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Call for a New Analytical Model for Law and Development

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Abstract: For decades, scholars in law and development have studied interactions and dynamics among institutions, legal rules, and development. However, a comprehensive analytical framework in law and development, one which assesses the impact of law, legal frameworks, and institutions (LFIs) on economic development in key areas, is yet to be developed. This is partly because existing law and development study has focused on the manner in which international aid organizations, such as the World Bank, have provided support in relation to law and development, the agendas that they have pursued, and the issues that have been created, while relatively less attention has been given to the needs of developing countries to develop appropriate legal rules and institutions with due consideration to the local conditions which may not make direct "transplants" workable. To address the need, two preliminary but important tasks must be performed: one is to identify the "key areas" subject to state regulation that are directly relevant to economic development. The other is to develop proper methodology to assess the impact of LFIs on economic development. This article recounts the evolution of law and development studies for the past four decades, examines the necessity and feasibility of developing the Analytical Law and Development Model, or "ADM," and considers relevant methodology issues. This article serves as a foundational work for the development of the ADM.

Keywords: law and development, developing countries, economic development

1 Introduction

Four decades have passed since the seminal article in law and development by Professors David Trubek and Marc Galanter, "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States,"[1]

1 David Trubek and Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 Wisconsin Law Review (1974), 1062–1102.

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was published. The authors were not hopeful about the future of law and development studies then,[2] and after four decades, law and development still remains undeveloped as an academic field, as reflected in the lack of methodology and of a comprehensive analytical framework to assess the impact of law, legal frameworks, and institutions (LFIs[3]) on development. Many of the gaps between the realities on the ground and the early 1970s academic discourse, as well as the resulting moral dilemma, as aptly described by Trubek and Galanter as "self-estrangement," remain. This is a call for a new approach and a new analytical model to bridge the gaps and to establish the field more firmly as an academic discipline that contributes to the economic progress of developing countries. If the gaps can indeed be closed as a result of adopting this new approach and the new analytical model, then the scholars will find themselves out of self-estrangement.

To this aim, a preliminary but important task for law and development studies is to develop focus in the field. Law and development studies, at least as they exist today, do not have clear conceptual boundaries. From Trubek and Galanter's article, "Scholars in Self-Estrangement" to the more recent "Development as Freedom"[4] by Amartya Sen, scholars have discussed "development" and "law and development" in different contexts, at times defining "development" somewhat differently.[5] It is because "development" does not have a fixed definition that is accepted universally, although it has generally been understood as progressive social, political, and economic changes in developing

2 *Id.*, at 1100–1102.

3 For LFIs, "law" means a specific rule or a set of rules binding on the members of a society. "Legal frameworks" denote frameworks in which law is organized to give effect such as regulatory structures and legal systems (*infra* note 89). "Institutions" refer to a wide range of organizations, norms, and practices related to the adoption, implementation, and enforcement of law. An earlier draft of this article used the term "impact of law" as the subject of assessment, but the author realizes that the impact of law cannot be assessed in separation from relevant legal frameworks and institutions. For example, the adoption of a law that imposes a criminal penalty on corruption would not be very effective if the society were to lack essential institutions, such as an effective prosecutorial service and an independent judiciary, to enforce law. As to the legal frameworks, the impact of a law can be different if it were to be implemented as a stand-alone statute with its own monitoring and enforcement mechanism or a part of a regulation subject to the control of a higher-level statute. Thus the term "LFIs" is instead used throughout this article to represent the inalienable amalgam of the constituent concepts in law and development. In consideration of the inseparable nature among LFIs, "law and development" may be defined as the study of the role of LFIs for development.

4 Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999).

5 Sen defines "development" as "a process of expanding the real freedoms that people enjoy" (thus development as "freedom"). *Id.*, at 3. This is a holistic view of "development" as opposed to focusing on economic growth.

countries.[6] The difficulty is that academics, one to the next, may have a very different idea about the substance of "progressive social, political, and economic changes"[7] constituting development. Depending on one's focus and preference, the discussion and analysis tend to head in a variety of directions, which has made a coherent development of the discipline rather difficult.

Thus, if more intelligible and consistent development of the field were to be achieved, the conceptual boundaries of "law and development" should be defined more narrowly: law and development studies should measure "development" with the focus on economic progress ("economic development").[8] The justification comes from the compelling need of our time to overcome the poverty typical of the majority of the world's population. Despite significant efforts made by the international community, as demonstrated by the United Nation's Millennium Development Goals (MDGs),[9] poverty still affects a majority of the world's inhabitants.[10] Successful economic development, which creates an economy that provides adequate resources to lift a majority of the population out of poverty, has been successfully undertaken in some East Asian countries, suggesting that economic development is the only permanent solution to the issue of poverty.[11] Thus developing an analytical model that provides useful

6 Trubek and Galanter (1974), *supra* note 1, at 1062, fn. 1.

7 *Id*.

8 Two seminal books in recent years by David Trubek and Alvaro Santos, *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006) and by Kenneth Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Washington, DC: Brookings, 2006) represent this trend. Economic development denotes the process of a structural transformation of an economy from one based primarily on the production of primary products (i.e., a product consumed in its unprocessed state) generating low levels of income to another based on modern industries that generate higher levels of income. The suggested focus on economic development does not mean that those who share this focus would necessary agree to a common methodology and analytical framework, but with the suggested focus, it would certainly be more feasible to expect a coherent development of the field. A comment has also been made that law tends to play a more central role in economic development when dealing with micro issues (contracts, crime, tort, antitrust, corporate law) than on macro issues (setting interest rates, etc.). The proposed focus on economic growth has also been met with "emphatic" agreement by other senior scholars such as Frank Upham.

9 In 2000, the United Nations set the MDGs with several objectives to be completed by year 2015. More details of the MDGs are available at: <http://www.un.org//millenniumgoals>, accessed 6 September 2014.

10 According to the World Bank report, 2.4 billion lived on less than US $2 a day as of 2010, which was a slight decline from 2.59 billion in 1981, available at: <http://www.worldbank.org/en/topic/poverty/overview>, accessed 6 September 2014.

11 For example, some East Asian countries, including South Korea, Taiwan, Hong Kong, and Singapore, achieved remarkable economic development, escaping from widespread poverty for

assessment of the impact of LFIs[12] on economic development will serve the key interest of the world's majority. Such an analytical model would provide legislative and institutional guidance for the countries that wish to develop effective LFIs for successful economic development.

The proposed focus on economic development does not imply that other values and objectives are unimportant or irrelevant. Many, including myself, share the belief that the promotion of these non-economic values, such as enhancement of political human rights,[13] development of democratic political governance, improvement of gender equality, and establishment of the rule of law, is also important. Development projects promoted by international organizations and national aid agencies have linked these non-economic issues to the terms of their support.[14] While such non-economic values and agendas, many of which may also affect economic development itself,[15] are undoubtedly important for human progress and should by no means be overlooked or disregarded, the following grounds suggest that the proposed focus on economic development will serve the best interest of law and development studies.

The non-economic values raise complex and multifaceted issues with substantial disagreement as to their substance, characterization, constituent elements, and enforceability. The concepts such as the constituent elements of democracy and those of gender equality may vary widely from country to country and from culture to culture, and it is difficult and often unjustified to

most of their populations and attaining the status of high-income countries within a single generation. Between 1961 and 1996, South Korea increased its GDP by an average of 9.8% per annum, Hong Kong by 9.6%, Taiwan by 10.2%, and Singapore by 10%. Alan Heston, Robert Summers and Bettina Aten, Penn World Table Version 6.1, Center for International Comparisons at the University of Pennsylvania (CICUP), October 2002, available at: <http://pwt.econ.upenn.edu/php_site/pwt_index.php>, accessed 6 September 2014. See Yong-Shik Lee, *Reclaiming Development in the World Trading System* (New York: Cambridge University Press, 2009), chapter 1.2.

12 The impact of LFIs refers to the impact of specific law, legal frameworks, and/or institutions in question. For LFIs, see *supra* note 3.

13 "Human rights" in this context include fundamental civil and political rights as affirmed by the *Universal Declaration of Human Rights* (adopted in 1948), the *International Covenant on Civil and Political Rights* (1966), and the *International Covenant on Economic, Social and Cultural Rights* (1966).

14 Carlos Santiso, *Good Governance and Aid Effectiveness: The World Bank and Conditionality*, 7 The Georgetown Public Policy Review, no. 1 (2001), 1–22.

15 For example, persistent disregard for certain basic human rights, such as excessive infringements on freedom of speech and resulting political discontent, may undermine the political stability essential to achieving economic development. For the relation between human rights and economic development, see Lorenz Blume and Stefan Voigt, *The Economic Effects of Human Rights*, 60 Kyklos, no. 4 (2007), 509–538.

declare certain cultural tendencies and preferences to be superior and thus to be promoted and enforced over another. Although one may claim that there is a set of "universal" values and priorities, such as fundamental human rights of a political and civil nature,[16] what is viewed as political and social progress is a much broader question that lacks a cross-cultural consensus.[17] In the context of law and development, which have not yet sufficiently been developed as an academic field, straying into these complex issues, no matter how admirable the underlying moral motive may have been, has not been conducive to its coherent development.[18] Thus the proposed focus on economic development, which does not present the same degree of conceptual complexities and cultural controversies[19] but addresses a more pressing issue for the majority of world populations,[20] has a strong justification.[21] The non-economic issues may be more

16 See *supra* note 13.

17 A debate between Jules Coleman on the one side and Louis Kaplow and Steven Shavell on the other side on what societies must pursue in law reform between "welfare" and "fairness" demonstrates lack of a universally accepted standard for political and social progress. Jules Coleman, *The Grounds of Welfare*, 112 Yale Law Journal, no. 6 (2003), 1511–1543.

18 Another difficulty with engaging in the issues of political and social progress is that it would be difficult to conduct a "neutral" analysis; as Amanda Perry-Kessaris has recently noted, one would have to choose some criteria with which to analyze, and it is that choosing that the analyst moves away from neutrality. Klaus Ziegert also opined that law and development would need a far more sophisticated theoretical approach to capture all the complexities (to encompass social and political issues) which are involved.

19 There could also be a question as to what constitutes economic development. Nonetheless the general concept of economic development, which denotes the process of a structural transformation of an economy from one based primarily on the production of primary products (i.e., a product consumed in its unprocessed state) generating low levels of income to another based on modern industries that generate higher levels of income, is more widely accepted. There is no consensus on the measurement of economic development, and no measure captures all the element of economic development. Subject to this limitation, a possible measure of economic development in a given time period is a rate of growth in GDP in the corresponding period. See *infra* note 182.

20 See *supra* note 10.

21 Another point that needs to be considered is sustainable development. Sustainable development refers to development which ensures the sustainability of natural systems and the environment by protecting the latter. United Nations, *Report of the World Commission on Environment and Development*, General Assembly Resolution 42/187 (11 December 1987). The justification for this Resolution is that development should not undermine the opportunity for future generations to meet their own needs. The difficulty for developing countries is that the protection comes at a substantial cost in the form of direct spending as well as opportunities for economic development being lost or made more expensive. It would thus be important to find an adequate balance between environmental protection and development efforts, and the point of balance may be different between developed and developing countries where the need for economic development projects with environmental impact and the availability of resources that can be used to control

adequately considered and addressed in other fields, such as law and society studies which explore the role of law broadly in social, political, economic, and cultural life.[22]

The lack of coherent focus in law and development studies has also led to the absence of an analytical model with solid methodology, which would be necessary to assess the impact of LFIs on development and would also be useful to develop effective LFIs for economic development.[23] As earlier attempts to "transplant" laws and legal systems of developed countries into developing countries were largely unsuccessful and as a result the effort to build the "developmental state"[24] came to be considered obsolete, the focus of law and development studies subsequently shifted away from the role of the state and the legal apparatuses to facilitate economic development.[25] The continued focus

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the environmental impact will be different. From the perspective of sustainable development, residents in Beijing, China, for example, might have preferred their lives 30 years ago to the hustle, congestion, corruption, and smog-infested air they inhabit today, but the reality is that more people are trying to leave the environmentally better countryside and move to big cities with considerable pollution such as Beijing and Shanghai for economic opportunities that these cities provide and that relatively fewer people try to leave those cities despite the environmental and other issues adversely affecting their lives on a daily basis. In addition, as developing countries attain more resources as a result of successful economic development, they tend to make considerable efforts to protect and restore the environment. See *infra* note 214.

22 To promote studies in law and society, an international association, "The Law and Society Association" (LSA), was organized in 1964. Such an international academic association does not exist for law and development, which shows a weaker status as an academic field. More details about the LSA and activities in law and society are available at: <http://www.law-andsociety.org/>, accessed 23 August 2014. The Law and Development Institute (LDI, <http://www.lawanddevelopment.net>) and presently the only peer-reviewed academic journal in the field, Law and Development Review (LDR, <http://www.lawanddevelopment.net>), have been founded to promote law and development studies. Brian Tamanaha also suggested that "legal development" which always takes place everywhere, rather than "law and development" or "the rule of law" work, which has largely failed, should be a point of consideration. Brian Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 Cornell International Law Journal (2011), 209–247. However, this "legal development" would also be broader in scope than the proposed focus on economic development.

23 This was also an objective of the earlier law and development movement. See Trubek and Galant (1974), *supra* note 1, at 1065–1069.

24 A developmental state is a national state that "creates [economic development] plans, relocate[s] surplus, combat[s] resistance, invest[s] and manage[s] key sectors, and control[s] foreign capital." Trubek and Santos (2006), *supra* note 8, at 8.

25 See Trubek and Santos (2006), *supra* note 8, at 1–18. However, there is recently a renewed interest in "developmental state." David Trubek, Diogo Couhinto and Mario Shapiro (eds.), *New State Activism in Brazil and the Challenge for Law, in Law and the New Developmental State: The Brazilian Experience in Latin American Context* (New York: Cambridge University Press, 2013).

on the latter would have necessitated the development of an analytical model and solid methodology to assess the impact of LFIs on development, but this did not take place. In conjunction with a series of political changes following the fall of the communist bloc and with the domination of neoliberalism,[26] law and development studies and projects were set on a series of predetermined neoliberal agendas such as deregulation, privatization, and trade liberalization.[27]

While many of these agendas have useful objectives and may also have helped broaden the scope of law and development studies, the development projects based on these agendas did not successfully assist the majority of developing countries to achieve economic progress.[28] The economic situation of most of the developing countries remains pressing.[29] The neoliberal policies since the 1980s, which emphasized the role of market and the importance of deregulation, did not result in economic development for most developing countries, while some countries, with the state playing a substantial economic role, achieved the most successful economic development in the twentieth century.[30] Thus the call for "developmental state," in which the state plays an active role for economic development, is far from dead.[31] Brian Tamanaha opined that law may not bring about economic development in itself,[32] but law, in conjunction with institutional frameworks, can substantially promote or deter economic development by regulating and influencing the actions of economic players. As such, there is a need for the development of an analytical

26 Neoliberalism is a political-economic philosophy based largely on neoclassical economics which emerged in the late nineteenth century in opposition to Marxism and reaffirmed that the market promotes economic efficiency and fair social distribution. Neoliberalism, which became a dominant political-economic ideology in the 1980s, discouraged positive government interventions in the economy and promoted free market approaches, including privatization and trade liberalization.

27 *Id*.

28 According to the UN Human Development Report (2003), 54 countries had become poorer than in 1990 by the early 2000s, as measured by per capita GDP.

29 See *supra* note 10.

30 See *supra* note 11.

31 Simon Deakin also opined that there is a need for effective state capacity, and the neoliberal/World Bank account of the 1990s is lacking on this point. According to Deakin, before we can speak of the rule of law, there has to be an effective state which can make law more than an aspiration, but he also pointed out that markets cannot be sustained without some of form of legal ordering which limits executive power and that there are many dimensions to the state, legal system just being one of them.

32 Brian Tamanaha, *The Lessons of Law-and-Development Studies*, 89 American Journal of International Law (1995), 470–486.

model and methodology to assess the impact of LFIs on economic development as further discussed in subsequent sections.

A note should be made that for law and development studies, "law" is not just a formal law such as statutes and judicially binding precedents but also includes informal norms to be identified through empirical research in accordance with its applicability and effectiveness on the ground. Thus a law that may be on the books but not applied or rarely applied in practice, may be irrelevant, while instructions or provisions in a non-traditional legal form that are consistently binding will be.[33] Thus "law" in the context of law and development is broader than what may be popularly perceived as "law."[34] Additionally, the impact of law cannot be considered in separation from its framework and institutions, thus as discussed,[35] this article uses the term "LFIs" to mean law, legal frameworks, and institutions, representing the inalienable amalgam of the constituent concepts in law and development.

The aforementioned analytical model, entitled the Analytical Law and Development Model (ADM), aims to provide a theoretical apparatus to examine the impact of LFIs on economic development in specific key areas that are subject to regulatory control by the state and directly relevant to economic development.[36] While the previous efforts to transplant laws from advanced countries may have been largely unsuccessful,[37] the memory of this failure should not bar the development of the ADM. The ADM is different from the earlier legal transplant movement in that it attempts to provide an analytical, rather than prescriptive, framework and a working reference for legislation. The

33 See *infra* note 194.

34 The broader concept of "law" is analogous to "institution" as described by Douglas North to mean "the humanly devised constraints that structure political, economic and social interaction" which "consist of both informal constraints (sanctions, taboos, customs, traditions, and codes of conduct), and formal rules (constitutions, laws, property rights)." Douglas C. North, *Institutions*, 5 Journal of Economic Perspectives, no. 1 (1991), 97–112, at 97. Religious "codes" and rules which may not be part of official state law but nevertheless bind local populations consistently with a degree of enforcement should also be considered "law" in the context of law and development.

35 See *supra* note 3.

36 These areas include (1) legal system and development; (2) property rights; (3) legal framework for political governance; (4) regulatory framework for business transactions; (5) state industrial promotion; (6) public health and environment; (7) taxation; (8) corporate governance; (9) competition law; (10) protection of IPRs; (11) banking and financing; (12) labor; (13) corruption; (14) criminalization and development; (15) compliance and enforcement; and (16) international legal framework: international economic law and IDL. Section 3.2 *infra* provides more detailed discussion of each of the key areas.

37 Trubek and Santos (2006), *supra* note 8, at 1–18.

model, which is to be discussed further in Section 3, identifies LFIs that are essential for economic development, measures their impact on economic development, and identifies and examines social, political, economic, and cultural conditions (hereinafter "socio-economic conditions") that are essential for the successful operation of law.[38]

Those socio-economic conditions may change throughout progressive stages of economic development: the socio-economic conditions prevailing in least-developed countries may well be different from those in more advanced developing countries where substantial economic development has already been achieved, and these changes will be accounted for in the ADM. Indeed LFIs that may work well in a certain stage of economic development may not in another stage due to the different underlying socio-economic conditions, and it has been demonstrated by the changes of LFIs in successful developing countries throughout their economic development process.[39] This means that the ADM needs to be dynamic and flexible, rather than static and prescriptive; it may present different sets of LFIs applicable at different economic development stages with the identification and analysis of the underlying socio-economic variables.

