987), *cert. denied*, 484 U.S. 871 (1987); *In re Union Carbide Corp. Gas Plant Disaster ("Bhopal II")*, MDL Docket No. 626, 1992 WL 36135 (S.D.N.Y. Feb. 18, 1992), *aff'd sub nom.*, *Bi v. Union Carbide Chem. & Plastics Co., Inc.*, 984 F.2d 582 (2d Cir. 1990), *cert. denied*, 510 U.S. 862 (1993).

<sup>102</sup> This point is partially challenged in C.R. SUBRAMANIAN, *INDIA AND THE COMPUTER: A STUDY OF PLANNED DEVELOPMENT* ch. VI (1992), by pointing out the problems India has had in developing a truly homegrown software industry.

<sup>103</sup> SUBRAMANIAN, *supra* note 102, at 155.

<sup>104</sup> Brent Bowers, *Tapping Foreign Talent Pool Can Yield Lush Growth*, WALL ST. J., Mar. 23, 1992, at B2.

<sup>105</sup> Scott Thurm, *Asian Immigrants Are Reshaping Silicon Valley*, WALL ST. J., June 24, 1999, at B6.

<sup>106</sup> Lewis, *supra* note 97, at 860.

<sup>107</sup> See generally Pradeep K. Chipper & Sumit K. Majumdar, *Foreign Ownership and Profitability: Property Rights, Control, and the Performance of Firms in Indian Industry*, 42 J.L. & ECON. 209 (1999); Ram T. Madaan & R. Nath Madaan, *India: Some Recent Legal Developments*, 32 INT'L LAW. 395 (1998); Rajesh Swaminathan, "Functioning Anarchy": *India's National Telecommunications Policy and the Development of "Basic" Telephone Services*, 11 COL. J. ASIAN L. 393 (1997).

been allowed, particularly in the computer industry.<sup>108</sup> Not surprisingly, with the advent of a significant software industry, India has improved its normative protections for software, though enforcement is still very problematic.

Sherwood assigns India an IP protection rating of forty-six.<sup>109</sup> At this level, according to Sherwood, the IP protection "regime is likely to have little positive influence on private decision-making for higher levels of technological activity."<sup>110</sup>

One can find in India a belated attempt to do what works. In the computer industry the relatively unsuccessful government efforts are being supplanted by private sector activity.<sup>111</sup> Adopting the problem-solving orientation relatively free from preconceived notions may help move the process along even more quickly. Once India abandoned its statist, top-down approach and opened the market up, development in the sector blossomed, even with a low "Sherwood number."<sup>112</sup>

### 3. Korea

South Korea has been a success story of development in general and in the electronics industry in particular.<sup>113</sup> However, it is not a major player in the computer industry as yet, though it has recently entered the field. Korea's development occurred despite "a regime of weak intellectual property protection [which] prevailed prior to 1987."<sup>114</sup> Sherwood explains Korea as an

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<sup>108</sup> This point is comprehensively developed by Subramanian. SUBRAMANIAN, *supra* note 102.

<sup>109</sup> Sherwood, *Rating*, *supra* note 66, at 345.

<sup>110</sup> *Id.* at 356.

<sup>111</sup> SUBRAMANIAN, *supra* note 102, at ch. XI.

<sup>112</sup> See Alec Klein, *AOL to Open Netscape Office in India's Tech Center: Internet Company Plans to Invest \$100 Million Over 5 Years*, WASH. POST, Mar. 6, 2001, at E5.

<sup>113</sup> KATHARINA PISTOR & PHILIP A. WELLONS, *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960-1995* (1999) (published before the steep downturn in the Asian economies in the late 1990s); Chang, *The Role of Law*, *supra* note 2; JAMES ET AL., *supra* note 63; Lim, *supra* note 83, at 93; Gunda Schumann, *Economic Development and Intellectual Property Protection in Southeast Asia: Korea, Taiwan, Singapore and Thailand*, in *INTELLECTUAL PROPERTY RIGHTS IN SCIENCE, TECHNOLOGY, AND ECONOMIC PERFORMANCE: INTERNATIONAL COMPARISONS* 163 (Francis W. Rushing & Carole G. Brown eds., 1990).

<sup>114</sup> SHERWOOD, *supra* note 66, at 177. For an overview of the changes then made, see Young-Cheol Jeong & Yoong Neung Kee, *Protection and Licensing of Software in*

example of adoption and improvement, or reverse engineering plus innovation, not as stealing technology. But, even if that nicety is conceded, Korea still illustrates that effective protection of intellectual property is not per se required.<sup>115</sup>

Korea's changes in copyright law are and will continue to be the result of both external and internal forces.<sup>116</sup> According to Kyo Ho Youm:

In conclusion, the copyright law in South Korea will continue to evolve in the years ahead. Considering the legal and political environment in which the Copyright Act was revised in 1986 along with a more active Korean judiciary in tackling various new issues, copyright will provide Koreans with an opportunity to develop the kind of legal theories and concepts which will meet the needs of their fast changing society. In many ways, the United States will serve as a useful frame of reference because of its extensive experience with copyright law over the years.<sup>117</sup>

It is not clear just what effect copyright protection will have on computer software development in Korea or computer-sector development in general. The most publicized enforcement actions have been driven by external forces—namely, seizures of infringing materials.<sup>118</sup>

Sherwood assigns Korea an IP protection rating of seventy-four, second highest among those he rated.<sup>119</sup> Sherwood sees this as high enough to induce foreign investment and perhaps to induce internal innovation.<sup>120</sup>

The damaging effects of the rough financial seas of the late 1990s on the Asian Pacific Rim illustrate the fragility of economic development. The crash in the late 1990s from Thailand to Japan was a financial crisis. The lack of financial stability and appropriate controls on the financial markets are generally

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Korea, 8 COMPUTER LAW., July 1991, at 25.