This article provides an account of the development of law and development studies in the last 40 years and advocates a new approach for law and development studies, as demonstrated by the proposed ADM, with hopes to revitalize a field that has been stagnant for decades.[40] The next section reflects on the

38 Mitsuo Matsushita, a prominent scholar in the field of international economic law and former member of the WTO Appellate Body, commented that a country's regulatory framework affects the way in which economic development is promoted and, at the same time, its politico-economic conditions affect the way in which regulatory system should be framed; law, economy, and politics affect each other, and scholars need to investigate interrelationship among those forces and see the role of law and legal system within these dynamics. He viewed that this process is inevitably interdisciplinary.

39 For instance, South Korea initially controlled commercial interest rates during its earlier economic development process and subsequently liberalized them in 1988 for the development of Korea's banking and financial industries had made government control no longer efficient and conducive to economic development by then. For an overview of the legislation history in Korea relevant to economic development, see Duol Kim (ed.), *History of Economic Laws in Korea: From Liberation to Present, vol. 1* (Seoul: Haenam Publishing Co., 2011).

40 Section 2, *infra*, discusses a number of works broadly in the area of law and development, thus describing the current status of law and development as "stagnant" may appear contradictory. Despite a number of publications which may broadly be conceived as law and development works, the number of scholars who focus on law and development is relatively small, and the field itself is unfamiliar to a majority of legal scholars, lawyers, and students across the world. Although there is a growing interest, the field is still stagnant, particularly with respect to the development of coherent theoretical and methodological frameworks.

development of law and development studies for the past four decades. Section 3 provides a discussion of the necessity and the feasibility of the ADM and introduces specific key areas subject to assessment.[41] Readers are reminded that a level of abstraction would be inevitable in the discussion of the ADM as the model has not been fully developed at this stage. Section 4 addresses some of the methodological issues. Conclusions are drawn in Section 5.

2 Law and development studies: the last 40 years

2.1 Overview

This section canvasses the evolvement of law and development studies for the last 40 years since the seminal publication of "Scholars in Self-Estrangement,"[42] which analyzed the growth of law and development as an area of inquiry in the United States in the 1950s and the 1960s and assessed why law and development studies faced a crisis by the early 1970s.[43] Since then, a number of scholars have addressed issues of law and development, but a theoretical framework and consistent methodology is yet to be developed. The following subsection provides brief summaries of academic literature[44] categorized by relevant topics in law and development as well as notes of their relevance to the ADM, followed by a short assessment of the path forward.

2.1.1 A field in "crisis"

"Scholars in Self-Estrangement" accounted that law and development, starting as development assistance activities of the United States after World War II,[45]

41 See *supra* note 36.

42 See *supra* note 1.

43 In contrast, a parallel movement based on "law and economics," which examines the economic efficiency of law, did not face this type of crisis within academia. Richard Posner provided an excellent coverage of the field. Richard Posner, *Economic Analysis of Law* (7th ed., New York: Aspen Publishers, 2007).

44 For a more comprehensive review of the field, see Kevin Davis and Michael Trebilcock, *The Relationship between Law and Development: Optimists versus Skeptics*, 56 The American Journal of Comparative Law, no. 4 (2008), 895–946. See also David Trubek, *Law and Development 50 Years On*, University of Wisconsin Legal Studies Research Paper no. 1212 (October 2012), available at: <http://ssrn.com/abstract=2161899>, accessed 6 September 2014.

45 *Id.*

was a reflection of how Washington believed its systems could help the third world to develop. The accompanying ethnocentric assumptions about the nature and role of law, its relationship to social change, and the role of certain institutions (e.g., judiciary) ignored local realities, in turn denying the field a functional theory that could be institutionalized.[46] Scholars came to realize that the gaps caused by this ignorance prevented law and development projects from realizing their objectives, and this led to the moral dilemma and crisis subsequently.[47] It is interesting to note that the problems of the subsequent neoliberal movement of the 1980s paralleled those associated with the classical legalism which had formed the basis of law and development movement in the 1950s and the 1960s in that both presumed a set of conditions, which did not exist on the ground, for the operations of market and law such as that legal order applies, interprets, and changes "universalistic rules."[48] These conditions were nevertheless presumed when a set of prescriptions were imposed on developing countries in the context of development projects, and because of the unrealistic presumptions, the outcome was eventual failure in both cases.

Jon Merryman explored further into the movement's failure.[49] He observed that since the legal assistance lacked any theoretical backing, it became a direct export of American legislation, leading to a suggestion that a more appropriate name and perspective for the field would be "comparative law and social change," which implies that law and development should not just be a direct transfer of laws from developed countries but needs to be an analytical process, as the ADM would do, allowing subsequent adjustment of those laws to fit the local conditions.[50] James Gardner argued that the fundamental failure of the law and development movement was the lack of understanding of the multiple roles of law in diverse processes of social change and individual choice.[51] Building from this assessment, Nobuyuki Yasuda also suggested that it may be desirable in the long term to integrate or at least coordinate regional laws and policies on a basis which reflects regional rather than Western traditions.[52] The analysis of

46 Trubek and Galanter (1974), *supra* note 1.

47 *Id*.

48 See Trubek and Galanter (1974), *supra* note 1, at 1070–1080.

49 Jon Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 The American Journal of Comparative Law (1977), 457–483.

50 *Id*.

51 James Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* (Madison, WI: University of Wisconsin Press, 1980).

52 Nobuyuki Yasuda, *Law and Development in ASEAN Countries*, 10 ASEAN Economic Bulletin, no. 2 (1993), 144–154.

non-Western laws and legal systems to be conducted by the ADM[53] would be consistent with this position.

Brian Tamanaha subsequently observed that law and development's "irrelevance" as a field lies in the fact that its proponents were too keen on results, as well as in the belief of social scientists that they could objectively solve the multifaceted problems faced by any society.[54] Yet they consistently failed to understand the entire spectrum of issues faced by developing countries that need to be addressed in a successful law and development program.[55] Tamanaha opined that while law may be essential for development and political reforms, law and development scholars should at the same time place more emphasis on local situations.[56] Maxwell Chibundu considered this issue in the African context[57] and reached the same conclusion: Chibundu concluded that the law and development movement must not only learn from past mistakes but also about its imperfections as a standard,[58] which indicates the necessity to improve the standard by developing an analytical framework, such as the ADM, to meet the need.

2.1.2 Law and development in neoliberalism: the rule of law

The 1980s saw the fall of communism in Eastern Europe and the rise of neoliberalism represented by the "Washington Consensus."[59] International financial and development institutions, based on the Washington Consensus, provided large amounts of financial support for development projects. With these

53 See discussion in Section 3.1 *infra*.

54 Tamanaha (1995), *supra* note 32.

55 *Id*.

56 *Id*.

57 Maxwell Chibundu, *Law in Development: On Tapping, Gourding and Serving Palm-Wine*, 29 Case Western Reserve Journal of International Law, no. 2 (1997), 167–261.

58 Chibundu also argued that since law represents the collective interactions and social constraints on the individual, it should not be concerned only with the physical necessities of the population, but their ideological and social aspirations as well. *Id*.

59 "Washington Consensus" refers to a set of policies representing the lowest common denominator of policy advice being addressed by Washington-based institutions, such as fiscal discipline, a redirection of public expenditure priorities toward areas offering both high economic returns and the potential to improve income distribution (such as primary healthcare, primary education, and infrastructure), tax reform to lower marginal rates and broaden the tax base, interest rate liberalization, a competitive exchange rate, trade liberalization, liberalization of inflows of foreign direct investment, privatization, deregulation (to abolish barriers to entry and exit), and protection of property rights. Global Trade Negotiations, Center for International Development at Harvard University, available at: <http://www.cid.harvard.edu/cidtrade/issues/washington.html>, accessed 6 September, 2014.

changes, the law and development movement found a new lease on life and new avenues to approach its objectives.[60] An important line of inquiry in this period was the rule of law. Thomas Carothers evaluated the rule of law experience, cautioning renewed optimism while promoting a repackaged law and development formulation.[61] He attributed the reemerging interest in the rule of law to the pressures stemming from globalization and surmised that the real challenge lies in nurturing internal pressure to achieve the implementation of the rule of law. Richard Posner, after examining the failures of legal transplants in producing development, was convinced that it is the quality of law as opposed to the quality of the judiciary and legal structures that can deliver development, emphasizing the necessity of contract and property law for economic growth.[62]

In furtherance of the rule of law exploration, Rachel Belton placed definitions of the rule of law under two headings: (1) those focusing on the ends that the rule of law is intended to serve within society (such as upholding law and order, or providing predictable and efficient judgments), and (2) those that highlight the institutional attributes considered necessary to actuate the rule of law (such as comprehensive laws, well-functioning courts, and trained law enforcement agencies).[63] For practical and historical reasons, legal scholars and philosophers have favored the former type of definition, while practitioners of the rule of law development programs have tended to use the latter. The latter approach would be consistent with that of the ADM which includes consideration of both LFIs and socio-economic conditions as essential analytical steps.[64]

Stressing the rule of law issue in the course of analyzing whether formal contracts are necessary for economic growth, Michael Trebilcock and Jing Leng concluded that at low levels of development informal methods of contract enforcement could substitute for formal enforcement.[65] According to them, even the absence of a strict adherence to the rule of law could result in economic

60 Thus some scholars call this the second law and development movement. Trubek and Santos, *infra* note 115.

61 Thomas Carothers, *The Rule of Law Revival*, Foreign Affairs (March/April 1998), available at: <http://www.foreignaffairs.com/articles/53809/thomas-carothers/the-rule-of-law-revival>, accessed 6 September 2014.

62 Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 The World Bank Observer, no. 1 (1998), 1–11.

63 Rachel Belton, *Competing Definitions of the Rule of Law: Implications for Practitioner, Carnegie Papers, Rule of Law Series (2005)* (Carnegie Endowment for International Peace, 2005), available at: <http://carnegieendowment.org/files/CP55.Belton.FINAL.pdf>, accessed 6 September 2014.

64 See discussion in Section 3 Section 3.1 *infra*.

65 Michael Trebilcock and Jing Leng, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 Virginia Law Review (2006), 1517–1580.

growth.[66] Subject to further studies in other areas, this could mean that the formal rule of law may not be essentially important for economic development, at least for the initial stages of economic development. Frank Upham also found that the rule of law orthodoxy ignores evidence that the formalist rule of law as advocated by the World Bank and other donors does not exist in the developed world and that attempting to transplant a set of institutions and legal rules into developing countries without attention to the local, indigenous contexts would be counterproductive and undermine preexisting local mechanisms for dealing with issues such as property ownership and conflict resolution.[67]

The characterization and understanding of the rule of law concept has also been a point of discussion: Simon Chesterman noted that nearly universal support for the rule of law, found at both international and national levels, is only possible because of widely divergent views of what it means in practice.[68] However, this pluralism, while it may not pose a problem when existing simultaneously at national levels, needs to be reassessed when the rule of law is to be promoted internationally.[69] In this vein, Chesterman proposed a core definition of the rule of law as a political ideal and argued that its applicability to the international level would depend on that ideal being seen as a means rather than an end, or as serving a function rather than defining a status.[70] This stance, seeing the rule of law as a means, rather than an end, would be consistent with the proposed functional approach to law and development with a focus on economic development. It has been observed that the promotion of the rule of law and good governance have delivered neither the improved rule of law nor improved governance.[71] While the causes of these alleged failures may not be very clear, the promotion of the rule of law without sufficient understanding of the local conditions could have been a reason.[72]

66 *Id.*

67 Frank Upham, *Mythmaking in the Rule of Law Orthodoxy*, Carnegie Papers (Carnegie Endowment for International Peace, 2005), available at: <http://carnegieendowment.org/files/wp30.pdf>, accessed 14 September 2014.

68 Simon Chesterman, *An International Rule of Law?* 56 The American Journal of Comparative Law, no. 2 (2008), 331–361.

69 *Id.*

70 *Id.*

71 Thomas McInerney, *Law and Development as Democratic Practice*, 37 Vanderbilt Journal of Transnational Law (2005), 935–969.

72 For example, the rule of law reforms that took place in Mexico for 20 years starting in the 1980s met with mixed results. See Robert Kossick, *The Rule of Law and Development in Mexico*, 21 Arizona Journal of International and Comparative Law (2004), 715–834.

Finally on the rule of law, the role of legal reforms in promoting development has been cast in a new, optimistic light due, in part, to cross-country statistical analyses done by scholars such as Kevin Davis that demonstrate causal relationships between variables measuring characteristics of legal institutions and those measuring development levels.[73] A conclusion may be drawn from this study that the development of legal institutions induces economic development. However, even if this conclusion were to be accepted, the question, as will be further explored by the ADM, would be whether the necessary institutional development will be feasible at all under the socio-economic conditions on the ground in the developing countries.

2.1.3 Law and development in neoliberalism: financial assistance and financial market

In addition to the rule of law, another focal point of the neoliberal development initiative was financial assistance, spearheaded by the World Bank providing financial support for general development projects and by the International Monetary Fund (IMF) for developing countries in financial distress. Carol Rose explored the renewed interest in law and development as a consequence of increased financial assistance to states by international financial institutions.[74] Rose used Vietnam as a case study to demonstrate a move away from the idea of legal transplants that was the core of the first law and development movement.[75] She outlined that Vietnam acceded to legal cooperation, but only incorporated legal developments within certain sectors and with no influence on the political setup (perhaps mirroring China).[76] She emphasized that the main challenge of the law and development movement is to protect against elite attempts to leverage law and development as a means to legitimize policy changes that make no provision to mitigate against the adverse impacts of a market economy.[77] These

73 Kevin Davis, *What Can the Rule of Law Variable Tell Us About the Rule of Law Reform?* 26 Michigan Journal of International Law (2004), 141–161.

74 Carol Rose, *The "New" Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 Law and Society Review (1998), 93–140.

75 According to Trubek and Santos, the first law and development movement was the earlier law and development movement in the 1950s and the 1960s based on the notion of "developmental state" (*supra* note 24) and the second movement is one that was spurred by neoliberal policies in the 1980s (*supra* note 26). The authors accounted that a new movement (third movement), which encompasses additional values and needs beyond the neoliberal ideals, is forming. Trubek and Santos (2006), *supra* note 8, at 1–18.

76 *Id.*

77 *Id.*

impacts should be included in ADM analysis as a cost of the change to be measured against potential benefits.

Others investigated the role of investor rights in financial development, corporate governance, and bankruptcy. In accordance with a study by Stijn Claessens and Leora Klapper, a rate of bankruptcies is observed higher in countries with stronger creditor rights and judicial efficiency.[78] Katharina Pistor and Chenggang Xu outlined that jump-starting stock markets in transitional economies had proved difficult, largely because these countries lacked effective legal governance structures and faced severe information problems.[79] Yet not all financial markets failed because of a lacking structural climate. Using China's initial stock market development as a case study, Pistor and Xu suggested that in certain circumstances administrative governance can successfully substitute for formal legal governance.[80] This suggests that the ADM will need to examine a broad range of governance types as relevant to economic development.[81] As for the role of foreign investment in development, Jonas Bergstein's work on Uruguay concluded that there needs to be a two-pronged approach to investment and development.[82] First, steps should be taken to develop social and human capital to take advantage of the inward investments. Second, investment and economic policy should be aimed at maximizing the jurisdiction's attractiveness to investors in a competitive global marketplace.[83] A difficult task will be to balance the economic and social cost of such maximization, which will involve substantial regulatory adjustment, against the actual benefit expected from investment.

Amy Chua addressed the problem of financial inequality and highlighted the problems caused by the deep ethnic divisions that exist within many developing countries, pointing out that the problems this poses to the law and development program are often overlooked.[84] Most significantly, when markets favor a certain ethnic group, often a different group is favored by democracy.[85]

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78 Stijn Claessens and Leora Klapper, *Bankruptcy Around the World: Explanations of Its Relative Use*, 7 American Law and Economics Review, no. 1 (2005), 253–283.

79 Katharina Pistor and Chenggang Xu, *Governing Stock Markets in Transition Economies: Lessons from China*, 7 American Law and Economics Review, no. 1 (2005), 184–210.

80 *Id.*

81 See Section 3.2.3 *infra*.

82 Jonas Bergstein, *Foreign Investment in Uruguay: A Law and Development Perspective*, 20 University of Miami Inter-American Law Review (1989), 359–392.

83 *Id.*

84 Amy Chua, *Markets, Democracy, and Ethnicity: Toward A New Paradigm for Law and Development*, 108 Yale Law Journal (1998), 1–107.

85 *Id.*

This creates an obvious tension between majority democratic interests and those producing the wealth required to improve a country's economic prospects.[86] This analysis can be applied to a broader class issue in society where the interest of the state and those in elite class, which may promote the long-term economic prosperity through maximizing resources for productive investments, does not align with others (perhaps in relative poverty) who may want immediate disbursement of the available resources through welfare spending and other means, even if the latter choice would reduce resources available for long-term investment. This implies that a democratic choice may not always be most efficient for economic development, as may also be indicated through the analysis of the ADM. Thus, ADM provides justification, at least in part, for the authoritative economic governance of some East Asian countries during their rapid economic development in the 1960s through the 1980s.[87]

In the late 1990s, a group of scholars, including Raphael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny ("LLSV"), conducted comparative studies and argued that legal origin helps to explain cross-country differences in financial development.[88] LLSV tried to demonstrate that the country's development in the financial market and its laws on property rights, shareholder rights, and creditor rights are affected by its legal origin such as common law or civil law legal origins.[89] Their work concludes that common law is superior in the development of the financial market. LLSV argued that "the economic consequences of legal origins are pervasive. Compared to French civil law, they concluded that common law is associated with (a) better investor protection, which in turn is associated with improved financial development, better access to finance, and higher ownership dispersion, (b) lighter government ownership and regulation, which are in turn associated with less corruption, better functioning labor markets, and smaller unofficial economies, and (c) less formalized and more independent judicial systems, which are in turn associated with more secure property rights and better contract enforcement."[90]

86 *Id*.

87 See *supra* note 11.

88 Raphael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert Vishny (LLSV), *Law and Finance*, 106 Journal of Political Economy, no. 6 (1998), 1113–1155.

89 "Common law" refers to the legal system originated from England based on binding judicial precedents, and "civil law" is the legal system prevalent in Continental Europe, Latin America, and East and Southeast Asia based on formally legislated "codes." *Id*., See also LLSV, *Investor Protection and Corporate Governance*, 58 Journal of Financial Economics (2000), 3–27 and LLSV, *Investor Protection and Corporate Valuation*, 57 Journal of Finance, no. 3 (2002), 1147–1170.

90 LLSV, *The Economic Consequences of Legal Origins*, 46 Journal of Economic Literature, no. 2 (2008), 285–332, at 298.

LLSV's works influenced academia as well as law and development programs significantly[91] and brought attention to institutions in the context of development studies, but criticism has been raised that the gaps cited by LLSV in economic performance among those countries may not be attributed to the difference in the legal origin at all: the convergence of common law and civil law systems largely muted the alleged effect of the distinct system,[92] and there is no convincing correlation between legal origin and economic growth as there may have been another cause such as difference in macroeconomic policy initiatives.[93] Simon Deakin also pointed out the limits of the legal origin theory as based on limited data and concluded that it is premature to use it as a basis for policy initiatives.[94] The ADM will analyze the impact of legal systems, including legal origins, subject to a possibility that they may not constitute criteria by which effectiveness for economic development will be determined.

2.1.4 State institutions

State institutions have always been at the center of law and development, whether they have been addressed from the perspective of developmental state in the first law and development wave, which underscored the positive role of state for development,[95] or from the subsequent neoliberal perspective, which focused on limiting state involvement in the economy and encouraged privatization and deregulation.[96] Addressing the state institutions, Frank Cross concluded based on empirical evidence that the necessity of legal institutions for economic growth is unquestionable, but further comparative legal research would be necessary to ascertain which institutions are most suitable for this purpose.[97] Davis and Trebilcock pointed out that it is the quality of the

91 LLSV's work is known to have influenced the World Bank in its development support programs such as "Doing Business" and other specific development programs in developing countries.

92 Frank Cross, *Identifying the Virtues of the Common Law*, Law and Economics Working Paper no. 063 (University of Texas, September 2005).

93 See Giuseppe Maggio, Alessandro Romano and Angela Troisi, *The Legal Origin of Income Inequality*, 7 Law and Development Review, no. 1 (2014), 1–22 and Dam (2006), *supra* note 8, at 39.

94 Simon Deakin, *Legal Origin, Juridical Form and Industrialisation in Historical Perspective: The Case of the Employment Contract and the Joint-Stock Company*, 4 Comparative Research in Law and Political Economy, no. 7 (2008), 1–39. Joel Trachtman also commented that the LLSV and related literature was flawed because of the problems with the legal system specifications and the misplaced causation.

95 See *supra* notes 24 and 25.

96 See *supra* notes 19 and 39.

97 Frank Cross, *Law and Economic Growth*, 80 Texas Law Review (2001), 1737–1775.

institutions that administer law and not the law *per se*, that offer a chance for development,[98] which contrasts with Posner's earlier emphasis on law over institutions.[99]

As discussed earlier,[100] LFIs cannot be considered in isolation from each other and it is doubtful that the relative importance can somehow be assigned to one over another where LFIs are constituent parts of an amalgam which by combination formulates a regulatory system. As Davis and Trebilcock found, the same law can have a very different impact on development, depending upon the makeup of the institution that administers and enforces the law. However, it is also the case that the same institution may have different impacts on development depending upon the law that the institution is assigned to administer and that organizes and supports the institution. Legal frameworks in which a law is organized to take effect[101] are also relevant.[102]

The importance of state institutions has also been highlighted in the context of successful economic development experience in East Asia.[103] Analyzing the role of law in the economic development of South Korea (hereinafter "Korea"), Y.H. Jung found that the pervasive and paternalistic influence of the state, rather than law, was vital for Korea's economic development.[104] According to Jung, the function served by law was limited in that there were fewer courts, lawyers, and institutions promoting western-style legal learning during the development periods of Korea through the 1960s to the 1980s.[105] However, while the state played a key role for economic development in Korea, it is not conclusive that

98 Kevin Davis and Michael Trebilcock, *Legal Reforms and Development*, 12 Third World Quarterly, no. 1 (2001), 21–36.

99 Posner (1998), *supra* note 62.

100 See *supra* note 3.

101 *Id.*

102 There is also a debate between holism which considers law and institutions inalienable from each other and reductionism which focuses on the impact of law. There is a trade-off between a narrow and more detailed analysis based on reductionism and a broader and more comprehensive study based on holism: the analytical approach of the former may be more straightforward and may yield a more precise outcome, but it may not be applicable in a different institutional setting and/or a different socio-economic context, whereas the outcome of the latter would be more adoptable in these situations, but the process of analysis will be more complex. Notwithstanding this complexity, the ADM will follow the latter approach.

103 See *supra* note 11.

104 Y.H. Jung, *How Did Law Matter for Korean Economic Development?: Evidence from 1970s*, paper prepared for the Korean Economic Association Conference (June 2012), available at: <http://www.kea.ne.kr/conf201206/papers/Jung%20Young%20Hoa-20120530.pdf>, accessed 6 September 2014.

105 *Id.*

the fewer legal institutions, as argued by Jung, are necessarily indicative of lesser importance of law during the development of Korea: all of the major state development policies were meticulously legislated during the development era[106] and executed by legal means. Thus there is a sufficient scope for considering the role of law in Korean economic development in conjunction with its institutional arrangements.[107] As indicated by Joseph Stiglitz and Sergio Godoy, the state carried out a vital role of mediating the synergy between the old structures and new forms as necessitated by development and may not have necessarily downplayed the role of law.[108] John Ohnesorge also observed that given the indisputable success of economic and social development in Northeast Asia, it would be impossible to justify excluding Northeast Asia, including Korea, from the center of law and development studies and emphasized the importance of studying their legal systems in the context of law and development.[109] By focusing on the legal development in East Asia, the ADM will attempt to bring them to the center of law and development analysis as advocated by Ohnesorge.

Finally on state institutions, Mariana Prado added a new dimension by addressing the possibility of "institutional bypass" as a new way of development reform.[110] Prado observed that the results from the large-scale development assistance for institutional reforms had been mixed to disappointing and identified successful institutional reforms which had one common feature: they

106 Legislation in Korea for economic development has been compiled in multivolume works with support from the Korean government and Korea Development Institute (KDI). Kim (2011), *supra* note 39.

107 Simon Deakin also opined that non-legal mechanisms, such as corruption and authoritarianism, may support small numbers bargaining but they cannot sustain impersonal, large-scale exchanges over long time horizons. He proposed that as a working proposition, in China, the limits of the mechanisms of guanxi (informal personal relations), on the one hand, and state power, on the other hand, are becoming clear. Hans-Berns Schäfer also agreed that there are substitute non-legal institutions, such as informal and bureaucratic methods of investor protection by social and political control, which might lead to investor protection and growth, but for a limited time period.

108 Sergio Godoy and Joseph Stiglitz, *Growth, Initial Conditions, Law and Speed of Privatization in Transition Countries: 11 Years Later*, National Bureau of Economic Research Working Paper no. 11992 (2006).

109 John Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 University of Pennsylvania Journal of International Economic Law, no. 2 (2006), 219–307.

110 Mariana Prado, *Institutional Bypass: An Alternative for Development Reform* (19 April 2011), text available on SSRN at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1815442>, accessed 6 September 2014.

bypassed dysfunctional institutions instead of trying to fix them, as most failed reforms did, and created a new institution in which efficiency and functionality would be the norm.[111] An example of an institutional bypass which Prado introduced is a bureaucratic reform in Brazil called Poupatempo ("Saving Time").[112] In 1997, the government of the state of São Paulo created a one-stop shop for bureaucratic services which had been offered at multiple service points, offices of the federal, state, and, in some cases, local administration.[113] For convenience and faster service, Poupatempo became the main provider of governmental services within the state shortly after its creation.[114]

Institutional bypass is a noteworthy idea which can provide a breakthrough when institutional reform is resisted by those who have vested interests in maintaining the status quo. Yet there would be a limit to the bypass method, depending upon the role of the institution subject to reform: if the institution's primary role is central policy making, institutional bypass would not be feasible because then institutional bypass may create multiple decision makers who may render conflicting decisions. Additionally, the problems of the duplicity of spending scarce financial resources and limited manpower in developing countries could also be a ground for objection to the bypass method.

2.1.5 Neoinstitutional economics

The proposed focus on economic development is also found in two major law and development publications in recent years: one compiled by David Trubek and Alvaro Santos, entitled "The New Law and Economic Development: A Critical Appraisal"[115] and the other by Kenneth Dam, "The Law-Growth Nexus."[116] The former book, edited by Trubek and Santos, analyzed the law and development movements since the 1950s and explored a new, "third" law and development movement that appeared to be forming.[117] Several leading scholars, including David Trubek, Duncan Kennedy, David Kennedy, Scott Newton, Kerry Rittich, and Alvaro Santos, advanced their views on relevant topics such as the rule of law in development assistance, the dynamics and

111 *Id*.
112 *Id*., at 3.
113 *Id*.
114 *Id*.
115 Trubek and Santos (2006), *supra* note 8.
116 Dam (2006), *supra* note 8.
117 For a brief description of the first and the second movements, see *supra* note 75.

interrelations among the rule of law, political choice and development, incorporation of the social, as well as the World Bank's uses of the rule of law promise in economic development.[118] Although the authors did not share the same view about the nature and objective of the third movement, they agreed that a new movement in law and development, which was distinctive from the previous two movements, was emerging.[119] Some of the authors also seemed to acknowledge the limited impact that law and institutions may have on economic development: Santos, for example, cited evidence to suggest that an efficient judiciary and clearly defined formal property rights are often of limited relevance to entrepreneurs in developing countries.[120]

Dam discussed the role of law and institutions for economic development in general, as well as in the context of specific areas such as judiciary, contracts, property, land, and the financial sector.[121] Based on the preceding works on institutions, such as North's influential book, "Institutions, Institutional Change, and Economic Performance,"[122] he sought to reason why legal institutions are important to economic development and then to identify what aspects of law are particularly important.[123] He placed a strong focus on the consequences of the new institutional economics ("neoinstitutional economics") for legal reform and laid out the policy implications and policy means for continuing through on new emphasis on legal institutions as a major factor for economic development.[124] Dam also examined the preconceptions about the role that different legal systems play in economic development, proceeding on the presumption that the rule of law is important to economic development, which contrasts with Santos' view that it may have (at least in the context of judiciary and property rights) limited relevance.[125]

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118 Trubek and Santos (2006), *supra* note 8.

119 The authors noted that the "third movement" was in a formative stage and included a mix of different ideas for development policy such as that markets can fail and compensatory intervention is necessary and that "development" means more than economic growth and must be redefined to include "human freedom." They also acknowledged that a new form of development doctrine is emerging which accepts the use of law not only to create and protect markets, but also to curb market access, support the social, and provide direct relief to the poor. *Id*., at 7–8.

120 *Id*., at 253–300.

121 Dam (2006), *supra* note 8.

122 Douglas North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990).

123 Dam (2006), *supra* note 8, at 6.

124 *Id*.

125 *Id*.

Finally, an account needs to be made on the development of neoinstitutional economics which has been an academic foundation for the current focus on institutions, such as the works of LLSV on legal origin in the context of financial development and the emerging consensus that institution is the key element for development. As the term "institutional" signifies, neoinstitutional economics analyzes various institutions, including legal and social norms and rules, which underlie economic activities.[126] The term neoinstitutional economics is to distinguish itself from institutional economics of the prewar period, which was advanced by scholars such as Thorstein Veblen and John Commons[127] and from neoclassical economics which forms mainstream economics focusing on economic concepts rather than organizations.[128]

The forerunners of neoinstitutional economics are two great sociologists and philosophers, Max Weber and Friedrich Hayek. Weber explained the relevance of culture to economic growth in his seminal work "The Protestant Ethic and the Spirit of Capitalism"[129] and the role of law in economy and society in "Law in Economy and Society."[130] Hayek's works, "The Constitution of Liberty"[131] and "Law, Legislation, and Liberty,"[132] focused on relevant legal concepts to support liberty as the cornerstone of wealth and growth. His point that liberty forms an essential basis of wealth and growth, was subsequently challenged by scholars such as Ha-Joon Chang[133] and also contrasted by the process of the unprecedented success in economic development by East Asian countries which allowed rather limited civil liberty under authoritarian regimes.[134]

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126 See Malcolm Rutherford, *Institutional Economics: Then and Now*, 15 Journal of Economic Perspectives, no. 3 (2001), 173–194.

127 See Thorstein Veblen, *The Theory of the Leisure Class: An Economic Study of Institutions* (New York: Macmillan, 1915) and John Commons, *Institutional Economics* (New York: Macmillan, 1934).

128 Dam (2006), *supra* note 8, at 1–2.

129 Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (New York: Charles Scribner, 1958).

130 Max Weber, *Law in Economy and Society* (translated by Max Rheinstein) (New York: Simon and Schuster, 1954).

131 Friedrich Hayek, *The Constitution of Liberty* (University of Chicago Press, 1960).

132 Friedrich Hayek, *Law, Legislation, and Liberty*, *Vols. 1–3* (University of Chicago Press, 1973, 1976, 1979).

133 Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (London: Anthem Press, 2002), chapter 3. Chang through empirical studies concluded that democracy is an outcome of economic development, rather than a cause. *Id*.

134 Those East Asian countries, such as Korea, Taiwan, and Singapore, and more recently China, adopted authoritarian rule with limited civil liberty but nevertheless achieved unprecedented economic development since the 1960s (China from the 1980s).

Two Nobel Prize winners, Ronald Coase and Douglass North, are directly associated with the development of neoinstitutional economics. Coase analyzed the significance of transaction costs and property rights for the institutional structure and functioning of economy.[135] North used history to illustrate the economic and institutional factors that contribute to economic development.[136] A number of scholars have also performed institutional analysis in the context of economic development: Dani Rodrik analyzed different forms that institutional solutions take place, concluding that institutional function does not determine institutional form and that there is no single institutional prescription for economic development.[137] Masahiko Aoki expanded the scope of neoinstitutional economics to include private sector organizations, emphasizing the stage of equilibrium that is achieved through the interplay among various institutions over time.[138] Timur Kuran studied the role that the traditional institutions of the Middle East, including Islamic economic institutions, played in its political development.[139] As part of institutional studies, informal contracting and transaction costs have received attention among academics.[140] Institutional approach has also been important in the study of international economic law, and a group of scholars, including myself, have analyzed the significance of the regulatory framework, including the institutional makeup, for economic development in the current international trade regime under the auspices of the World Trade Organization (WTO).[141]

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135 Ronald Coase, *The Nature of the Firm*, 4 Economica, no. 16 (1937), 386–405 and Ronald Coase, *The Problem of Social Cost*, 3 Journal of Law and Economics (1960), 1–44.

136 North (1990), *supra* note 122.

137 Dani Rodrik, *Institutions for High-Quality Growth: What They Are and How to Acquire Them*, 35 Studies in Comparative International Development, no. 3 (2000), 59–86 and Dani Rodrik, "Introduction: What Do We Learn from Country Narratives?", in Dani Rodrik (ed.), *In Search of Prosperity: Analytic Narratives on Economic Growth* (Princeton University Press, 2005), pp. 1–19.

138 Masohiko Aoki, *Information, Corporate Governance, and Institutional Diversity* (Oxford University Press, 2000) and Masohiko Aoki, *Toward a Comparative Institutional Analysis* (MIT Press, 2001). Aoki uses evolutionary game theory to model institutions.

139 Timur Kuran, "The Scale of Entrepreneurship in Middle Eastern History: Inhibitive Roles of Islamic Institutions", in William J. Baumol, David S. Landes and Joel Mokyr (eds.), *Entrepreneurs and Entrepreneurship in Economic History* (Princeton University Press, 2010), pp. 62–87.

140 See Ronald Gilson, Charles Sable and Robert Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice and Doctrine*, Stanford Law and Economics Olin Working Paper, no. 389 and Columbia Law and Economics Working Paper, no. 367 (2010). Steven Tadelis and Oliver Williamson, *Transaction Cost Economics* (12 March 2012), available at: <http://ssrn.com/abstract=2020176>.

141 Yong-Shik Lee et al. (eds.), *Law and Development Perspective on International Trade Law* (Cambridge University Press, 2011) and Lee (2009), *supra* note 11.

2.2 The path forward

Several conclusions may be drawn from law and development studies over the last 40 years. These are perhaps best summarized by Trubek, with his pithy identification of three major threads.[142] First, law and development never properly developed as an academic field. Second, the results from implementation of law and development projects were mixed and suffered from an insufficient quantity of case studies to isolate "what works and what doesn't." Third, there was a theoretical tension between the push for strong state involvement and for more laissez-faire regulatory approaches.[143] Especially troublesome was what to make of the success found in East Asia.[144] Trubek highlights the lack of consensus on both hurdles faced and ideal policies to pursue in the law and development field.[145] Whether it is the basic scholarship approach taken toward law and development,[146] the differences in methods and conclusions between lawyers and economists, or the lack of communication between those that look at the full range of law and development issues and those with a more "silo" mentality, there is certainly no lack of internal conflict. While there may be positive aspects to more narrowly focused studies, their benefits might be outweighed by the deleterious effects accompanying field fragmentation.[147] According to Trubek's assessment, the path forward is nothing but certain.[148]

However, as discussed in the preceding subsection, there has also been a resurgence of optimism regarding the role of legal reforms in promoting development based upon cross-country statistical analysis that indicates causal relationships between variables measuring characteristics of legal institutions and those measuring development levels.[149] Nonetheless, the basis of this optimism is limited in that many of the variables used to measure respect for the rule of law, enforcement of property rights and contracts do not isolate information capable of shedding light upon the potential impact of legal reforms.[150] Many

142 Trubek (2012), *supra* note 44.

143 See also David Kennedy, David Trubek and Albaro Santos (eds.), *The Rule of Law, Political Choices, and Development Common Sense*, *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006), pp. 95–137.

144 Trubek (2012), *supra* note 44.

145 *Id.*

146 Trubek subdivides these scholarship approaches into skepticism, criticism, and optimism, respectively. *Id.*

147 *Id.*

148 *Id.*

149 See *supra* note 73.

150 *Id.*

doubt the wisdom of investing more resources in the law and development mission when questions about its efficacy remain.[151] Davis and Trebilcock, in their review of law and development studies, concluded that none of the pre-eminent scholars in the field can assure that adherence to law would lead to development.[152] Despite these concerns, they still see law and development as worthwhile pursuit, highlighting what has become an almost standard suite of advice: institutions may be a necessary precursor, but local cultures, history, and institutional traditions do play a significant role in successful development.[153]

Despite the cited uncertainties and ambiguities inherent in the field, there is a growing interest in law and development, first spurred by the neoliberal movement in the 1980s and then more recently by the countries that have achieved successful economic development in the recent decades and now wish to share their development experience with other developing countries.[154] A vibrant discussion (even if it entails serious disagreements) and increased specialization are strong indicators that the academic space of law and development has a renewed lease. It is unclear whether past mistakes can be leveraged into future success stories. As was the case with the first law and development movement,[155] the second law and development movement, driven by the neoliberalism since the 1980s, repeated the same mistake by adhering to a set of presumptions, such as that an economy runs and grows optimally with minimal governmental regulations, without due regard to the local conditions and variables which determine the adoptability of laws and institutions in recipient countries and ultimately their success. The burgeoning of "the rule of law" move as the post-2015 development agenda[156] will be destined to meet the

151 Davis and Trebilcock (2008), *supra* note 44.

152 *Id*.