<sup>115</sup> Cf. Lewis, *supra* note 98, at 863.

<sup>116</sup> Kyo Ho Youm, *Copyright Law in the Republic of Korea*, 17 UCLA PAC. BASIN L.J. 276, 277 (2000).

<sup>117</sup> *Id.* at 300.

<sup>118</sup> *Id.* at 298–99.

<sup>119</sup> Sherwood, *Rating*, *supra* note 66, at 345.

<sup>120</sup> *See id.* at 353.

identified as the main culprits.<sup>121</sup> This sort of event demonstrates that the picture is more complex than the innovation syllogism sometimes seems to imply.

#### 4. *China*

China has undergone dramatic economic growth and dramatic normative changes in its law in the last two decades.<sup>122</sup> Law has played an important part in restructuring the economy:

In order to transform the economy into what is called a "socialist" market economy, China engaged in a frenzy of lawmaking to establish a predictable framework satisfactory to market actors. Under the 1989 Five Year Plan, the government proposed to draft twenty-two priority laws, including, for example, a Banking Law, a Domestic Investment Law, a Securities Law, a Fair Competition Law, a Foreign Trade Law, International Arbitration Regulations, and Regulations Relating to Foreign Mining Investment.<sup>123</sup>

China has also had a dramatic rise in use of others' intellectual property, particularly trademark and copyright-related material.<sup>124</sup> This market in counterfeit goods is an important part of China's economic progress.<sup>125</sup> Whatever the merits of strong or lax enforcement for China, the case illustrates that protection of intellectual property is not necessary for innovation (at least in the sense of adapting foreign innovation to local needs and wants) and economic development in the short term and in early stages of development. Foreign pressures, and perhaps local pressures, will begin to mount as China develops more products internally and seeks to export them.<sup>126</sup> Indeed, such pressures have been brought

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<sup>121</sup> Chang, *The Role of Law*, *supra* note 3, at 277.

<sup>122</sup> See Lubman, *supra* note 4.

<sup>123</sup> Coa, *supra* note 19, at 557 n.58 (citation omitted).

<sup>124</sup> See Daniel C.K. Chow, *Counterfeiting in the People's Republic of China*, 78 WASH. U. L.Q. 1, 3 (2000) (trademark); Robert B. Frost, Jr., Comment, *Intellectual Property Rights Disputes in the 1990s Between the People's Republic of China and the United States*, 4 TUL. J. INT'L & COMP. L. 119, 127-28 (1995) (copyright).

<sup>125</sup> Chow, *supra* note 124, at 3; cf. Lewis, *supra* note 97, at 862-63.

<sup>126</sup> See Allison & Lin, *supra* note 62 (patent law); Frost, *supra* note 124, at 129 (copyright); Jill Chiang Fung, Comment, *Can Mickey Mouse Prevail in the Court of the Monkey King? Enforcing Foreign Intellectual Property Rights in the People's Republic of China*, 18 LOY. L.A. INT'L & COMP. L.J. 613 (1996).

to bear and China has adopted stronger laws, albeit enforcement is still severely wanting.<sup>127</sup> But strong IP protection is not a prerequisite to economic development.

#### *D. Lessons from the Case Studies*

Even Sherwood concedes that “[t]he role of effective intellectual property protection is little understood in developing countries.”<sup>128</sup> A problem in developing any such regime is to avoid having it be solely a wealth transfer system from the target state to the multinational corporation and its investors. The aim is to create a regime that encourages real internal development.

The case studies illustrate: (1) that at least for certain levels of insular development and certain levels of export-driven development there are no *necessary* relationships (a) between intellectual property protection and innovation, and (b) between such protection and the exploitation of innovation; and (2) that, as a consequence of the understanding that there is no such necessary relationship, implementation of a Western-style regime of intellectual property protection ought to be done, if at all, only after the identification of a particular problem which is to be addressed by such a system.

As India has moved away from a top-down approach modeled on yesterday’s technology toward a more functional approach, a more problem-oriented approach, it has become more successful in the computer sector. It is taking advantage of its underemployed educated population, and is dropping the top-down judgments of how to develop a computer industry and letting the computer sector develop more organically.

Similarly, Brazil has moved from its initial success in developing a domestic “informatics” industry toward a more open approach in part recognizing that sufficient indigenous development did not seem to be occurring. The results are not conclusive, but both the closed and open approaches seem to have had a place. In Brazil, protection of software and other computer-related technology is still not effective, even though the content of the law is, except for certain aspects of trade secret protection,

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<sup>127</sup> Allison & Lin, *supra* note 62, at 753–56 (patent law); Frost, *supra* note 124, at 129, 131 (copyright).

<sup>128</sup> Sherwood, *Rating*, *supra* note 66, at 357.

normatively adequate.

#### **IV. Conclusion**

Ultimately, a lawyering approach may be more effective than Weberian approaches for identifying, analyzing, and generating practical solutions to computer-sector development concerns. There are no indications that lack of protection is a good thing in the long run. Lack of protection does restrict the flow of products and ideas, which cannot in the long run be good for growth, change and competitiveness. Nonetheless, such protections are not sufficient and may not be necessary for certain levels and types of economic development. As the case of Brazil has shown, mere normative compliance is not enough. The lawyering approach with its emphasis on professionalism, client-centeredness, and practical problem-solving will lead to better results than imposed Weberian solutions.