153 *Id*.

154 Some of the successful developing countries, such as China and Korea, have expanded their budget for international aid and development substantially. Also, the Korean government has recently announced that it would promote "law exports," meaning that it would introduce advanced Korean laws and legal frameworks to developing countries in their areas of need. Newsis, *Minister of Legislation (Announces) Exports of Advanced Korean Legal Systems* (in Korean), Joongang Daily News (16 April 2013), available at: <http://article.joins.com/news/article/article.asp?total_id=11247168&ctg=1203>, accessed 6 September 2014.

155 See *supra* note 75.

156 United Nations, *High-level Event of the General Assembly on the Contributions of Human Rights and the Rule of Law in the Post-2015 Development Agenda* (9–10 June 2014), available at: <http://www.un.org/en/ga/president/68/settingthestage/5hrrol.shtml>, accessed 6 September 2014.

same failure if it should disregard the local needs and socio-economic conditions on the ground.

As observed in the preceding subsection, the recurring theme in the past and current literature is that local context is important, but the way in which and the extent to which they affect the successful adoption and implementation of LFIs for economic development is yet to be clarified. The scholars have also tried to demonstrate the effect of law and/or institutions in some of the areas relevant to economic development, such as property and financial development, with divergent conclusions, but a comprehensive analytical model, which assesses the impact of LFIs on economic development in the key areas and would be essential to provide legislative guidance for economic development, is yet to be developed.[157] The field requires a focus on economic development, as discussed in the first section, as well as a new direction which should be aided by an adequate analytical framework and working methodology. If these conditions are met, there will be strong chances for law and development to be developed as a viable academic field as well as an effective means in the pursuit of development. The ADM is proposed as an essential step in that direction.

3 New analytical model for law and development

3.1 Necessity and feasibility of the ADM

Tamanaha opined that law does not bring about economic development and that developing countries should make their own laws to resolve local issues, rather than trying to import laws from developed countries.[158] The outcome of the earlier law and development movement[159] also suggests that direct legal transplant is not likely a working proposition: in order for a imported law to have intended effects in the recipient country, whether for economic development or for any other objective, the law needs to be supported by effective institutions and be implemented in an adequate legal framework. In addition, a series of socio-economic conditions, which are essential for the successful operation of laws in the exporting countries, should also exist in the recipient country. For example, a successful implementation of intellectual property

157 See *supra* note 36.

158 See *supra* note 32.

159 The attempts to transplant laws of the United States in the first law and development movement were largely unsuccessful. See preceding discussions in Sections 1 and 2 *supra*.

rights (IPRs) would require the availability of IPR experts as well as financial resources to implement it. It would thus be destined to failure if the IPR legal regime is to be imposed on developing countries where neither sufficient IPR experts nor financial resources are available.[160]

For another example, in a developing country in which a formal contract is not frequently used for commercial transactions,[161] a law reform that aims to facilitate business transactions by adjusting legal requirements applied to a formal contract would likely have only limited effect. Also, the availability of an efficient and fair business dispute resolution process may be considered essential to promote economic development. In this vein, access to judicial courts can be promoted from the Western perspective which emphasizes a legalized dispute resolution process.[162] However, in places where formal judiciary is less important and informal dispute settlement is more prevalently used, the underlying conditions that link better court access to economic development would not exist, and any law and procedure that attempt to ensure improved court access would have only limited impact on economic development.

The preceding examples indicate that a law that works in the recipient country cannot be adopted from another place where the legal frameworks, institutions, and essential socio-economic conditions are different, thus the idea of any kind of law and development "model," which purports to present an optimal set of LFIs for economic development, may sound an obsolete and outdated one, only to result in another failure. However, it should also be noted that developing countries have a need for effective LFIs to deal with issues associated with economic development and face real questions about what specific course of action or policy, many of which are inevitably stipulated in the form of a law,[163] should be adopted to achieve their objective. As Tamanaha concluded, a local solution is indeed necessary, but reference can still usefully be made to the LFIs of other countries, particularly more developed ones, as an essential part of developing a local solution. The difficulty is, as mentioned

160 Lack of necessary resources explains the inability of many developing country members of the WTO to implement the IPR regime (trade-related aspects of IPRs) as required by WTO disciplines (TRIPS Agreement). According to a study, the cost of implementing the TRIPS Agreement amounts to annual national budgets for many least-developed countries. J. Michael Finger, *The WTO's Special Burden on Less Developed Countries*, 19 Cato Journal, no. 3 (2000), 425–437, at 435.

161 See Gilson et al. (2010), *supra* note 140.

162 Trubek and Galanter (1974), *supra* note 1.

163 In the 1960s and 1970s when the Korean economy was in rapid development, all major economic policies still had to be in the form of law for clarity and consistency despite the authoritarian rule prevailing at the time. See Kim (2011), *supra* note 106.

earlier, that the adoptability and effectiveness of a law that may have worked in one place cannot be ensured in another where the underlying legal frameworks, institutions, and socio-economic conditions may well be very different.

There is a need for a non-prescriptive ADM that proposes an optimal set of LFIs for economic development in specific key areas,[164] with identification and analysis of the socio-economic conditions necessary for successful implementation. For instance, several developing countries including Vietnam, Cambodia, Myanmar, and Bangladesh are known to have shown interest in adopting certain laws from Korea, including the *Code of Ethics for Government Officials* and the *Information Disclosure Act*.[165] Again the issue is the adoptability of laws in the recipient country that may have a very different set of legal frameworks, institutions, and socio-economic conditions. Thus it would be necessary to identify and analyze the underlying conditions[166] which have made the laws successfully operate in Korea, assess how those laws are expected to work under a different set of legal frameworks, institutions, and socio-economic conditions in the recipient country, and determine what adjustment should be made to ensure effective implementation.

This process can potentially be complex for there may be a number of conditions for the successful implementation of laws, and it may not be feasible to identify and assess all of them. Nonetheless, the most important factors, which would determine failure or success of implementation, would have to be identified and analyzed. The recipient country will then be able to assess whether the identified key conditions also exist and determine how the missing or the different conditions on the ground, if any, would affect the implementation. The recipient country may also consider whether it would be possible to create the institutions, legal frameworks, and the socio-economic conditions essential for successful implementation in the recipient country and/or whether adjustment can be made to the laws to operate successfully under the existing conditions of the former.[167] The suggested ADM will thus be referential, not

164 See *supra* note 36.

165 Newsis (2013), *supra* note 154.

166 The terms "underlying conditions," "factors," and "conditions" refer to the institutions, legal frameworks, and socio-economic conditions essential for economic development.

167 This presumes that developing countries are aware of their own conditions relevant to the implementation of law and will be able to conduct their own analysis. A group of scholars led by David Trubek seeks to improve the developing countries' capacity to conduct law and development analysis. The enhanced capacity will indeed help developing countries to undertake this analysis.

prescriptive, and will be distinctively different from the earlier approaches which did not give due consideration to the local conditions.[168]

3.2 Elements of the ADM

As emphasized above, the adoptability of law depends on the existence of the conditions essential for successful implementation. Therefore, Cambodia, presently a UN-designated least-developed country,[169] may find that the significant difference in the underlying conditions makes the aforementioned Korean laws[170] rather ineffective after its adoption; the law would be more effective in Cambodia if it should fit the underlying socio-economic conditions in Cambodia. Thus it stands to reason that the law as it was implemented in Korea on the subject decades ago, if this could be identified, when Korea's economic and social circumstances may have been closer to those of Cambodia today, would likely be more effective in Cambodia than the laws applied in Korea today. This is because the underlying conditions in Cambodia would be closer to those in Korea when undergoing the earlier stages of economic development similar to that of Cambodia today. For example, the level of financial and technological resources available for the government to implement the proposed law, such as those required to disclose requested information timely under the *Information Disclosure Act*,[171] could be more similar between the countries going through similar stages of economic development than those through very different stages.

The preceding discussion suggests that the ADM, if it is to be useful for developing countries, needs to be dynamic, rather than static, in the sense that it should be able to present different sets of LFIs adoptable in different stages of economic development. It will be possible to develop such a model through empirical studies of successful development cases, studying LFIs successful in each stage of economic development. I cite Korea, as well as other East Asian

168 As discussed earlier, the first and second law and development movements did not focus on the conditions and realities on the ground of developing countries which, in turn, hindered successful adaptation of the law and development prescriptions.

169 Further on least-developed countries, See UN-OHRLLS website, available at: <http://unohrlls.org/meetings-conferences-and-special-events/ldc-caucus-at-the-sidelines-of-the-development-cooperation-forum-ethiopia-high-level-symposium/>, accessed 6 September 2014.

170 Newsis (2013), *supra* note 154.

171 Lack of resources such as personnel handling and processing such requests, other than the political unwillingness to disclose information, may create difficulty for implementing the Act effectively.

countries and economies such as Taiwan,[172] as useful empirical cases[173] due to their successful economic development in recent decades, advancing from one of the poorest economies in the 1960s to an affluent developed economy with world-class industries and advanced technologies by the 1990s. Korea went through all the major stages of economic development in just three decades, implementing most of its development policies in legal forms,[174] thus this example will enable investigators to find legislative and institutional references for every stage of economic development in a relatively small, easily traceable timeframe.[175] The development cases of other countries such as China and Brazil could also be considered, but their cases, in my view, may have limited applicability to many developing countries that do not have a comparable population and resource base, and consequently have vastly different socio-economic conditions.[176]

Incorporating the preceding discussion, the ADM may provide analysis in two steps, first on the LFIs that are helpful to promote economic development as identified by the empirical studies of development cases[177] and then on the

172 See *supra* note 11.

173 Successful economic development cases in other regions should also be considered: for example, Rwanda, which has developed their economy successfully for the past 20 years (real GDP growth averaged at about 9% per annum between 2001 and 2014), could also be studied as a success case in the early stages of economic development. See World Bank, *Rwanda Overview*, available at: <http://www.worldbank.org/en/country/rwanda/overview>.

174 Kim (2011), *supra* note 106.

175 Yet, there has not been a serious study of the role that law has played in the economic development in Northeast Asia, including Korea. Ohnesorge observed that "[g]iven their indisputable record of economic and social success, and given the fact that literature on Northeast Asian legal systems is widely available, the failure to place Northeast Asia at the core of law and development theorizing seems impossible to justify." Ohnesorge (2006), *supra* note 109, at 224.

176 Japan's development has also been studied by many, but its reference value for the ADM is rather limited in that Japan was not a developing country when it progressed economically after the Second World War: Japan initiated economic development ("modernization") nearly 140 years ago under strong government mandate ("Meiji Restoration") and had already achieved a high level of economic and industrial development by the early twentieth century. Thus Japan's "economic development" since the 1950s is not a case of economic development of a developing country but that of economic recovery by an already developed country from the disasters of the Second World War similar to the case of Germany. Nonetheless, Japan's economic and legal systems had significant influence on the development of countries in East Asia such as Korea and Taiwan.

177 There will be potentially multiple sets of LFIs to be identified as helpful for economic development. As demonstrated by Dani Rodrik's work, successful economic development cases have shown that there is no single regulatory and institutional prescription for economic development. See *supra* note 137.

socio-economic conditions that are essential for successful implementation. As discussed, the ADM may propose different sets of LFIs for different stages of economic development. The ADM may be used as a diagnostic and implementation tool for specific law reform efforts[178] as well as a scholarly enterprise to assess the impact of LFIs on economic development more generally.

The following example would be a use of the ADM in the former diagnostic/implementation mode. Suppose that a developing country is considering legislative options between a set of contract law rules for sale of goods which imposes strict requirements for the formation and enforcement of a contract including, for example, precise description of a product to sell/buy, precise price terms, quantity, and delivery terms,[179] and another set which relaxes those requirements and allows the formation and enforcement of a contract with lesser terms, even without precise price terms in the absence of which a "prevailing market price," among other standards, may prevail.[180] Suppose also that the country is undergoing an early stage of economic development where parties to a contract typically have only limited legal sophistication and commercial experiences.

In the first analytical step described above, if relevant empirical analysis indicates that the latter relaxed approach proves to be more efficient and conducive to promoting commercial transactions and economic development in the early stages of economic development than the more rigid former approach would be, perhaps for the reason of limited legal sophistication and commercial experience to comply with strict legal requirements, then the preliminary proposal will be to adopt the more relaxed set of contract law rules. The step will also require an examination of relevant legal frameworks and institutions which need to be in place to enforce contracts. Thus, if as a result of this examination no effective court or its equivalent is found to enforce contracts, the proposed adoption of contract law would probably not be very useful. The second step goes beyond the analysis of LFIs and will look into other relevant socio-economic contexts. Thus if the majority of the population in that country do not normally engage in an enforceable contract, as a prevalent cultural practice, to sell goods, regardless of the existence of legal institutions such as

178 The law reform efforts will involve changes in LFIs which refer to any change in law, legal frameworks, and/or institutions.

179 This approach will be analogous to the requirements of common law contract. See E. Allen Farnsworth, *Contracts* (4th ed., Aspen Publishers, 2004), chapters 2–6, pp. 43–410.

180 This relaxation was also adopted in commercial laws of many countries such as Uniform Commercial Code (Article 2) enacted by all of the states in the United States.

courts, the proposed adoption of law will not be very effective for absence of the socio-economic condition necessary to support a formal contract.

Consideration can be given, with the participation of local experts, to whether the population can be encouraged to use a contract for sales transactions (i.e., adjusting socio-economic conditions) or the proposed law can be revised to fit the transactional practice on the ground, for example, by waiving a requirement that a contract must be in writing for enforcement, or both adjustment of socio-economic conditions and revision of the proposed law may be attempted at the same time for a better outcome. A cost/benefit analysis (CBA),[181] if conducted, may also reveal that the cost of adopting the law, including necessary adjustment of the socio-economic conditions and/or revision of the law, outweighs the potential benefit, and the proposed adoption may not proceed further. In any event, the process of the ADM would be more effective with better chances of success than merely trying to transplant laws of an advanced country without consideration of the essential conditions on the ground.

The ADM may also be used to propose sets of LFIs conducive to economic development in specific key areas, including legal system; property rights; legal framework for political governance; regulatory framework for business transactions; state industrial promotion; public health and environment; taxation; corporate governance; competition law; protection of IPRs; banking and financing; labor; corruption; criminalization of economic offences; compliance and enforcement; and international legal framework: international economic law and international development law (IDL).[182] For this analysis, the ADM will first develop a common analytical framework applicable to all areas, such as one identifying common institutions that need to be in place regardless of the areas, including, for example, effective state administration and judicial courts or equivalent forum for dispute settlement, and then calibrate the framework to fit each of the specific areas, such as identifying a patent granting agency or its equivalent as an institution specifically necessary for IPRs.[183] As this is an analytical step to identify suitable LFIs, it is effectively distinguished from the

181 A CBA measures the benefit of the proposed regulation against its cost. For a detailed discussion, see discussion in Section 4 *infra*.

182 See *supra* note 36. Dam provided analysis in some of these areas including legal system, contracts, property, and financial sector. Dam (2006), *supra* note 8. Robert Cooter and Hans-Bernd Schäfer also addressed some of the key areas in their recent work, including property, contracts, finance and banking, corporations, and corruption. Robert Cooter and Hans-Bernd Schäfer, *Solomon's Knot: How Law Can End the Poverty of Nations* (Princeton University Press, 2012).

183 See discussion in Section 3.2.7 *infra*.

previous prescriptive attempts to transplant existing laws from advanced countries.

The second step performs the analysis of essential socio-economic conditions. The proposed development of the ADM will entail this two-step analysis being repeated in each of the key areas,[184] potentially developing separate ADMs for each of the areas. The analysis may be conducted in more than one economic scenario, for example, one for the early stages of economic development and the other for more advanced stages, as LFIs tend to evolve through different stages of economic development.[185] This means that the analysis to be performed in the ADM would make different references in each scenario, one to the LFIs found in successful development cases in the early stages of economic development and the other to those found in the more advanced stages,[186] leading to the recommendation of different sets of LFIs for different stages of economic development.

To determine whether specific LFIs are expected to contribute to economic development, it would be necessary to develop an appropriate methodology to assess their impact on economic development. Discerning this impact will be a complex process which requires an elimination of various other factors, such as macroeconomic initiatives, which may have concurrently contributed to the economic changes in question.[187] The impact may not always be precisely quantifiable, but coherent methodology is still needed to make a reasoned assessment. To develop methodology, a set of varied techniques could be adopted, including the methods used by Regulatory Impact Assessments (RIAs) such as CBA.[188] The latter would be particularly relevant when the ADM is applied to address a specific development need because this method can help

184 See *supra* note 36.

185 There is no universally recognized cutoff line between "initial stages of economic development" and "more advanced stages." In the early stages of development, there is generally a surplus of unskilled labor and shortage of skilled labor and capital which need to be imported. As economic development progresses, the stock of unskilled labor diminishes and those of skilled labor and capital rise, resulting in increases in the price (wage) of the former and decreases in the prices of the latter. For the stages of economic development, see W.W. Rostow, *The Stages of Economic Growth* (Cambridge University Press, 1962). Since the level of per capita income during the early stages of economic development is relatively low, a dividing line could be made at the point between per capita "low income" and "middle income" as determined by the World Bank (USD 1,045 in GNI per capita as of 2014). World Bank, *Country and Lending Groups*, available at: <http://data.worldbank.org/about/country-and-lending-groups>, accessed 6 September 2014.

186 *Id*.

187 See *infra* note 281.

188 See the discussion in Section 4 *infra*.

to determine whether the adoption of a particular law would be effective and cost-efficient.[189]

The ADM aims to provide legislative guidance, again with the identification of necessary socio-economic conditions, in specific key areas for economic development. The cited areas are not an exhaustive final list and remain open to future revision. The remainder of this subsection introduces each of the key areas, highlighting its relevance to economic development, and discusses some of the pertinent questions and issues to be addressed by the ADM. Many of the questions have already been addressed by previous studies but are discussed below as the relevant starting place to develop the ADM.

3.2.1 Legal system and development

The legal system, which refers to a procedure or process for interpreting and enforcing the law, may have significant relevance to the way in which law affects development, and the ADM needs to clarify this. For example, for a system that has a relative emphasis on statutes, such as civil law system, the statutory framework would be a particularly important aspect of legal device for development. The legal origin theory discussed earlier explores how the legal system affects economic development.[190] However, in assessing the impact of the legal system, close attention should be given to the issue of causation so that the difference in economic performance is not attributed to the difference in the legal origin where there may be another intervening factor, such as macroeconomic initiatives, which may neutralize the impact of the legal origin.[191] While the difference in the legal origin and legal system exists, the trend of convergence among different systems should also be considered in the analysis.[192]

The ADM may analyze the effect of legal system in a broader context. In the legal cultural context, certain forms of governmental communication and social norms may have *de facto* mandatory legal effect,[193] regardless of whether formally announced as law, and this should be considered in law and development

189 *Id*.

190 See the discussion in Section 2.1 *supra*.

191 See *supra* note 280.

192 For example, in common law countries where judicial precedents form binding laws, new areas subject to regulation tend to be codified in statutes, and in civil law countries where all laws should be found in the form of written statutes in principle, judicial decisions from higher courts tend to form *de facto* binding precedents.

193 C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 International and Comparative Law Quarterly, no. 4 (1989), 850–866, at 856.

studies. For example, "administrative guidance" imposed by governments in Korea and Japan on businesses and industries during the periods of economic development[194] was invariably followed although it was not formally a "law" and did not mandate compliance by law. Compliance was nevertheless secured on a voluntary basis because it was conceived in their local political and legal cultures as a legitimate role of the government to give such guidance. As discussed, "law" in the law and development context should be identified in the local context, regardless of its form, in full consideration of its particular legal system and legal culture.[195]

3.2.2 Property rights

Property rights have been advocated as an important prerequisite to economic development:[196] a legal right to property ownership motivates economic players to engage in economic activities when these activities yield property interests, and this in turn contributes to economic development. All of the OECD countries today, which are economically advanced, protect individual property rights. At the same time, there are historical instances in which absence of property rights did not necessarily result in economic stagnation, but instead led to significant economic growth.[197] The ADM needs to identify and analyze the socio-economic conditions which require property rights for economic development and those which enable economic growth without clearly defined property rights.

Individual rights to property also need to be balanced against the public interest, particularly in the context of expropriation for economic development purposes. Subject to further research, it may be the case that in the early stages of economic development, when building social infrastructure, such as roads, it is essential to have laws that allow governments to expropriate private land for public interest under less stringent conditions than those prevailing in more advanced countries. Such laws may be necessary to meet the need of economic development on the ground. The requirements of government expropriation can

194 "Haeng-Jung Ji-Do" (in Korean) or "Gyo-Sei Shi-Do" (in Japanese).

195 See *supra* note 34.

196 Dam (2006), *supra* note 8, at 129–133 and Cooter and Shaffer (2012), *supra* note 182, chapter 6. Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books, 2003). See also T. Beseley and M. Gothak, "Property Rights and Economic Development", in Dani Rodrik and M.R. Rosenzweig (eds.), *Handbook of Development Economics, vol. 5* (North Holland, 2009), pp. 4525–4595.

197 Trubek and Santos (2006), *supra* note 8, at 253–300. See also Guangdong Xu, *Property Rights, Law, and Economic Development*, 6 Law and Development Review, no. 1 (2013), 117–142.

be tightened in the later stages of development when the need is reduced and more resources are available. The ADM will also assess the way in which and the extent to which individual property rights promote economic development, subject to relevant socio-economic conditions, and assess the point of balance[198] between individual property rights and public interest in property.

3.2.3 Legal framework for political governance

Political stability is an important precondition for economic development. While political stability cannot be created by laws alone, an effective legal framework for political governance, such as a constitution, can facilitate political stability. It is noted that political stability is not synonymous with democracy: while civil liberty has been considered a key ingredient for prosperity,[199] it has been historically observed that promotion of democracy, while an important value, does not necessarily lead to economic development: Ha-Joon Chang concluded that democracy tends to be an outcome, rather than a cause, of economic development.[200] Successful economic developments in Korea from the 1960s to the 1980s and in contemporary China show the importance of political stability *albeit* with certain democratic deficits. The system of political governance that creates political stability may indeed differ from country to country, depending upon political needs, cultural priority, historical context, and popular aspirations, and the ADM will have to consider these elements.

The ADM also needs to examine, based on local conditions and priorities, what form of political governance may bring political stability and what legal framework will be conducive to creating political stability. It is to be noted that some of the successful developing countries with authoritarian rule in the past have become democracies once they have achieved a degree of economic development.[201] An argument could be made that authoritarian rule with limited civil participation may have been justified in the early stages of economic development for its efficiency in mobilizing resources for economic

198 This "balance" will represent an optimal regulatory point to serve the interest of economic development at the given stage of economic development. It may also reflect a normative standard in the host country imposed by the local socio-economic conditions on the ground.

199 See *supra* notes 131 and 132. See also J. Baland, Dani Rodrik and M.R. Rosenzweig (eds.), *Governance and Development*, *Handbook of Development Economics*, *vol. 5* (North Holland, 2009), pp. 4597–4656.

200 Chang (2002), *supra* note 133, chapter 3.

201 Both Korea and Taiwan achieved political democracy with full civil representation by the 1990s.

development, as shown in the development cases of Korea and Taiwan, but as the economy develops and the capacity and role of civil society increase, the call for civil representation in governance increases and so does the demand for democratic rule.[202] It remains to be seen whether other successful developing countries, such as China, will follow the same path.

3.2.4 Legal framework for business transactions

Freedom of contract[203] and laws that effectively enforce contracts have long been considered important for economic development.[204] On the other hand, there is an equally strong observation that formal contracts are not particularly relevant to business transactions and that the issues and difficulties arising from business transactions are often resolved informally, without reference to contractual terms.[205] Even if informal interactions and dealings are an important part of business transactions, the case may be that the existence of effective and enforceable contract law, in conjunction with effective legal frameworks and institutions, will be helpful to promote business transactions by creating predictability in remedies should "informal" discourse fail to work. Thus the ADM will identify LFIs that recognize the prevalent forms of contractual relations and provide effective remedy for breach.

Freedom of contract may also need to be balanced against the public interest of protecting the economically weaker parties and creating an equitable playing field in business relations where the parties have dissimilar bargaining powers. For example, the rights of consumers in commercial relations, such as commercial sale of goods and services, insurance products, and other financial transactions, need to be protected against more powerful corporate suppliers by mandatory rules overriding contractual terms inconsistent with this aim. The government may also have to intervene in private contractual relations to meet

202 *Id.*

203 Freedom of contract refers to the freedom of individuals and legally recognized groups ("legal persons"), such as corporations, to form contracts and determine contractual terms. Freedom of contract is considered the cornerstone of free market economy but may be restricted by public interest, such as those associated with labor rights, minimum wages, and antitrust requirements. See Michael Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press, 1997) and David Bernstein, *Freedom of Contract*, George Mason Law & Economics Research Paper no. 08-51 (2008).

204 Philip Keefer and Stephen Knack, *Why Don't Poor Countries Catch Up? A Cross-National Test of an Institutional Explanation*, 35 Economic Inquiry, no. 3(1997), 590–602, at 596.

205 Trebilcock and Leng (2006), *supra* note 65, and Gilson et al. (2010), *supra* note 140.

the needs of economic development, such as cases of expropriation for infrastructure projects. The ADM needs to examine this balance between freedom of contract and the public interest to intervene, which may indeed be different for different stages of economic development, where the relative bargaining powers of the parties may change.[206] Beyond freedom of contract, the ADM will also address additional issues, including secured transactions, which form the ability to leverage otherwise economically unproductive assets, as well as the regulatory control of business transactions.

3.2.5 State industrial promotion

Economists have argued since the eighteenth century on the subject of the economic efficiency of government involvement in the economy. While state-led development policies in some of the most successful development cases, such as Korea, Taiwan, Singapore, and more recently, China, have been effective, many doubt the wisdom of government involvement in the economy,[207] although the doubts seem to have been weakened after the financial crisis of the last decade caused in substantial part by the absence of proper government regulation of dubious financial products.[208] Where the availability of information is limited and the financial market is imperfect (which are the inherent conditions of less-developed countries), the government can provide useful initiatives in productive industrial pursuits, as demonstrated in the cited successful development cases.[209] Adoption and management of industrial promotion policies are indeed a hallmark of developmental states.[210]

On the other hand, industrial promotion by the state, which might be useful in the early stages of economic development, may not be sustained indefinitely, and at some point those industries promoted by the state would have to sustain themselves in the market environment without continuing government support.

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206 For instance, large corporations attaining significant economic and social influence in the process of successful economic development are in a superior bargaining position vis-à-vis individual consumers.

207 Lee (2009), *supra* note 11, chapter 3.1. See also A. Harrison, "Trade, Foreign Investment, and Industrial Policy for Developing Countries", in Dani Rodrik and M.R. Rosenzweig (eds.), *Handbook of Development Economics, vol. 5* (North Holland, 2009), pp. 4039–4214.

208 For the causes of the financial crisis of 2008, see Stijn Claessens and Fabian Valencia (eds.), *Financial Crises: Cause, Consequences, and Policy Responses* (International Monetary Fund, 2014) and Jeffrey Friedman (ed.), *What Caused Financial Crisis* (University of Pennsylvania Press, 2010).

209 *Id*.

210 See *supra* note 24.

State industrial promotion is also subject to international regulation today: the current regulatory framework for international trade (WTO legal disciplines) prohibits a range of government subsidies affecting international trade and also regulates other government measures affecting international trade, such as imposition of tariffs, which has been used to promote domestic industries.[211] The ADM needs to clarify the conditions for successful state industrial promotion as well as the legal framework that enables the government to provide effective assistance to meet the development needs, which may vary in different stages of economic development.

3.2.6 Public healthcare and environment

Provision of adequate public healthcare and a suitable natural environment is essential for successful economic development. Widespread disease and poor health caused by inadequate healthcare and an unhealthy environment are not conducive to sustaining the effective labor force essential for economic development, particularly in the early stages of development when the availability of capital and technology is limited and production tends to rely on labor. Where income levels are generally low, private healthcare tends to be more expensive than can be afforded by laborers, and some form of public healthcare system, as mandated by law, is necessary to safeguard public health. It has further been demonstrated that the introduction of a public healthcare system had a significant and immediate effect on the dynamics of infant mortality and crude death rates, and those reductions have a positive effect on growth in per capita income.[212] On the other hand, maintaining an extensive public healthcare system is costly, and the ADM will have to undertake a difficult task of determining the regulatory balance between the ideal level of public healthcare provision and the available resources.

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211 For instance, government subsidies contingent upon exportation and substation of imports ("export subsidies" and "import substitution subsidies") are prohibited under the WTO Agreement on Subsidies and Countervailing Measures. Certain other subsidies affecting international trade are "actionable": i.e., may invoke countervailing measures. For a detailed discussion, see Lee (2009), *supra* note 11, chapter 3.

212 Anthony Strittmatter and Uwe Sunde, *Health and Economic Development – Evidence from the Introduction of Public Health Care*, Department of Economics, School of Economics and Political Science, University of St. Gallen, Discussion Paper no. 2011-32, August 2011, available at: <http://www1.vwa.unisg.ch/RePEc/usg/econwp/EWP-1132.pdf>, accessed 6 September 2014. See also G. Mwabu, "Health Economics for Low-Income Countries", in T. Paul Schultz and John Strauss (eds.), *Handbook of Development Economics Vol. 4* (North Holland, 2008), pp. 3305–3374.

As for the environment, promotion of manufacturing industries in the process of economic development may cause substantial pollution and other forms of environmental damage.[213] Conversely, however, repressing industrial activities that have adverse impacts on the environment may also cause a negative impact on the industrial promotion that the country may need for economic development. There is a substantial cost to protect the environment and prevent environmental damage, and the resource distribution will be a dilemma for developing countries where the available resources are limited. It will be indeed a challenge to find an adequate regulatory balance which may differ depending on the level of economic development and the resources available. The ADM will nevertheless perform this task. It has been observed that the countries that have achieved economic development have also shown a tendency to highlight the environmental issues and tighten the environmental requirements as their economies develop and their income level rises.[214]

3.2.7 Taxation

Taxation has a considerable impact on development as states affect specific economic activities through taxation. For instance, a higher tax on consumption of specific products will discourage consumption as well as production of those

213 See Lixia Yang, Shaofeng Yuan and Le Sun, *The Relationships between Economic Growth and Environmental Pollution Based on Time Series Data: An Empirical Study of Zhejiang Province*, 7 Journal of Cambridge Studies, no. 1 (2012), 33–42.

214 Efforts have also been made to restore the environment that had been damaged as a result of industrial drive during the periods of economic development. A publicized example is the successful restoration of "Cheonggyecheon" (Cheonggye River Stream) in the City of Seoul, Korea. The river stream, a 8.4 km creek flowing west to east through downtown Seoul, was covered with concrete for over a 20 year period since the late 1950s for serious pollution created by the migration of people to the surrounding area after the Korean War. In 1976, a 5.6 km-long, 16 m-wide elevated highway was completed over the concrete-covered stream, and the area became an example of successful economic development of Korea. In 2003, the Seoul Metropolitan Government initiated a USD 900 million environmental project to restore the stream, resulting in the successful recovery of the stream itself, natural environment around the stream, and natural habitats in the area. For further details of the restoration project, see Peter G. Rowe (ed.), *A City and Its Stream: An Appraisal of Cheonggyecheon Restoration Project and Its Environs in Seoul, South Korea* (Harvard University Graduate School of Design, 2010). The Chinese government, with the resources that they now have as a result of successful economic development, is also making efforts to improve the environment, such as air quality, in major cities such as Beijing and Shanghai.

products.[215] The emphasis on indirect tax which is added to the price of goods and services across the board, such as value-added tax, may have an effect of encouraging savings and discouraging domestic consumption.[216] Higher taxes on real estate transactions may also discourage speculative real estate transactions: property prices, especially those in urban areas, tend to increase rapidly when the economy grows at a high rate, and the rapidly increasing prices attract a high volume of investment in real estates. Speculative investments further raise property prices which cause serious housing issues for workers relying upon fixed wages, and the governments of developing countries have responded by trying to restrain these speculative investments with high taxes.[217]

Taxation has been used to promote the activities that the government deems beneficial for economic development and to discourage those deemed detrimental. For example, to promote export-driven economic development policies, taxation that favors exports has been adopted by some of the successful developing countries.[218] In contrast, higher taxes (tariffs) have been imposed on the importation of products that are competing with domestic products, subject to the rules of international trade. The activities that are considered beneficial for economic development may change in different stages of economic development,[219] thus the ADM needs to examine the modes of taxation that encourages new enterprises and productive pursuits in the given stages of economic

215 Nicholas Kaldor, *Taxation for Economic Development*, 9 The Journal of Modern African Studies, no. 1 (1963), 7–23, at 17. See also E. Ahmad and N. Stern, "Taxation for Developing Countries", in Hollis Chenery and T.N. Srinivasan (eds.), *Handbook of Development Economics Vol. 2* (North Holland, 1989), pp. 1005–1092.

216 A relevant study shows that taxing consumption rather than income generates more savings and leads to higher growth. See James Alm and Asmaa El-Ganainy, *Value-Added Taxation and Consumption*, Tulane University Working Paper no. 1203 (2012), 24.

217 For example, the Korean government taxed profit generated by short-term sale of residential property at over 40%.

218 Customs-free export zones have been widely used by developing countries to encourage investment. There have been successful experiences across the Middle East and North Africa (MENA) region. See OECD, *Tax Incentives for Investment – A Global Perspective: Experiences in MENA and non-MENA Countries*, 10 (2007), available at: <http://www.oecd.org/mena/investment/38758855.pdf>, accessed 6 September 2014. Duty drawbacks have also been used to encourage export and economic development. See Jai S. Mah, *Export Promotion Policies, Export Composition and Economic Development of Korea*, 4 The Law and Development Review, no. 2 (2011), 3–27, at 13.

219 For instance, taxation that continues to favor domestic products may become counterproductive when domestic products can compete with imported products and competition with imported products has indeed become necessary to improve economic efficiency.

development, as well as effective legal frameworks and institutional arrangements which enable such taxation.[220]

3.2.8 Corporate governance

The existence of business corporations that function effectively is considered an important precondition for economic development.[221] Corporate governance determines the effectiveness and the manner in which corporations may function. In the early stages of economic development, the system of corporate governance that enables corporate heads (often the founders of corporations) to make prompt decisions and readily mobilize resources that are available to the corporation may prove effective.[222] In the later stages of economic development, when corporations become more diverse and complex in their activities and also attain substantial influence on society with the resources they possess and the economic opportunities they control (such as employment), a system of corporate governance that ensures transparency, protects the rights of shareholders, particularly those of smaller shareholders, and upholds corporate social responsibility would be important for sustainable development.[223] The ADM needs to identify LFIs that meet these changing needs.

A difficulty in the transition is that once corporate control is concentrated in the hands of a few, which may be disproportionate to their actual shares in the corporations,[224] and if the corporations are deemed successful, taking up a large portion of a developing national economy,[225] then there is a tendency to maintain the status quo: creating a system that ensures transparency and protects the rights of small shareholders will become difficult. This means that, besides the issue of fairness associated with the corporate governance concentrated in the small number of people, the corporate decisions to be made by a few could have

220 See also Yariv Brauner and Miranda Stewart (eds.), *Taxation, Law and Development* (Edward Elgar, 2013).

221 The majority of economic output has been produced by corporations in all of the countries that have achieved economic development.

222 Charles P. Oman, *Corporate Governance and National Development*, OECD Development Centre Working Paper no. 180 (October 2001), 13.

223 *Id*., at 28. See also Archie B. Carroll, *A Three-Dimensional Conceptual Model of Corporate Social Performance*, 4 Academy of Management Review (1979), 497–505.

224 The control is attainable when law allows circular cross shareholding among subsidiaries.

225 In Korea, the aggregate revenues of the ten largest corporate groups ("Chaebols") were known to be equivalent to 77% of the national gross product (GDP) as of 2012.

a significant effect on the whole national economy.[226] Their decisions are likely to protect the interest of their own corporations, rather than that of the other smaller corporations and of the entire economy and thus will not be conducive to sustainable economic development.[227] Thus the ADM also needs to examine, with references to the empirical cases, the LFIs, as well as the necessary socio-economic conditions, which facilitate the needed transition in corporate governance.

3.2.9 Competition law

Competition law is another key area in which study needs to be undertaken in relation to economic development.[228] Anticompetitive behavior which reduces market competition, such as price fixing by collusion, dividing sales territories, and tying, has adverse impacts on consumer welfare and economic efficiency. Competition law aims to control such behavior. While strong competition law and its robust application may induce competition in the economy, the ADM will give consideration to the possible adverse development impacts in the initial stages of economic development where allowance should be made for effective entrepreneurs to accumulate resources and profits without regulatory obstacles to achieve economies of scale for economic growth.[229]

This means that in the early stages of economic development, the enforcement of competition law may need to be modified in accordance with the need of the economy as a whole. However, *some* competition might still be necessary to avoid one entrepreneur taking complete control over a sector and attaining an economically inefficient monopolistic control. The emergence of large corporate groups, as seen in the development cases of Korea,[230] may have a detrimental effect on competition, but those corporate groups with productive capacities and financial resources may also be useful to achieve the economies of scale, which is important for economic development, particularly in the early stages. Laws

226 *Id.*

227 This has been demonstrated by the record-breaking profit increases for Chaebols in Korea since the early 2000s while the national economic growth remained stagnant.

228 For a recent study in the area, see Daniel Sokol, Thomas K. Cheng and Ioannis Lianos (eds.), *Competition Law and Development* (Stanford University Press, 2013).

229 Chaebols in Korea, such as Samsung and Hyundai, were allowed a degree of market control domestically so that they may secure revenue base and increase their sizes to achieve economies of scale which subsequently enabled them to compete internationally during the periods of economic development.

230 *Id.*

that ensure an adequate level of consumer protection will also be necessary, particularly where competition is limited by a small number of suppliers. In this vein, the ADM will examine the important role of consumer law in conjunction with competition law.

3.2.10 Protection of IPRs

The importance of IPRs has been highlighted in recent decades, particularly by developed countries with significant stakes in IPRs.[231] IPR protection has double-edged impacts on economic development. An effective IPR regime, which protects rights of inventors and ensures financial returns for innovation, may have an effect of encouraging technical innovation and new creation, and this may be helpful for economic development. However, extensive IPR protection also presents obstacles for developing countries and start-up entrepreneurs in attaining new technology that is essential to promote economic development. It will thus be important for the ADM to find a regulatory balance between the need to protect IPRs and that to facilitate new technology acquisition.

The point of balance may well be different in accordance with the level of economic development for the different benefit/cost ratio from IPR protection: in the early stages of economic development, inexpensive access to advanced technology may prove more beneficial for economic development than the gains from IPR protection.[232] IPR protection has been enforced through international regulatory frameworks such as the WTO Agreement on Trade Related Intellectual Property Rights (TRIPS Agreement). WTO Member States, including developing country members, are required to protect IPRs as stipulated in the TRIPS Agreement through domestic legislation.[233] Questions have been raised as to the justification of imposing IPRs through the mechanism of international trade law.[234] The ADM could, subject to assessment, justify imposing a lower license fee or none at all, depending upon the level of economic development.

3.2.11 Banking and financing

The legal framework for banking and financing is essential for economic development as it sets forth the regulatory apparatus for the accumulation and

231 Lee (2009), *supra* note 11, chapter 5.3.
232 *Id.*
233 *Id.*
234 *Id.*

distribution of capital through various banking and financing devices such as savings and loans.[235] The regulatory frameworks and practices in some of the successful developing countries in the past facilitated state control over banking and financing.[236] Through this control the state maximized the use of available capital for industrial pursuit, with policy interest rates lower than market rates, and also induced a high rate of savings by setting high interest rates and in some cases by restraining consumer loans such as home mortgage financing.[237]

However, it has been criticized that the practice became a cause for the East Asian financial crisis in the 1990s as state control over banking and financing weakened the competitiveness of the sector and resulted in a number of non-performing loans.[238] "Liberalization" of the banking and financing sector has been emphasized since then,[239] but many of the liberalization prescriptions by the IMF also caused substantial disruptions and halted economic growth for years for the developing countries that accepted the prescriptions.[240] The ADM needs to clarify, based on research with historical references, the merits and shortcomings of the regulatory framework which allows state control over banking and financing in the early stages of economic development as well as the point of necessary liberalization.

3.2.12 Labor law and development

Labor law, which sets forth the legal requirements of the security and conditions of employment, is an important determinant of labor mobility which is relevant to

235 See M.A. Kose, "Financial Globalization and Economic Policies", in Dani Rodrik and M.R. Rosenzweig (eds.), *Handbook of Development Economics, vol. 5* (North Holland, 2009), pp. 4283–4359.

236 For example, banking and financial industries in Korea were under the control of the government until the 1980s, and they were directed to provide loans to the industries, rather than individual consumers, to promote the economic development of Korea. Mah (2011), *supra* note 218, at 14.

237 *Id*. See also Youngjoon Kwon and Yong-Shik Lee, *Legal Analysis of Traditional Leasehold in Korea (Chonsegwon) from Comparative Legal Perspective*, 29 Arizona Journal of International and Comparative Law, no. 2 (2012), 263–286, at 282.

238 Giancarlo Corsetti, Paolo Pesenti and Nouriel Roubini, *What Caused the Asian Currency and Financial Crisis? Part I: A Macroeconomic Overview*, National Bureau of Economic Research Working Paper, no. 6833 (1998), available at: <http://www.nber.org/papers/w6833>, accessed 6 September 2014.

239 See Aparna Shivpuri Singh, *Banking and Financial System in GMS Countries, Its Relationship to Economic Development*, Hanoi Resource Centre, Policy Brief (September 2007), available at: <http://cuts-international.org/HRC/pdf/PB-9-07.pdf>, accessed 6 September 2014.

240 See also Hider A. Khan, *Global Markets and Financial Crises in Asia* (New York: Palgrave Macmillan, 2004).

economic development.[241] The World Bank through its "Do Business" project advises to increase the flexibility in labor law to enhance economic development,[242] but it has been criticized that the suggested labor mobility is not entirely essential for economic development.[243] The question of job security and labor protection goes beyond the economic agenda and directly affects political and social stability, and even those countries that are fully prepared to focus on economic development would not be able to sacrifice labor protection entirely just to enhance labor mobility at potentially large political and social costs.[244]

In contrast, development history shows that successful developing countries have achieved high rates of economic growth without sacrificing labor protection.[245] An argument could be made that adequate job protection enhances the financial security among laborers and promotes productivity, based on the stability, provided that there exist prevalent work ethics and proper incentive for higher performance within the firm. The ADM will assess, through empirical studies, the relationship between labor protection/mobility and economic development as well as the other socio-economic conditions that determine this relationship. The ADM also needs to analyze the cost of lowering labor protection against the gains from increasing labor mobility.[246]

3.2.13 Corruption and development

It is widely recognized that corruption is one of the most serious impediments to economic development in less-developed countries.[247] While corruption distorts

241 See R.B. Freeman, "Labor Regulations, Unions, and Social Protection in Developing Countries: Market Distortions or Efficient Institutions?", in Dani Rodrik and M.R. Rosenzweig (eds.), *Handbook of Development Economics, vol. 5* (North Holland, 2009), pp. 4657–4702.

242 Alvaro Santos, *Labor Flexibility, Legal Reform and Economic Development*, 50 Virginia Journal of International Law, no. 1 (2009), 43–106.

243 *Id*.

244 Lydia Fraile, *Lessons from Latin America's Neo-Liberal Experiment: An Overview of Labour and Social Policies since the 1980s*, 148 International Labour Review, no. 3 (2009), 215–233. The author claims that a more balanced policy approach should be applied in Latin America in order to enjoy a more equitable growth path, such as raising the minimum wage, restoring industry-wide wage bargaining, regulating subcontracting, and stepping up labor inspection and enforcement. *Id*.

245 During periods of economic growth, labor mobility, except migration from rural areas to urban centers, was relatively low in East Asian countries, such as Korea, Taiwan, and Japan, which all achieved high rates of economic growth.

246 Some of the economically successful countries, such as Japan, are known for having ensured long-term employment security for the period of economic growth.

247 A study showed that corruption slows the rate of poverty reduction by reducing growth and increases income inequality. See Sanjeev Gupta, Hamid Davoodi and Rosa Alonso-Terme, *Does*

economic decisions and interferes with efficient distribution of resources,[248] some of the most successful developing countries in the past, particularly in East Asia, achieved economic development notwithstanding the existence of significant corruption.[249] Complete elimination of corruption is unlikely to be attainable in most developing countries, but history has shown that economic development can be achieved *despite* the existence of corruption.[250] The ADM will explore regulatory prescriptions to constrain corruption to a level that will not undermine the economic development process as a whole.

The ADM also needs to analyze the socio-economic conditions for corruption. The systematic reduction of the discretion exercised by individual public officers may help to reduce corruption, but this needs to be measured against the loss of administrative efficiency, particularly in the early stages of economic development where the number of trained administrators is limited. Anticorruption laws, accompanied by effective penal sanctions, are important to repress corruption. Likewise, the substance of effective anticorruption laws and the process in which such laws take effect may be different depending upon the cultural practices and social dynamics between the officials and general public. The ADM needs to clarify, with historical references, the effective legal framework, as well as the underlying conditions for repression of corruption. Successful economic development, which enables the government to increase wages of public officials, as well as expansion of civil representation in governance, has contributed to reducing corruption.[251]

Corruption Affect Income Inequality and Poverty? 3 Economics of Governance, no. 1 (2001), 23–45, at 25. See also Daniel Kauffman, *Rule of Law Matters: Unorthodoxy in Brief*, Brookings Report, 21 January 2010, available at: <http://www.brookings.edu/research/reports/2010/01/21-governance-kaufmann>.

248 *Id*. *See also* Vito Tanzi and Hamid Davoodi, "Corruption, Public Investment, and Growth", in Hirofumi Shibata and Toshihiro Ihori (eds.), *The Welfare State, Public Investment and Growth* (Springer, 1998), Arvind K. Jain, *Corruption: A Review*, 15 Journal of Economic Surveys, no. 1 (2001), 71–121, at 93–94, and R. Pande, "Understanding Political Corruption in Low Income Countries", in T. Paul Schultz and John Strauss (eds.), *Handbook of Development Economics Vol. 4* (North Holland, 2008), pp. 3155–3184.

249 *See* Vito Tanzi, *Corruption Around the World: Causes, Consequences, Scope and Cures*, International Monetary Fund Staff Papers (1998), 571. *See also* Susan Rose-Ackerman, *Corruption and Development*, paper prepared for the Annual Bank Conference on Development Economies (Washington, DC, 1997), 40.

250 *Id*.

251 For instance in Korea, substantial increases in the wages of government officials in the course of economic development, as well as the introduction of regional election, are known to have reduced corruption.

3.2.14 Criminalization and development

Most societies regulate offenses related to economic transactions, such as committing a fraudulent act causing financial damage to another. The most prevalent forms of sanction would be civil sanction (i.e., monetary damages through civil suits), but to prevent serious offenses which have significant impact on the economy,[252] the state may also impose a criminal sanction as a stronger form of penalty.[253] The scope of the economic offenses to be "criminalized" and the penal sanctions to be enforced will be different according to the local socio-economic context: the degree of criminalization that will be tolerated by the society and the extent of the need that those economic offenses have to be dealt with criminal punishment, rather than civil sanction, will be different from society to society.[254]

The ADM needs to measure, through empirical research, the effect of criminalization on preventing economic offences. The ADM will also assess the impact that the criminalization of economic offences has on economic development. Any beneficial effect should be measured against the social and economic cost of criminal investigations and proceedings on those offences. Perhaps more importantly, excessive criminalization may cause entrepreneurs to act more conservatively to avoid possible criminal sanctions, and this may have a detrimental effect on economic development, particularly in the early stages of economic development. Finding an adequate balance will be a difficult task, and the point of the balance may vary not only by societies but through different stages of economic development. The ADM will have to identify, from the perspective of economic development, the legal standard to define specific

252 Economic-related crimes, such as money laundering, damage financial institutions and reduce productivity in the economy by encouraging crime and corruption. See Shawgat S. Kutubi, *Combating Money-Laundering by the Financial Institutions: An Analysis of Challenges and Efforts in Bangladesh*, 1 World Journal of Social Sciences, no. 2 (2011), 36–51, at 36.

253 The use of penal sanctions for economic offenses is a controversial topic. Liberally oriented social scientists may be found supporting stern penal enforcement against economic violators while conservative groups appear less sanguine for criminal prosecution when punishment of business offenders is debated. See Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 The University of Chicago Law Review, no. 3 (1963), 423–449, at 424.

254 For instance, there is a trend toward criminalization of cartel conduct recently, and the evolution of criminal sanctions requires adaptation of agencies and practitioners to new processes and significant changes in judicial and public attitudes to the moral contemptibility of cartel conduct. See Julie Clarke, *The Increasing Criminalization of Economic Law-A Competition Law Perspective*, 19 Journal of Financial Crime, no. 1 (2012), 76–98, at 88.

economic behaviors to be dealt with criminal penalties and the manner in which criminal law should be enforced against those offenses.

3.2.15 Compliance and enforcement

Laws that are proposed in the promotion of development will not be useful unless they are complied with and enforced. It should be noted that laws are not the only norm in a society, and in many instances, not even the most powerful norm.[255] The degree of legal compliance and enforcement varies from one place to another,[256] and to secure the level of compliance and enforcement necessary to implement the laws, the ADM needs to analyze the legal and cultural context as well as the socio-economic conditions and local priorities relevant to compliance and enforcement.[257] The most effective means, including institutional framework, to secure compliance and enforcement needs to be explored in consideration of these factors.

Voluntary compliance is more cost-efficient than enforcement and is thus preferable. It is more likely to secure voluntary compliance when the public understand that it is in their interest to comply with law. This requires systematic public education, and the effectiveness of such education will be, in turn, determined by the degree of general public confidence in the government. Enforcement will be necessary in the absence of voluntary compliance. Consistent and effective enforcement is a difficult task, particularly for developing countries with limited financial resources and administrative control, and effort needs to be made to ensure that corruption does not lead to inconsistently selective enforcement of law, which will erode the public confidence essential to secure compliance. Previous rule of law studies and reports addressed compliance and enforcement issues,[258] and the outcomes of those studies also need to be analyzed.

255 See *supra* note 34.

256 The World Justice Project, *Rule of Law Index 2014*, 24–25, available at: <http://worldjusticeproject.org/rule-of-law-index>, accessed 6 September 2014.

257 Law and non-state legal forms, regardless of whether recognized by state, are treated as relevant factors that together constitute the present reality of complex normative orders. See Franz von Benda-Beckmann, *Legal Pluralism and Social Justice in Economic and Political Development*, 32 Institute of Development Studies Bulletin, no. 1 (2001), 46–56, at 53.

258 The World Justice Project (2014), *supra* note 256.

3.2.16 International legal framework: international economic law and IDL

International legal frameworks, particularly the international legal framework for economic transactions ("international economic law") and international norms for economic development ("IDL"), are relevant to economic development. International economic law, including the rules of international trade under the auspices of the WTO and the rules of international monetary affairs under the IMF, bind on member countries, which include most developing countries, and regulate their conduct in international trade and monetary affairs. Expansion of international trade and adequate monetary management, including foreign-exchange reserve management,[259] are essential for economic development.[260] The ADM needs to analyze the rules that regulate government conduct on international trade and international monetary affairs for they have direct impacts on the policies that can be adopted for economic development.[261]

A relevant debate is whether international trade law should allow a degree of protectionism for developing countries to support their infant domestic industries for economic development or should instead promote open trade, as the current WTO regime does, as the latter ensures economic welfare and efficiency.[262] Despite popular belief, these two presumably opposing policies are not in fact mutually exclusive, and the successful developing countries in East Asia adopted open trade policies on the one hand to expand exports and increase imports essential for their export industries, such as raw materials and machinery, and protectionism on the other hand to curtail imports, particularly consumer goods, that will compete with products from their infant domestic industries.[263] There has been debate on the effectiveness of supporting infant industries for economic development.[264] Notwithstanding the debate, most of the countries that have achieved successful economic development protected

259 Foreign-exchange reserves refer to foreign-currency assets held by central banks and monetary authorities, and the reserves are necessary to pay for imports and service international loans. Lack of foreign-exchange reserves has caused financial crisis in developing countries, and maintaining a sufficient level of foreign-exchange reserves is essential to maintaining the monetary stability necessary for economic development. See Khan (2004), *supra* note 240.

260 Successful developing countries have achieved economic development through expansion of international trade and increases in exports. For further discussion of the role of international trade in economic development, see Lee (2009), *supra* note 11, chapter 1.2.

261 Lee (2009), *supra* note 11 and Lee et al. (2011), *supra* note 141.

262 For the debate between open trade and trade protectionism as means for economic development, see Lee (2009), *supra* note 11, chapter 3.1.

263 *Id.*

264 *Id.*

domestic industries from foreign competition one way or another during the periods of their own economic development.[265] WTO legal disciplines allow certain regulatory exceptions to protect domestic industries, although the regulatory treatment does not seem to be sufficient to facilitate the economic development of developing countries.[266]

IDL refers to a set of international norms for the promotion of development. The United Nations declared the right to development (RTD) as a human right in 1984,[267] and it is recognized that the international community as a whole has a duty to promote economic development as reflected in the MDGs promoted by the UN with an international mandate.[268] However, scholars have not reached consensus as to whether RTD is an enforceable legal right and what constitutes the substance of IDL. Many, particularly those from developed countries, tend to believe that IDL is a soft law at best, and its enforcement is either unfeasible or should not even be attempted.[269] Parallel to IDL, there has been a demand for "sustainable development,"[270] which has become a significant pressure on developing countries by requiring them to take measures to protect and preserve the environment for future generations.

Regardless of whether IDL should be considered an enforceable legal right or a soft law, there is consensus in the international community that economic development needs to be fostered, particularly for least-developed countries as advocated in the MDGs.[271] The ADM will take account of this and assist to develop LFIs which utilize international support for development, including laws that mandate advance planning and monitoring to ensure proper use of the resources provided by international development agencies for the purpose of economic development.

265 *Id*.

266 *Id*., chapters 2.2 and 2.3.

267 UN Declaration on the Right to Development adopted by the General Assembly in 1986 (General Assembly resolution 41/128). The RTD is a group right of peoples rather than an individual right. The RTD was reaffirmed by the 1993 Vienna Declaration and Programme of Action.

268 See *supra* note 9.

269 A study pointed out the difficulty in the enforcement of IDL in the context of RTD: "The value of the concept of a right is that it creates entitlements, and the entitlements are easier to enforce if the contents and beneficiaries of the right are clearly specified. In the case of the right to development, it is not clear who are the right and duty bearers, equally vague is the content of the right." Yash Ghai, *Whose Human Right to Development?*, Human Rights Unit Occasional Papers 12 (Commonwealth Secretariat, November 1989). However, a view was also raised that lack of direct enforceability of soft law does not mean that it has absolutely no legal effect: the states party to the document laying out the soft law norm must be presumed to have entered into it in good faith. See Chinkin (1989), *supra* note 193, at 864–865.

270 See *supra* note 21 for a discussion of sustainable development.

271 See *supra* note 9.

4 Methodology for law and development

4.1 Inherent complexities

The development of the ADM will require a set of methods to assess the impact of LFIs[272] on economic development. The inherent complexity lies in that economic development is a function of numerous factors beyond the legal elements, such as economic policies, technological resources, capital and labor endowments.[273] Other socio-economic conditions such as political stability and entrepreneurship will also affect economic development.[274] It will thus be not straightforward, if not altogether impossible, to sort out the impact of LFIs on economic development from that of other factors. Another layer of complexity is that changes in LFIs[275] affect the other factors relevant to economic development, such as economic policies, technological development, and endowments, and that the impact on economic development seemingly caused by exogenous, non-legal factors may have been initiated by changes in LFIs.

The difficulty with the methodology has been demonstrated by the legal origin theory advanced by LLSV, which concludes that the legal systems of the common law origin are more conducive to economic development than those of the civil law system.[276] Dam criticizes that the accuracy of the study may have been compromised for the oversimplified categorization of legal origins and possible disregard for causal factors other than legal origins such as macroeconomic initiatives.[277] For another example, the rule of law studies, which purport to conclude that the rule of law has a positive correlation to economic development and thus contributes to the latter, may face the same criticism that the rule of law, which may require considerable resources for implementation such as educated lawyers, courts, legal enforcement systems, and financial resources to operate them, is a result of economic development, rather than its cause.[278]

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272 See *supra* note 12.

273 For the conditions of economic development, see Lee (2009), *supra* note 11, at 160.

274 *Id*.

275 Changes in LFIs refer to any change in law, legal frameworks, and/or institutions in question. *Supra* note 178.

276 See relevant discussion in Section 2 *supra*.

277 Dam (2006), *supra* note 8, at 31–49.

278 For a discussion of the rule of law and economic development, see Stephan Haggard and Lydia Tiede, *The Rule of Law and Economic Growth: Where Are We?* 39 World Development, no. 5 (2011), 673–685. The authors found that measures of property rights, checks on government, and corruption are correlated much less tightly with economic growth than is often thought. *Id*., at 673.

Econometric modeling, such as regression analysis,[279] is often employed in these types of studies, and it should control for other possible causal factors, which may have concurrent impact on economic development, to avoid arriving at a misleading conclusion. In the analysis of the legal origin theory, Dam indicated possible intervening factors which may have altered the conclusion of the study.[280] This means that the causal analysis required for the ADM will potentially be complex, involving identification of a range of factors that may affect economic development as well as exclusion of the impact of those other factors. The process will be increasingly difficult where LFIs and those other factors correlate with each other.[281]

The measurement of the impact on development is also an issue. There is no universally accepted measure of economic development, and a frequently used indicator is a change in total economic output expressed as "Gross Domestic Product" or "GDP."[282] Therefore, one way to assess the legal impact on economic development would be to measure changes in economic growth (GDP changes) associated with corresponding changes in LFIs. Studies sometimes

279 Regression analysis refers to a statistical process for estimating the relationships among variables. It is used to show the relationship between a dependent variable and one or more independent variables by modeling and analyzing these variables. For further discussion, see David A. Freedman, *Statistical Models: Theory and Practice* (Cambridge University Press, 2005) and A. Deaton, "Data and Econometric Tools for Development Analysis", in J. Behrman and T.N. Srinivasan (eds.), *Handbook of Development Economics Vol. 3* (North Holland, 1995), pp. 1785–1882.

280 Dam (2006), *supra* note 8, at 39. Dam concluded through analysis of relevant periods that Britain outperformed France economically from the 1970s to 1990s due to macroeconomic policy initiatives rather than any superiority of common law over French law.

281 This is the problem of "endogeneity," and there are econometric techniques to address the problem such as instrumental variable methods and propensity score methods. See Freedman (2005), *supra* note 279 and Judea Pearl, *Causality: Models, Reasoning, and Inference* (Cambridge University Press, 2000), pp. 348–352.

282 OECD defines GDP as "an aggregate measure of production equal to the sum of the gross values added of all resident institutional units engaged in production (plus any taxes, and minus any subsidies, on products not included in the value of their outputs)," available at: <http://stats.oecd.org/glossary/detail.asp?ID=1163>, accessed 6 September 2014. GDP is commonly used to measure the economic output of a whole country or region. As mentioned earlier, measuring economic development by a change in GDP may not capture all the elements of economic development and may appear to focus on the economic output aspect of economic development too much. There is a more comprehensive index, such as the human development index (HDI). However, indicators such as HDI measure non-economic elements such as life expectancy as well as economic ones, thus will not be appropriate to measure economic development. Also, HDI and other similar indexes also tend to correlate with GDP per capita although they include measurement of non-economic aspects of development.

attempt to predict the legal impact on economic development with precision, such as specific percentage changes in GDP,[283] although the accuracy of such estimation is often controversial.[284] In many cases, however, precise measurement will not be feasible, with too many intervening factors correlating with one another, and an estimate may have to be as general and imprecise as that proposed changes in LFIs are expected to result in either a positive or a negative outcome for economic development.

4.2 Feasible methodology

Bearing in mind the inherent complexities and difficulties discussed above, the following methodology may be considered for the development of the ADM. First, modeling techniques may be adopted to measure the impact of LFIs on economic development. An econometric model[285] which measures economic growth in certain time intervals associated with the corresponding changes in LFIs may suggest the relationship between law and development in the areas subject to assessment. However, as discussed above, possible intervening factors also need to be identified in the analysis and their impact should be assessed and isolated. These other factors may well be different by each key area[286] that constitutes the constituent part of the ADM, and therefore, an econometric model applicable to one area may well be different from another. As a result, the ADM may have to adopt multiple econometric models.

Second, where specific LFIs are found to be supportive of economic development, perhaps from a regression analysis, the underlying socio-economic factors that are essential for the successful implementation of the law should

283 Korea Institute for International Economic Policy (KIEP) estimated that Korea's GDP after the implementation of United States–Korea Free Trade Agreement would increase by 1.99%. See Han-Mi, FTA Chaegyul Ttae Shiljil GDP 1.99% Jungga [After Conclusion of the Korea-U.S. FTA Real GDP Will Increase by 1.99%], Chosun Daily Newspaper, 19 January 2006.

284 USITC estimated that the impact of the United States–Korea FTA on economic growth would be much smaller, with GDP increasing only 0.7% for Korea as a result of the FTA. United States International Trade Commission, USITC PUB. 3452, *U.S.-KOREA FTA: The Economic Impact of Establishing a Free Trade Agreement ("FTA") between the United States and the Republic of Korea* (Inv. No. 332-425, 2001), 5–2.

285 Econometric model refers to a statistical model used in econometrics which applies mathematics and statistical methods to economic data to extract relationships. It includes various methods, such as a regression analysis which is a popular statistical method for estimating the relationships among variables. For a comprehensive treatment of the subject, see William H. Greene, *Econometric Analysis* (Prentice Hall, 2002).

286 See *supra* note 36.

also be identified and analyzed.[287] A series of quantitative and qualitative analyses may have to be undertaken to assess the impact of the underlying factors. For example, the costly IPR regime, even if there is a positive correlation between strong IPR regime and economic growth, may not work under the economic conditions of least-developed countries for the prohibitive cost issues.[288] This process should reduce the possibility of reaching a misleading conclusion from an observation of a simple correlation between changes in LFIs and economic growth.

The methodology for the ADM would also require the participation and insights of scholars and practitioners in multiple social science disciplines, including law, economics, sociology, and political science, to understand the nature and implications of the underlying socio-economic factors and assess their impact properly. Understanding of the local cultural context is also essentially relevant in the process, and the assistance of anthropologists and local experts would also be important for this assessment. As discussed, the ADM may propose multiple sets of LFIs corresponding to different stages of economic development, with the analysis of the underlying socio-economic factors essential for successful implementation, and its application for use by a specific developing country would entail reassessment and adjustment of the model proposals with the extensive participation of the local experts who understand the underlying local conditions. The reassessment and adjustment will be all the more effective if local experts should possess sufficient analytical capacities in law and development. For this, reinforcing law and development capacities in developing countries will be important, and efforts to develop local capacities have been initiated.[289]

Finally, the methods of RIAs should also be considered in developing methodology. An RIA is defined as "a process of systematically identifying and assessing the expected effects of regulatory proposals, using a consistent analytical method, such as benefit/cost analysis."[290] Achieving regulatory

287 As discussed, the previous attempts to transplant law in developing countries failed due to absence of the consideration of these factors. See the previous discussion in Section 2.1 *supra*.

288 See *supra* note 160.

289 See *supra* note 167.

290 Organisation for Economic Co-operation and Development (OECD), *Introductory Handbook for Undertaking Regulatory Impact Analysis (RIA)*, Version 1.0, October 2008, at 3, available at: <http://www.oecd.org/gov/regulatory-policy/44789472.pdf>, accessed 6 September 2014. For an analysis of RIAs, see also Jacopo Torriti and Ragnar E. Löfstedt, *The First Five Years of the EU Impact Assessment System: A Risk Economics Perspective on Gaps between Rationale and Practice*, 15 Journal of Risk Research, no. 2 (2012), 169. For additional guides on RIAs, see Canadian Government, *RIAS Writers' Guide* (1992); European Union, *Impact Assessment*

efficiency (i.e., minimizing the cost) and effectiveness is an important objective of RIA.[291] The first RIA was conducted by the United States in the late 1970s,[292] and RIA is now required by virtually all OECD countries prior to legislation. The World Bank has also promoted RIA requirements to its client countries, and as a result, an increasing number of developing countries also have adopted them.

The scope of RIA would be broader than the assessment to be performed by the ADM in that the former addresses the social, political, and cultural, as well as economic objectives and impacts, whereas the latter focuses on economic development. Nonetheless, the ADM may still adopt some of the techniques used by RIA: RIA requires policy makers to question the problem to be addressed by the proposed regulation, the specific policy objective to be achieved, and alternative ways to achieve it.[293] These are relevant questions that should also be addressed by the ADM: they would be helpful to determine which LFIs should be considered for adoption for the purpose of economic development and to decide whether the social, political, and cultural impacts of the proposed LFIs as well as any required adjustment would be acceptable, even if the proposed LFIs are found to be conducive to economic development.

The social cost of pursuing economic development can be substantial. For example, some East Asian countries adopted a policy to limit home mortgage financing for individuals through control over banks, with a policy objective to maximizing the amount of capital available for industrial investments rather than for individual use.[294] This policy helped to increase savings which were then used to expand industrial capacities in the form of low-cost loans and contributed to rapid economic growth and successful economic development.[295] However, this policy also caused considerable hardship for ordinary people who could not get home mortgage financing from banks and instead had to save much of their income for an extended period of time to purchase a home. They made personal sacrifices to support long-term economic growth, and it is the

Guidelines (2005); United States Government, *Circular A4: Regulatory Analysis* (2003); and Australian Government, *Best Practice Regulation Handbook* (2007).

291 OECD (2008), *supra* note 290, at 4.

292 The "Inflation Impact Assessments" required by the Carter Administration in the United States from 1978 is considered the first RIA.

293 *Id.*

294 See *supra* note 236.

295 In 1988, the savings rate to income in Korea was as high as 25%. From 1988 to 1998, Korea's savings rate remained the highest in the world. Financial Supervisory Commission Blog, available at: <http://blog.naver.com/blogfsc> (in Korean), accessed 6 September 2014. For a discussion of the rapid economic development of the East Asian countries, see *supra* note 11.

type of social cost that a developing country may have to decide whether to accept for the benefit of future generations.

The CBA,[296] adopted for RIAs, is an essential method to determine the efficiency of the proposed regulation. CBA measures the benefit of the proposed regulation against its cost and helps policy makers to determine whether the net benefit (the benefit minus the estimated implementation cost) of the proposed regulation warrants its implementation. The cost (and the benefit) will vary depending upon the local circumstances: for example, where available resources such as social infrastructure, human resource, and financial capital are limited, the cost of regulatory implementation could be larger or even prohibitively large as shown in the case of least-developed countries required to implement the TRIPS Agreement.[297] As discussed, ADM assessment will attempt to identify any adjustment that should be made to the proposed LFIs and the socio-economic conditions, including financial resources, that are essential for the implementation of the proposed LFIs.[298] CBA can be employed to assess the cost of the adjustment against the short-term and the long-term benefits of the proposed LFIs and assist policy makers to determine which proposed LFIs, after any necessary adjustments, warrant implementation. CBA, however, will be subject to a limitation that some of the adjustment costs may not be quantifiable and thus cannot be calculated.[299]

296 For technical guidance on CBA, see Canadian Government, *Benefit-Cost Analysis Guide for Regulatory Programs* (1995); United States Government, *Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs*; Australian Government, *Introduction to Cost-Benefit Analysis and Alternative Evaluation Methodologies* (2006).

297 See the previous discussion in Section 3.1 *supra*. The OECD also points out that there are compliance costs such as buying new equipment needed to comply with regulations; employing additional staff to work on regulatory compliance; employing consultants or other sources of expertise to help with regulatory compliance; changes in production processes made necessary by regulations; other increases in the costs of producing goods; and collecting and storing information that the regulations require them to report or keep. OECD (2008), *supra* note 290, at 4.

298 For example, consideration could be given to improving financial resources that can be used to implement IPR provisions by internationally borrowing money to secure IPR expertise and infrastructure, although it should be questioned whether the expected benefit of implementing IPR provisions justifies the cost, particularly in the early stages of economic development.

299 The OECD guide also acknowledges that not all costs may be quantifiable and discusses the need for partial CBA analysis. OECD (2008), *supra* note 290, at 10. For further on CBA and the difficulties with quantifying the impact of a regulation, see David Driesen, *Cost-Benefit Analysis and the Precautionary Principle: Can They Be Reconciled?* 43 Michigan State Law Review (2013), 771–826.

5 Conclusion

Four decades ago, scholars were described as "self-estranged" due to their failures to associate law and development studies with the realities on the ground.[300] Law and development studies since then have drifted, and the field has been stagnant, particularly with respect to the development of a coherent theory and methodology. Law and development projects based on the neoliberal ideology have flourished from the 1990s onward, but they have not been successful in bringing about development throughout the world.[301] Those development projects and initiatives thus have been criticized as a means to serve political-economic agendas of the developed world, rather than meeting the economic development needs of the developing world.

How, then, may law and development be revitalized as a field with a real prospect of contributing to development? I suggest that it should begin with setting a proper focus on economic development, which is the primary concern for the developing world. The focus will also allow the development of a coherent analytical and methodological framework such as the ADM which will be an essential step for the consistent development of the field. Again, the proposed focus by no means suggests that the other aspects of social and political development, such as promotion of human rights, gender equality, democracy, and the rule of law, are unimportant or should not be considered. However, by trying to incorporate all of these agendas in the study of law and development, which by nature are not culturally and ideologically neutral, the proposed development of a coherent analytical framework will be all the more difficult, and as a result the field will continue to stagnate. As noted, other fields, such as law and society, are more suited to address these agendas.

The development of the ADM is both necessary and feasible. The ADM will not only provide the long-awaited analytical framework for law and development studies but will also present working legislative guidance for developing countries which seek to develop LFIs that will support economic development under their own political, social, and economic conditions. Law and development projects will likely produce a positive outcome when they are designed to fit the socio-economic conditions on the ground and when they meet the local development needs, rather than to serve the political and economic agendas and priorities of the developed world.

The lesson from successful economic development in East Asia in the recent decades and that from rather unsuccessful past in South Asia and Latin America

300 Trubek and Galanter (1974), *supra* note 1.

301 See *supra* note 28.

is that there is no universal path for economic development and no universal legal or institutional arrangement that works for economic development everywhere.[302] While the economic efficiency of the market economy and the rule of law have been advocated as necessities for economic development,[303] history of successful economic development shows that their adaptation has not been universal; for example, China has developed rapidly since the 1980s despite having not adopted the level of rule of law as promoted by the West and with the government remaining in control of much of the economy against the prescriptions of the conventional market economy.[304] As discussed earlier, the economic development of South Korea and other successful developing countries in the earlier periods followed the same pattern (i.e., authoritative rule and close government involvement in the economy).

The proposed ADM will represent meaningful partnership with developing countries because it enables developing countries to choose the development-facilitating LFIs in each of the key areas,[305] which will work in the stage of their economic development and under their own socio-economic conditions. By understanding and responding to the real needs of the developing world, aided by the proposed ADM, rather than insisting on the ideal aspirations and preferences of the developed world, scholars in law and development will finally find themselves out of self-estrangement and in tune with the realities on the ground.

Finally, a note should be made that law and development may be relevant and useful not only to promoting the economic development of developing countries but also to remedying the economic problems of developed countries.[306] The financial crisis in the last decade, which caused a worldwide

302 See *supra* note 137.

303 See *supra* note 151. A recent study also suggests that the economic growth of Europe owes much to the rise of learned law and its teaching in universities. Hans-Bernd Schäfer and Alexander Wulf, *Jurists, Clerics and Merchants: The Rise of Learned Law in Medieval Europe and Its Impact on Economic Growth*, 11 Journal of Empirical Legal Studies, no. 2 (2014), 266–300.

304 The government involvement in China is justified in the notion of the socialist market economy which is a form of state capitalism. See Osman Suliman, *China's Transition to a Socialist Market Economy* (Praeger, 1998).

305 See *supra* note 36.

306 As widely noted, the economic gap between the majority of the population and the economically privileged is widening in an increasing number of developed countries while the macroeconomic indicators at the national level, such as GDP per capita, improve. In many developed countries, the majority suffer from lack of employment opportunity, stagnant income, and rising prices in education, healthcare, housing, and other necessities for life. Thus the "economic progress" of developed countries in this context would mean the economic progress of the majority of population, rather than just the improvement of macroeconomic indicators which may not necessarily correlate to the economic welfare of the majority.

economic downturn, showed us that potential flaws in the current regulatory system of developed countries, which may have contributed to the outbreak of this crisis,[307] need to be addressed. The widening income gap among segments of populations in developed countries also requires regulatory reform to improve the economic conditions of the ever-increasing groups in relative poverty within developed countries. The proposed law and development approach, which analyzes the appropriate LFIs for economic development which work under the socio-economic conditions on the ground, can also be adopted to address the economic problems of developed countries.[308]

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References

Ahmad, E. and N. Stern, "Taxation for Developing Countries", in Hollis Chenery and T.N. Srinivasan (eds.), *Handbook of Development Economics vol. 2* (North Holland, 1989).

Alm, James and Asmaa El-Ganainy, *Value-added Taxation and Consumption*, Tulane University Working Paper no. 1203 (2012).

Aoki, Masohiko, *Information, Corporate Governance, and Institutional Diversity* (Oxford University Press, 2000).

307 See *supra* note 208.

308 This might require a broader academic approach: Simon Deakin has opined that more research is necessary to understand the role of law in development, or industrialization, in the West and that a theory of the state and of the legal system is currently insufficient. This suggests that the works done by preeminent predecessors, such as Max Weber and Friedrich Hayek, on the role of law for the economic prosperity of the West may not have been sufficient to understand the causes of the economic development and industrialization in the West.

Aoki, Masohiko, *Toward a Comparative Institutional Analysis* (MIT Press, 2001).
Baland, J., Dani Rodrik, and M.R. Rosenzweig (eds.), *Governance and Development*, *Handbook of Development Economics*, vol. 5 (North Holland, 2009).
Belton, Rachel, *Competing Definitions of the Rule of Law: Implications for Practitioner*, *Carnegie Papers*, *Rule of Law Series (2005)* (Carnegie Endowment for International Peace, 2005), available at: <http://carnegieendowment.org/files/CP55.Belton.FINAL.pdf>, accessed 6 September 2014.
Benda-Beckmann, Franz von, *Legal Pluralism and Social Justice in Economic and Political Development*, 32 Institute of Development Studies Bulletin, no. 1 (2001).
Bergstein, Jonas, *Foreign Investment in Uruguay: A Law and Development Perspective*, 20 University of Miami Inter-American Law Review (1989).
Bernstein, David, *Freedom of Contract*, George Mason Law & Economics Research Paper no. 08-51 (2008).
Beseley, T. and M. Gothak, "Property Rights and Economic Development", in Dani Rodrik and M.R. Rosenzweig (eds.), *Handbook of Development Economics, vol. 5* (North Holland, 2009).
Blume, Lorenz and Stefan Voigt, *The Economic Effects of Human Rights*, 60 Kyklos, no. 4 (2007).
Brauner, Yariv and Miranda Stewart (eds.), *Taxation, Law and Development* (Edward Elgar, 2013).
Carothers, Thomas, *The Rule of Law Revival*, Foreign Affairs (March/April 1998), available at: <http://www.foreignaffairs.com/articles/53809/thomas-carothers/the-rule-of-law-revival>, accessed 6 September 2014.
Carroll, Archie B., *A Three-Dimensional Conceptual Model of Corporate Social Performance*, 4 Academy of Management Review (1979).
Chang, Ha-Joon, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (London: Anthem Press, 2002).
Chesterman, Simon, *An International Rule of Law?* 56 The American Journal of Comparative Law, no. 2 (2008).
Chibundu, Maxwell, *Law in Development: On Tapping, Gourding and Serving Palm-Wine*, 29 Case Western Reserve Journal of International Law, no. 2 (1997).
Chinkin, C.M., *The Challenge of Soft Law: Development and Change in International Law*, 38 International and Comparative Law Quarterly, no. 4 (1989).
Chua, Amy, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 Yale Law Journal (1998).
Claessens, Stjin and Leora Klapper, *Bankruptcy Around the World: Explanations of Its Relative Use*, 7 American Law and Economics Review, no. 1 (2005).
Claessens, Stjin and Fabian Valencia (eds.), *Financial Crises: Cause, Consequences, and Policy Responses* (International Monetary Fund, 2014).
Clarke, Julie, *The Increasing Criminalization of Economic Law – A Competition Law Perspective*, 19 Journal of Financial Crime, no. 1 (2012).
Coase, Ronald, *The Nature of the Firm*, 4 Economica, no. 16 (1937).
Coase, Ronald, *The Problem of Social Cost*, 3 Journal of Law and Economics (1960).
Coleman, Jules, *The Grounds of Welfare*, 112 Yale Law Journal, no. 6 (2003).
Commons, John, *Institutional Economics* (New York: Macmillan, 1934).
Cooter, Robert and Hans-Bernd Schafer, *Solomon's Knot: How Law Can End the Poverty of Nations* (Princeton University Press, 2012).
Corsetti, Giancarlo, Paolo Pesenti and Nouriel Roubini, *What Caused the Asian Currency and Financial Crisis? Part I: A Macroeconomic Overview*, National Bureau of Economic Research

Working Paper, no. 6833 (1998), available at: <http://www.nber.org/papers/w6833>, accessed 6 September 2014.
Cross, Frank, *Law and Economic Growth*, 80 Texas Law Review (2001).
Cross, Frank, *Identifying the Virtues of the Common Law*, Law and Economics Working Paper no. 063 (University of Texas, September 2005).
Dam, Kenneth, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Washington, DC: Brookings, 2006).
Davis, Kevin, *What Can the Rule of Law Variable Tell Us About the Rule of Law Reform?* 26 Michigan Journal of International Law (2004).
Davis, Kevin and Michael Trebilcock, *The Relationship between Law and Development: Optimists versus Skeptics*, 56 The American Journal of Comparative Law, no. 4 (2008).
De Soto, Hernando, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books, 2003).
Deakin, Simon, *Legal Origin, Juridical Form and Industrialisation in Historical Perspective: The Case of the Employment Contract and the Joint-Stock Company*, 4 Comparative Research in Law and Political Economy, no. 7 (2008).
Deaton, A., "Data and Econometric Tools for Development Analysis", in J. Behrman and T.N. Srinivasan (eds.), *Handbook of Development Economics Vol. 3* (North Holland, 1995).
Driesen, David, *Cost-Benefit Analysis and the Precautionary Principle: Can They Be Reconciled?* 43 Michigan State Law Review (2013).
Fraile, Lydia, *Lessons from Latin America's Neo-Liberal Experiment: An Overview of Labour and Social Policies since the 1980s*, 148 International Labour Review, no. 3 (2009).
Freedman, David A., *Statistical Models: Theory and Practice* (Cambridge University Press, 2005).
Freeman, R.B., "Labor Regulations, Unions, and Social Protection in Developing Countries: Market Distortions or Efficient Institutions?", in Dani Rodrik and M.R. Rosenzweig (eds.), *Handbook of Development Economics, vol. 5* (North Holland, 2009).
Friedman, Jeffrey (ed.), *What Caused Financial Crisis* (University of Pennsylvania Press, 2010).
Gardner, James, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* (Madison, WI: University of Wisconsin Press, 1980).
Ghai, Yash, *Whose Human Right to Development?* Human Rights Unit Occasional Papers 12 (Commonwealth Secretariat, November 1989).
Gilson, Ronald, Charles Sable and Robert Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory*, *Practice and Doctrine*, Stanford Law and Economics Olin Working Paper, no. 389 and Columbia Law and Economics Working Paper, no. 367 (2010).
Godoy, Sergio and Joseph Stiglitz, *Growth*, *Initial Conditions*, *Law and Speed of Privatization in Transition Countries: 11 Years Later*, National Bureau of Economic Research Working Paper no. 11992 (2006).
Greene, William H., *Econometric Analysis* (Prentice Hall, 2002).
Gupta, Sanjeev, Hamid Davoodi and Rosa Alonso-Terme, *Does Corruption Affect Income Inequality and Poverty?* 3 Economics of Governance, no. 1 (2001).
Haggard, Stephen and Lydia Tiede, *The Rule of Law and Economic Growth: Where Are We?* 39 World Development, no. 5 (2011).
Harrison, A., "Trade, Foreign Investment, and Industrial Policy for Developing Countries", in Dani Rodrik and M.R. Rosenzweig (eds.), *Handbook of Development Economics, vol. 5* (North Holland, 2009).
Hayek, Friedrich, *The Constitution of Liberty* (University of Chicago Press, 1960).

Hayek, Friedrich, *Law, Legislation, and Liberty*, *vols. 1–3* (University of Chicago Press, 1973, 1976, 1979).

Heston, Alan, Robert Summers and Bettina Aten, Penn World Table Version 6.1, Center for International Comparisons at the University of Pennsylvania (CICUP), October 2002, available at: <http://pwt.econ.upenn.edu/php_site/pwt_index.php>, accessed 6 September 2014.

Jain, Arvind K., *Corruption: A Review*, 15 Journal of Economic Surveys, no. 1 (2001).

Jung, Y.H., *How Did Law Matter for Korean Economic Development?: Evidence from 1970s*, paper prepared for the Korean Economic Association Conference (June 2012), available at: <http://www.kea.ne.kr/conf201206/papers/Jung%20Young%20Hoa-20120530.pdf>, accessed 6 September 2014.

Kadish, Sanford H., *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 The University of Chicago Law Review, no. 3 (1963).

Kaldor, Nicholas, *Taxation for Economic Development*, 9 The Journal of Modern African Studies, no. 1 (1963).

Kauffman, Daniel, *Rule of Law Matters: Unorthodoxy in Brief*, Brookings Report, 21 January 2010, available at: <http://www.brookings.edu/research/reports/2010/01/21-governance-kaufmann>.

Keefer, Philip and Stephen Knack, *Why Don't Poor Countries Catch Up? A Cross-National Test of an Institutional Explanation*, 35 Economic Inquiry, no. 3 (1997).

Kennedy, David, David Trubek and Albaro Santos (eds.), *The Rule of Law, Political Choices, and Development Common Sense*, *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006).

Davis Kevin and Michael Trebilcock, *Legal Reforms and Development*, 12 Third World Quarterly, no. 1 (2001).

Khan, Hider A., *Global Markets and Financial Crises in Asia* (New York: Palgrave Macmillan, 2004).

Kim, Duol (ed.), *History of Economic Laws in Korea: From Liberation to Present, vol. 1* (Seoul: Haenam Publishing Co., 2011).

Kose, M.A., "Financial Globalization and Economic Policies", in Dani Rodrik and M.R. Rosenzweig (eds.), *Handbook of Development Economics, vol. 5* (North Holland, 2009).

Kossick, Robert, *The Rule of Law and Development in Mexico*, 21 Arizona Journal of International and Comparative Law (2004).

Kuran, Timur, "The Scale of Entrepreneurship in Middle Eastern History: Inhibitive Roles of Islamic Institutions", in William J. Baumol, David S. Landes and Joel Mokyr (eds.), *Entrepreneurs and Entrepreneurship in Economic History* (Princeton University Press, 2010).

Kutubi, Shawgat S., *Combating Money-Laundering by the Financial Institutions: An Analysis of Challenges and Efforts in Bangladesh*, 1 World Journal of Social Sciences, no. 2 (2011).

Kwon, Youngjoon and Yong-Shik Lee, *Legal Analysis of Traditional Leasehold in Korea (Chonsegwon) from Comparative Legal Perspective*, 29 Arizona Journal of International and Comparative Law, no. 2 (2012).

La Porta, Raphel, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert Vishny (LLSV), *Law and Finance*, 106 Journal of Political Economy, no. 6 (1998).

Lee, Yong-Shik, *Reclaiming Development in the World Trading System* (New York: Cambridge University Press, 2009).

Lee, Yong-Shik et al. (eds.), *Law and Development Perspective on International Trade Law* (Cambridge University Press, 2011).

LLSV, *Investor Protection and Corporate Governance*, 58 Journal of Financial Economics (2000).
LLSV, *Investor Protection and Corporate Valuation*, 57 Journal of Finance, no. 3 (2002).
LLSV, *The Economic Consequences of Legal Origins*, 46 Journal of Economic Literature, no. 2 (2008).
Maggio, Giuseppe, Alessandro Romano and Angela Troisi, *The Legal Origin of Income Inequality*, 7 Law and Development Review, no. 1 (2014).
Mah, Jai S., *Export Promotion Policies, Export Composition and Economic Development of Korea*, 4 The Law and Development Review, no. 2 (2011).
McInerney, Thomas, *Law and Development as Democratic Practice*, 37 Vanderbilt Journal of Transnational Law (2005).
Merryman, Jon Henry, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 The American Journal of Comparative Law (1977).
Finger, J. Michael, *The WTO's Special Burden on Less Developed Countries*, 19 Cato Journal, no. 3 (2000).
Mwabu, G., "Health Economics for Low-Income Countries", in T. Paul Schultz and John Strauss (eds.), *Handbook of Development Economics vol. 4* (North Holland, 2008).
Newsis, *Minister of Legislation (Announces) Exports of Advanced Korean Legal Systems* (in Korean), Joongang Daily News (16 April 2013), available at: <http://article.joins.com/news/article/article.asp?total_id=11247168&ctg=1203>, accessed 6 September 2014.
North, Douglas C., *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990).
North, Douglas C., *Institutions*, 5 Journal of Economic Perspectives, no. 1 (1991).
Ohnesorge, John, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 University of Pennsylvania Journal of International Economic Law, no. 2 (2006).
Oman, Charles P., *Corporate Governance and National Development*, OECD Development Centre Working Paper no. 180 (October 2001).
Organisation for Economic Co-operation and Development, *Tax Incentives for Investment – A Global Perspective: Experiences in MENA and non-MENA Countries* 10 (2007), available at: <http://www.oecd.org/mena/investment/38758855.pdf>, accessed 6 September 2014.
Organisation for Economic Co-operation and Development, *Introductory Handbook for Undertaking Regulatory Impact Analysis (RIA)*, Version 1.0, October 2008, at 3, available at: <http://www.oecd.org/gov/regulatory-policy/44789472.pdf>, accessed 6 September 2014.
Pande, R., "Understanding Political Corruption in Low Income Countries", in T. Paul Schultz and John Strauss (eds.), *Handbook of Development Economics vol. 4* (North Holland, 2008).
Pearl, Judea, *Causality: Models, Reasoning, and Inference* (Cambridge University Press, 2000).
Pistor, Katharina and Chenggang Xu, *Governing Stock Markets in Transition Economies: Lessons from China*, 7 American Law and Economics Review, no. 1 (2005).
Posner, Richard A., *Creating a Legal Framework for Economic Development*, 13 The World Bank Observer, no. 1 (1998).
Posner, Richard A., *Economic Analysis of Law*, (7th ed., New York: Aspen Publishers, 2007).
Prado, Mariana, *Institutional Bypass: An Alternative for Development Reform* (19 April 2011), text available on SSRN at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1815442>, accessed 6 September 2014.
Rodrik, Dani, *Institutions for High-Quality Growth: What They Are and How to Acquire Them*, 35 Studies in Comparative International Development, no. 3 (2000).

Rodrik, Dani, "Introduction: What Do We Learn from Country Narratives?" in Dani Rodrik (ed.), *In Search of Prosperity: Analytic Narratives on Economic Growth* (Princeton University Press, 2005).

Rose, Carol, *The "New" Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 Law and Society Review (1998).

Rose-Ackerman, Susan, *Corruption and Development* (1997), paper prepared for the Annual Bank Conference on Development Economies, Washington, DC, 40.

Rostow, W.W., *The Stages of Economic Growth* (Cambridge University Press, 1962).

Rowe, Peter G. (ed.), *A City and Its Stream: An Appraisal of Cheonggyecheon Restoration Project and Its Environs in Seoul, South Korea* (Harvard University Graduate School of Design, 2010).

Rutherford, Malcolm, *Institutional Economics: Then and Now*, 15 Journal of Economic Perspectives, no. 3 (2001).

Santiso, Carlos, *Good Governance and Aid Effectiveness: The World Bank and Conditionality*, 7 The Georgetown Public Policy Review, no. 1 (2001).

Santos, Alvaros, *Labor Flexibility, Legal Reform and Economic Development*, 50 Virginia Journal of International Law, no. 1 (2009).

Sen, Amartya, *Development as Freedom* (Oxford: Oxford University Press, 1999).

Singh, Aparna Shivpuri, *Banking and Financial System in GMS Countries*, *Its Relationship to Economic Development*, Hanoi Resource Centre, Policy Brief (September 2007), available at: <http://cuts-international.org/HRC/pdf/PB-9-07.pdf>, accessed 6 September 2014.

Sokol, Daniel, Thomas K. Cheng and Ioannis Lianos (eds.), *Competition Law and Development* (Stanford University Press, 2013).

Strittmatter, Anthony and Uwe Sunde, *Health and Economic Development – Evidence from the Introduction of Public Health Care*, University of St. Gallen, School of Economics and Political Science, Department of Economics, Discussion Paper no. 2011-32, August 2011, available at: <http://www1.vwa.unisg.ch/RePEc/usg/econwp/EWP-1132.pdf>, accessed 6 September 2014.

Suliman, Osman, *China's Transition to a Socialist Market Economy* (Praeger, 1998).

Tadelis, Steven and Oliver Williamson, *Transaction Cost Economics* (12 March 2012), available at: < http://ssrn.com/abstract=2020176>.

Tamanaha, Brian, *The Lessons of Law-and-Development Studies*, 89 American Journal of International Law (1995).

Tamanaha, Brian, *The Primacy of Society and the Failures of Law and Development*, 44 Cornell International Law Journal (2011).

Tanzi, Vito and Hamid Davoodi, "Corruption, Public Investment, and Growth", in Hirofumi Shibata and Toshihiro Ihori (eds.), *The Welfare State, Public Investment and Growth* (Springer, 1998).

Tanzi, Vito, *Corruption Around the World: Causes*, *Consequences*, *Scope and Cures*, International Monetary Fund Staff Papers (1998).

Torriti, Jacopo and Ragnar E. Löfstedt, *The First Five Years of the EU Impact Assessment System: A Risk Economics Perspective on Gaps between Rationale and Practice*, 15 Journal of Risk Research, no. 2 (2012).

Trebilcock, Michael, *The Limits of Freedom of Contract* (Harvard University Press, 1997).

Trebilcock, Michael and Jing Leng, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 Virginia Law Review (2006).

Trubek, David, Diogo Couhinto and Mario Shapiro (eds.), *New State Activism in Brazil and the Challenge for Law, in Law and the New Developmental State: The Brazilian Experience in Latin American Context* (New York: Cambridge University Press, 2013).

Trubek, David and Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 Wisconsin Law Review (1974).

Trubek, David and Alvaro Santos, *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006).

Trubek, David, *Law and Development 50 Years On*, University of Wisconsin Legal Studies Research Paper no. 1212 (October 2012), available at: <http://ssrn.com/abstract=2161899>, accessed 6 September 2014.

United Nations, *Report of the World Commission on Environment and Development*, General Assembly Resolution 42/187 (11 December 1987).

United Nations, *High-level Event of the General Assembly on the Contributions of Human Rights and the Rule of Law in the Post-2015 Development Agenda* (9–10 June 2014), available at: <http://www.un.org/en/ga/president/68/settingthestage/5hrrol.shtml>, accessed 6 September 2014.

United States International Trade Commission, USITC PUB. 3452, *U.S.-KOREA FTA: The Economic Impact of Establishing a Free Trade Agreement ("FTA") between the United States and the Republic of Korea* (Inv. No. 332-425, 2001).

Upham, Frank, *Mythmaking in the Rule of Law Orthodoxy*, Carnegie Papers (Carnegie Endowment for International Peace, 2005), available at: <http://carnegieendowment.org/files/wp30.pdf>, accessed 14 September 2014.

Veblen, Thorstein, *The Theory of the Leisure Class: An Economic Study of Institutions* (New York: Macmillan, 1915).

Weber, Max, *Law in Economy and Society* (translated by Max Rheinstein) (New York: Simon and Schuster, 1954).

Weber, Max, *The Protestant Ethic and the Spirit of Capitalism* (New York: Charles Scribner, 1958).

World Bank, *Country and Lending Groups*, available at: <http://data.worldbank.org/about/country-and-lending-groups>, accessed 6 September 2014.

World Bank, *Rwanda Overview*, available at: <http://www.worldbank.org/en/country/rwanda/overview>.

World Justice Project, *Rule of Law Index 2014*, 24–25, available at: <http://worldjusticeproject.org/rule-of-law-index>, accessed 6 September 2014.

Xu, Guangdong, *Property Rights, Law, and Economic Development*, 6 Law and Development Review, no. 1 (2013).

Yang, Lixia, Shaofeng Yuan and Le Sun, *The Relationships between Economic Growth and Environmental Pollution Based on Time Series Data: An Empirical Study of Zhejiang Province*, 7 Journal of Cambridge Studies, no. 1 (2012).

Yasuda, Nobuyuki, *Law and Development in ASEAN Countries*, 10 ASEAN Economic Bulletin, no. 2 (1993).